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COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

ANNUAL REPORT
2006

Synopsis of the Work of the Court of Justice of the European Communities,
the Court of First Instance of the European Communities
and the European Union Civil Service Tribunal

Luxembourg 2007

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Foreword

In the year which has just drawn to a close, discussion began with a view to the adoption, in the not too distant future, of a new type of procedure. The procedure is intended to deal expeditiously with references for a preliminary ruling on provisions adopted relating to the area of freedom, security and justice, and might be called 'the emergency preliminary ruling procedure'. Certain references for a preliminary ruling in this rapidly developing field will need to be handled with particular expedition, whether because of their sensitive nature or because of very strict time limits laid down by the Community legislation. Since the current procedural framework is not suited to meeting such needs, only a new type of procedure is capable of providing the necessary guarantees of efficiency.

Also, 2006 was marked by the partial renewal of the membership of the Court, entailing the departure of six of its members. When the new appointments were made, the Governments of the Member States were concerned to safeguard the stability of the institution, thereby enabling it to continue smoothly in the performance of its task. The Court cannot but welcome this.

This Report contains a full record of changes affecting the institution and of its work in 2006. As usual, a substantial part of the Report is devoted to succinct but exhaustive accounts of the main judicial activity of the Court of Justice, the Court of First Instance and the Civil Service Tribunal, accompanied by statistics.

V. Skouris
President of the Court of Justice

Chapter I

The Court of Justice of the European Communities

A — The Court of Justice in 2006: changes and proceedings

By Mr Vassilios Skouris, President of the Court of Justice

This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2006. It describes, first, how the institution evolved during that year, with the emphasis on the institutional changes affecting the Court and developments relating to its internal organisation and working methods (Section 1). It includes, second, an analysis of the statistics in relation to developments in the Court's workload and the average duration of proceedings (Section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject-matter (Section 3).

1. The main development in 2006 for the Court as an institution was constituted by the adoption of preparatory measures for the accession of the Republic of Bulgaria and of Romania on 1 January 2007 (Section 1.1). The past year was also the first in which the Civil Service Tribunal operated (Section 1.2), and a legislative process was embarked upon to establish a procedure for the expeditious and appropriate handling of references for preliminary rulings concerning the area of freedom, security and justice (Section 1.3).

1.1. A year and a half after the enlargement in 2004 when 20 new judges were welcomed to the institution, the Court of Justice had to commence preparations for the accession of the Republic of Bulgaria and of Romania on 1 January 2007. In January 2006 an ad hoc working group was set up in order to identify the needs of the various departments and to ensure coordination of all the preparatory work at administrative level. In addition, from 1 July 2006, members of staff were recruited to work in the two new language units in the Translation Directorate.

As regards the organisation of judicial work, the Court decided, in view of the forthcoming accession of the Republic of Bulgaria and of Romania, to create an additional chamber of five judges and an additional chamber of three judges. The Court now has four five-judge chambers (the First, Second, Third and Fourth Chambers) and four three-judge chambers (the Fifth, Sixth, Seventh and Eighth Chambers). Each five-judge chamber is composed of six judges, and each three-judge chamber of five judges, who sit in rotation in accordance with the relevant provisions of the Rules of Procedure [1].

1.2. By decision of 2 December 2005, published in the Official Journal on 12 December 2005, it was declared that the European Union Civil Service Tribunal was duly constituted. Thus, 2006 was the first full calendar year in which this new body has operated, and it delivered its first judgment on 26 April 2006.

Chapter III of this Report contains a detailed account of the Civil Service Tribunal's work, while Part C of that chapter sets out all the statistics concerning its first year of judicial activity.

[1] Once the Bulgarian and Romanian Judges arrive, the Second and Third Chambers will comprise seven judges, while the Sixth and Seventh Chambers will each be composed of six judges.

1.3. In response to the Presidency Conclusions of the Brussels European Council of 4 and 5 November 2004, the Court of Justice and the political organs of the European Union began consideration of the measures which could be adopted in order to ensure the expeditious handling of references for a preliminary ruling concerning the area of freedom, security and justice.

On 25 September 2006, the Court of Justice submitted an initial discussion paper on the treatment of questions referred for a preliminary ruling concerning the area of freedom, security and justice [2]. In this document, the Court noted in particular that existing procedures, including the accelerated procedure under Article 104a of the Rules of Procedure, are not capable of ensuring that this category of cases is dealt with sufficiently expeditiously and states that it would be wise to contemplate a new type of procedure, which might be called 'the emergency preliminary ruling procedure'. The Court put forward two options for this type of procedure.

On 14 December 2006, the Court submitted to the Council of the European Union a supplement to that discussion paper, which contains a more detailed analysis of the two procedural options [3]. This legislative process which is now under way will lead to the adoption of the necessary amendments to the Statute of the Court of Justice and its Rules of Procedure, so that the Court may deal with this type of case with maximum efficiency.

2. The statistics concerning the Court's judicial activity in 2006 reveal a considerable improvement, for the third year in a row. The reduction in the duration of proceedings before the Court should be noted, as should the decrease in the number of cases pending despite a significant increase in new cases.

In particular, the Court completed 503 cases in 2006 (net figure, that is to say, taking account of the joinder of cases). Of those cases, 351 were dealt with by judgments and 151 gave rise to orders. The number of judgments delivered and orders made in 2006 is not far from the number in 2005 (362 judgments and 150 orders), despite the constant decrease in pending cases over the preceding three years (974 cases on 31 December 2003, 840 on 31 December 2004, 740 on 31 December 2005).

The Court had 537 new cases brought before it, representing an increase of 13.3 % compared with the number of new cases in 2005 (474 cases, gross figure). The number of cases pending on 31 December 2006 was 731 (gross figure).

The reversal, already observed in 2004 and 2005, of the trend of increasingly lengthy proceedings was consolidated in 2006. As concerns references for a preliminary ruling, the average duration of proceedings was 19.8 months as against 23.5 months in 2004 and 20.4 months in 2005. A comparative analysis from 1995 onwards reveals that the average time taken to deal with references for a preliminary ruling reached its shortest in 2006. The

2 This document is available on the Court's website (http://curia.europa.eu/fr/instit/txtdocfr/index_projet.htm).

3 This document is available on the Court's website (http://curia.europa.eu/fr/instit/txtdocfr/index_projet.htm).

average time taken to deal with direct actions and appeals was 20 and 17.8 months respectively (21.3 months and 20.9 months in 2005).

In the course of the past year the Court has made use to differing degrees of the various instruments at its disposal to expedite the handling of certain cases (priority treatment, the accelerated or expedited procedure, the simplified procedure, and the possibility of giving judgment without an Opinion of the Advocate General). Use of the expedited or accelerated procedure was requested in five cases, but the requirement of exceptional urgency laid down by the Rules of Procedure was not satisfied. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court.

The Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. It made 16 orders on the basis of that provision, bringing a total of 21 cases to a close.

In addition, the Court made fairly frequent use of the possibility offered by Article 20 of the Statute of determining cases without an Opinion of the Advocate General where they do not raise any new point of law. About 33 % of the judgments delivered in 2006 were delivered without an Opinion (compared with 35 % in 2005).

As regards the distribution of judgments between the various formations of the Court, it may be noted that the Grand Chamber and the full Court dealt with nearly 13 %, chambers of five judges with 63 %, and chambers of three judges with 24 %, of the cases brought to a close in 2006. Compared with the previous year, the number of cases dealt with by five-judge chambers increased significantly (54 % in 2005), the number decided by the Grand Chamber remained stable (13 % in 2005), and the number disposed of by three-judge chambers decreased markedly (33 % in 2005).

For further information regarding the statistics for the 2006 judicial year, reference should be made to Part C of this chapter.

3. This section presents the main developments in the case-law, arranged by subject as follows: constitutional or institutional issues; European citizenship; free movement of goods; agriculture; free movement of persons, services and capital; visas, asylum and immigration; competition rules; approximation and harmonisation of laws; trade marks; taxation; social policy; cooperation in civil and judicial matters; police and judicial cooperation in criminal matters. Quite frequently, however, a judgment which, on the basis of the main issue addressed by it, comes under a given subject, also broaches questions of great interest concerning another subject.

Constitutional or institutional issues

In Opinion 1/03 [2006] ECR I-1145, the Court ruled, at the Council's request, on whether the European Community has exclusive competence, or only shared competence with the Member States, to conclude the new Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters intended to replace the Lugano Convention.

Summarising the principles which may be derived from its case-law on the conclusion of international agreements by the Community, the Court observed first of all that in order to find, in the absence of express Treaty provisions, that the Community — which enjoys only conferred powers — has exclusive competence, it is necessary to have shown, on the basis of a specific analysis of the relationship between the agreement envisaged and the Community law in force, that the conclusion of such an agreement is capable of affecting the Community rules. The Court then conducted an examination of that kind as regards both the rules governing the jurisdiction of courts and the rules concerning the recognition and enforcement of judgments in civil and commercial matters. After the Court had (i) established that, by virtue of the very existence of Regulation (EC) No 44/2001, which provides for a unified and coherent system of rules on jurisdiction, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as that established by that regulation is capable of affecting those rules of jurisdiction, (ii) specifically verified that that is indeed the case with the agreement envisaged despite the inclusion in it of a disconnection clause providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law and (iii) stated that the same finding may be made with regard to the provisions envisaged regarding the recognition and enforcement of judgments, it reached the conclusion that the new Lugano Convention falls entirely within the sphere of exclusive competence of the Community.

In Case C-177/04 *Commission* v *France* [2006] ECR I-2461, the Court had to decide an action for failure to fulfil obligations under Article 228 EC.

In response to the French Republic's submissions that the reformulation by the Commission of the European Communities during the procedure of the complaints against it amounted to a new claim, so as to render the action inadmissible, the Court held that the requirement that the subject-matter of the proceedings is circumscribed by the pre-litigation procedure cannot go so far as to mean that in every case the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. It is accordingly permissible for the Commission to limit the extent of the failure to fulfil obligations which it asks the Court to find, so as to take account of partial measures to comply adopted in the course of the proceedings.

After establishing that the failure on the part of the French Republic to fulfil obligations still subsisted at the date of the Court's examination of the facts, the Court examined the Commission's proposal of a periodical penalty payment. It recalled first of all that Article 228 EC has the objective of inducing a Member State to comply with a judgment establishing a failure to fulfil obligations, and thereby of ensuring that Community law is in fact applied; such a penalty payment and a lump sum are both intended to place the Member State concerned under economic pressure inducing it to put an end to the infringement and are decided upon according to the degree of persuasion needed for the Member State to alter its conduct. It is for the Court, in the exercise of its discretion, to set a penalty payment in the light of the basic criteria which are, in principle, the duration of the infringement, the seriousness of the infringement and the ability of the Member State to pay. Regard is also to be had to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations.

In this connection, the Court observed that, while guidelines such as those in the notices published by the Commission may indeed contribute to ensuring the transparency, predictability and legal certainty of that institution's actions, it nevertheless remains the fact that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which in any event cannot bind the Court. In the case in point, while the Court accepted the coefficients relating to the seriousness of the infringement, to the gross domestic product of the Member State concerned and to its number of votes, it did not, on the other hand, uphold the coefficient relating to the duration of the infringement. Holding that, for the purposes of calculating that coefficient, regard is to be had to the period between the Court's first judgment and the time at which it assesses the facts, not the time at which the case is brought before it, the Court ordered the Member State to pay a penalty payment higher than that proposed by the Commission.

In Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, which was an action for failure to fulfil obligations brought by the Commission, the Court declared that, by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland had failed to fulfil its obligations under various provisions of the EC and EA Treaties. The reasoning followed by the Court in reaching that conclusion comprised several stages. First, given the fact that the Commission alleged that Ireland had infringed Article 292 EC, by virtue of which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for in the Treaty, the Court considered whether the provisions of the Convention on the Law of the Sea alleged by Ireland before the arbitral tribunal to have been infringed by the United Kingdom were to be regarded as provisions of Community law, the infringement of which by a Member State falls within the procedure for failure to fulfil obligations set up by Article 226 *et seq.* EC. After reasoning involving the rules governing the conclusion of international agreements by the Community, the relevant Community legislation and a specific examination of the provisions alleged by Ireland to have been infringed, the Court reached the conclusion that the provisions of the Convention relied on by Ireland in the dispute relating to the MOX plant which was submitted to the arbitral tribunal are rules which form part of the Community legal order. Therefore the Court has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them, and it is the Court which, by virtue of Article 292 EC, has exclusive jurisdiction to deal with a dispute such as that brought by Ireland before the arbitral tribunal. However, Ireland's failure to fulfil obligations did not end there. It also failed to fulfil its Community obligations by submitting Community measures for examination by the arbitral tribunal, in particular various directives adopted on the basis of the EC Treaty or the EA Treaty; this constituted a further breach of the obligation resulting from Articles 292 EC and 193 EA to respect the exclusive jurisdiction of the Court to interpret and apply provisions of Community law. Furthermore, Ireland failed to comply with its duty to cooperate in good faith under Articles 10 EC and 193 EA by bringing proceedings under the dispute-settlement procedure laid down in the Convention on the Law of the Sea without having first informed or consulted the competent Community institutions.

In Case C-173/03 *Traghetti del Mediterraneo* (judgment of 13 June 2006, not yet published in the ECR), the Court explained the rules applicable to liability of the Member States for

infringement of Community law in the specific case where the infringement is committed in the exercise of judicial functions. In particular, it was called upon to assess the compatibility with Community law of national legislation which, first, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and second, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court. The Court held (i) that Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court and (ii) that Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation may lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239.

Case C-432/04 *Commission* v *Cresson* (judgment of 11 July 2006, not yet published in the ECR) gave the Court the opportunity to clarify the obligations owed by Members of the Commission as referred to in Article 213 EC. It held that the concept of 'obligations arising from their office as a Member of the Commission' must be construed broadly and encompasses, in addition to the obligations of integrity and discretion, the obligation to be completely independent and to act in the general interest of the Community. In the event of a breach of a certain degree of gravity, the penalty provided for by the Treaty is compulsory retirement or the deprivation of the Member's right to a pension or other benefits in its stead. A Member of the Commission whose term of office has come to an end can be punished in respect of a breach which occurred during his term of office but is discovered subsequently. Since compulsory retirement can no longer be ordered, the only penalty available to the Court is the deprivation of rights, which may be total or partial depending on the degree of gravity of the breach. However, the period for taking action is not unlimited, given the requirement of legal certainty and the right to be heard by virtue of which the person against whom an administrative procedure has been initiated by the Commission must be afforded the opportunity to make known his views. The Court also stated that that the fact that no appeal may be brought against the Court's decision does not in any way constitute, in light of the right of Members of the Commission to effective judicial protection, a deficiency which would preclude exercise of its jurisdiction. So far as concerns the examination of the complaints levelled against the Commissioner proceeded against, the Court held that findings made in the course of criminal proceedings may be taken into account but the Court is not bound by the legal characterisation of the facts that is made and it is for the Court to investigate whether the conduct complained of constitutes a breach of the obligations arising from the office of Member of the Commission. On the basis of these considerations and following a detailed examination of the facts placed before it, the Court partially upheld the action, reaching the conclusion that the Member of the Commission concerned had acted in breach of the obligations arising from her office of Member of the Commission for the purposes of Articles 213(2) EC and 126(2) EA. However, having regard to the circumstances of the case, the Court held that the finding of breach

constituted, of itself, an appropriate penalty, and it did not impose on Mrs Cresson a penalty in the form of a deprivation of her right to a pension or other benefits in its stead.

In Case C-145/04 *Spain* v *United Kingdom* (judgment of 12 September 2006, not yet published in the ECR) and Case C-300/04 *Eman and Sevinger* (judgment of 12 September 2006, not yet published in the ECR), the Court adjudicated on the Treaty rules relating to European citizenship and the election of representatives to the European Parliament, in particular with regard to the right to vote in such elections and the exercise of that right. In *Spain* v *United Kingdom*, the Court was required to consider the power of the Member States to extend the right to vote in European Parliament elections to residents who are not citizens of the European Union. The Kingdom of Spain was contesting, in the case in point, a statute of the United Kingdom of Great Britain and Northern Ireland which provides, in relation to Gibraltar, that Commonwealth citizens resident in Gibraltar who are not Community nationals have the right to vote and to stand as a candidate in elections to the European Parliament. The Court held that it is for the Member States to define, in compliance with Community law, the persons entitled to vote and to stand as a candidate in elections to the European Parliament. Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them other than their own nationals or citizens of the Union resident in their territory. Nor, according to the Court, can a clear link between citizenship and the right to vote be deduced from the Treaty provisions relating to the composition of the European Parliament and to citizenship of the Union. Finally, observing that a principle cannot be derived from the Treaty's articles relating to citizenship of the Union that its citizens are the only persons entitled under all the other provisions of the Treaty, the Court concluded that the contested United Kingdom legislation was consistent with Community law.

In *Eman and Sevinger*, the Court ruled on the interpretation of Articles 17 EC, 19(2) EC, 190 EC and 299(3) EC in response to a reference for a preliminary ruling from the Raad van State (Netherlands). The proceedings before the national court concerned two Netherlands nationals resident in Aruba who contested the rejection, on the basis of their place of residence, of their application for registration on the electoral roll for the election of Members of the European Parliament on 10 June 2004. The Court held that persons who possess the nationality of a Member State and who reside or live in a territory which is one of the overseas countries and territories referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty. However, the overseas countries and territories (OCTs) are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 EC to 188 EC) with the result that, failing express reference, the general provisions of the Treaty do not apply to them. Articles 189 EC and 190 EC, relating to the European Parliament, therefore do not apply to those countries and territories, with the consequence that the Member States are not required to hold elections to the European Parliament there. Furthermore, in the current state of Community law, there is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held. The principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified.

Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* (judgment of 19 September 2006, not yet published in the ECR) gave the Court the opportunity to strike a balance between the primacy of Community law and legal certainty with regard to the treatment to be accorded to an administrative act which is unlawful because it infringes Community law. The Court stated that, in accordance with the principle of legal certainty, administrative bodies are not placed under an obligation to reopen an administrative decision which has become final upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies. It acknowledged, however, that there may be a limit to this principle if four conditions are met: the administrative body must, under national law, have the power to reopen that decision; the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance; that judgment must, in the light of a decision given by the Court subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling; and the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court (see Case C-453/00 *Kühne & Heitz* [2004] ECR I-837). In addition, the principle of equivalence requires that all the rules applicable to appeals, including the prescribed time limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law. Where, pursuant to rules of national law, the administration is required to withdraw an administrative decision which has become final but is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law. The national court will ascertain whether legislation incompatible with Community law constitutes manifest unlawfulness within the meaning of the national law concerned and, if that is the case, draw the necessary conclusions under national law.

In two cases, an issue was raised as to the admissibility of an action for annulment. First, Case C-417/04 P *Regione Siciliana* v *Commission* [2006] ECR I-3881, which was an appeal in which the Regione Siciliana sought the setting aside of an order of the Court of First Instance that had declared its action for annulment of a Commission decision closing financial assistance from the European Regional Development Fund to be inadmissible, allowed the Court to give further consideration to the concept of a 'Member State'. The Court recalled that an action by a local or regional entity cannot be treated in the same way as an action by a Member State, the term 'Member State' within the meaning of Article 230 EC referring only to government authorities of the Member States. It stated, however, that, on the basis of that article, a local or regional entity may, to the extent that it has legal personality under national law, institute proceedings against a decision addressed to it 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 it. Nevertheless, a regional authority responsible for the execution of a project of the European Regional Development Fund cannot be regarded as directly concerned by a Commission decision addressed to the Member State in question relating to the closing of the financial assistance from that Fund. Second, Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* (judgment of 12 September 2006, not yet published in the ECR) caused the Court to examine whether decisions taken by the Commission to bring legal proceedings may be annulled. The Court stated that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment. Thus, a decision to

commence proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but it does not per se determine definitively the obligations of the parties to the case and therefore does not in itself alter the legal position in question. Individuals who nevertheless consider that they have suffered damage because of an institution's unlawful conduct are not, however, denied access to justice since an action for non-contractual liability is available if the conduct in question is of such a nature as to entail liability on the part of the Community.

In Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, the Court held, with regard to Article 234 EC, that the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court of Justice for a preliminary ruling. A court against whose decisions there is a judicial remedy under national law is required to stay proceedings and make a reference to the Court for a preliminary ruling on the validity of a Community act only where it considers that one or more arguments for invalidity of the act which have been put forward by the parties or otherwise raised by it of its own motion are well founded.

Finally, in a whole series of cases the Court was faced with the problem of the choice of the legal basis for Community measures. Six cases merit specific attention.

Of these, the first to be noted are Case C-94/03 *Commission* v *Council* [2006] ECR I-1 and Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I-107, concerning Decision 2003/106/EC [4] and Regulation (EC) No 304/2003 respectively [5]. In each of these cases, the Court reaffirmed the main guiding principles which it has already laid down in its case-law concerning dual legal basis. The Court recalled (i) that the choice of the legal basis for a Community measure must be founded on objective factors which are amenable to judicial review and include in particular the aim and content of the measure, (ii) that if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be founded on a single legal basis, namely that required by the main or predominant purpose or component, and (iii) that, exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases, but recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament. Applying that case-law, the Court held in the first case that Decision 2003/106/EC should have been founded on Articles 133 EC and 175(1) EC, in conjunction with the relevant provisions of Article 300 EC, and therefore had to be annulled since it was based solely on Article 175(1) EC, in conjunction with the first sentence of the first subparagraph of Article 300(2) EC and the first subparagraph of Article 300(3) EC. Similarly, in the second

4 Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade (OJ L 63, 6.3.2003, p. 27).

5 Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals (OJ L 63, 6.3.2003, p. 1).

case the Court held that Regulation (EC) No 304/2003 should have been founded on Articles 133 EC and 175(1) EC and therefore had to be annulled since it was based solely on Article 175(1) EC.

The other four cases have the common feature that they concern the conditions governing recourse to Article 95 EC as a legal basis.

First of all, in Case C-436/03 *Parliament* v *Council* [2006] ECR I-3733, the Court recalled its case-law which states that Article 95 EC empowers the Community legislature to adopt (i) measures to improve the conditions for the establishment and functioning of the internal market — and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms guaranteed by the Treaty, which include the freedom of establishment, and (ii) measures whose aim is to prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws, provided that the emergence of such obstacles is likely and the measure in question is designed to prevent them. The Court accordingly held in the case in point that Article 95 EC could not constitute an appropriate legal basis for the adoption of Regulation (EC) No 1435/2003 [6] and that it was correctly adopted on the basis of Article 308 EC. It was also in application of that case-law that the Court held in Case C-217/04 *United Kingdom* v *Parliament and Council* [2006] ECR I-3771 that Regulation (EC) No 460/2004 [7] was rightly based on Article 95 EC. Conversely, in Joined Cases C-317/04 and C-318/04 *Parliament* v *Council and Commission* [2006] ECR I-4721, the Court held that Decision 2004/496/EC [8] was not validly adopted on the basis of Article 95 EC, read in conjunction with Article 25 of Directive 95/46/EC [9], since the agreement that was the subject of that decision related to data processing which concerned public security and the activities of the State in areas of criminal law and was therefore excluded from the scope of Directive 95/46/EC by virtue of the first indent of Article 3(2) of that directive. Finally, in Case C-380/03 *Germany* v *Parliament and Council* (judgment of 12 December 2006, not yet published in the ECR), the Court recalled that, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. It then held, principally on the basis of that case-law, that by adopting Articles 3 and 4 of Directive 2003/33/EC [10] solely on the basis of Article 95 EC, the Community legislature did not

6 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

7 Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (OJ L 77, 13.3.2004, p. 1).

8 Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ L 183, 20.5.2004, p. 83, and corrigendum at OJ L 255, 30.8.2005, p. 168).

9 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 L 281, 23.11.1995, p. 31), as amended.

10 Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

infringe Article 152(4)(c) EC and that the action brought by the Federal Republic of Germany challenging those provisions of the directive consequently had to be dismissed.

European citizenship

In this field, two cases deserve attention in addition to the cases noted above relating to the election of representatives to the European Parliament.

In Case C-406/04 *De Cuyper* (judgment of 18 July 2006, not yet published in the ECR), the Court examined the compatibility of Belgian legislation on unemployment with the freedom of movement and residence conferred on citizens of the European Union by Article 18 EC. Under Belgian legislation, unemployed persons over 50 years of age, although no longer obliged to remain available for work, are subject to a residence requirement. The Court pointed out first of all that the right of residence of citizens of the Union is not unconditional, but is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect. The Court found that the Belgian legislation places certain Belgian nationals at a disadvantage simply because they have exercised their freedom of movement and residence, and is thus is a restriction on the freedoms conferred by Article 18 EC. It accepted, however, that the restriction was justified by objective considerations of public interest independent of the nationality of the persons concerned. The Court stated that a residence condition reflects the need to monitor the employment and family situation of unemployed persons by allowing inspectors to check whether the situation of a recipient of the unemployment allowance has undergone changes which may have an effect on the benefit granted. The Court also noted that the specific nature of monitoring with regard to unemployment justifies the introduction of arrangements that are more restrictive than for other benefits and that more flexible measures, such as the production of documents or certificates, would mean that the monitoring would no longer be unexpected and would consequently be less effective.

The compatibility of a residence condition with Article 18 EC was also at issue in Case C-192/05 *Tas-Hagen and Tas* (judgment of 26 October 2006, not yet published in the ECR), concerning legislation on the award of benefits to civilian war victims which requires the person concerned to be resident on national territory at the time at which the application is submitted.

The Court sought first to determine whether such an issue falls within the scope of Article 18 EC. It observed in this regard that, as Community law now stands, a benefit to compensate civilian war victims falls within the competence of the Member States, although they must exercise that competence in accordance with Community law. In the case of legislation of the kind at issue, exercise of the right of free movement and of residence which is accorded by Article 18 EC is such as to affect the prospects of receiving the benefit, so that the situation cannot be considered to have no link with Community law. With regard to the permissibility of the residence condition, the Court stated that it is liable to deter exercise of the freedoms accorded by Article 18 EC and therefore constitutes a restriction on those freedoms. It observed that the condition may admittedly be justified in principle by the wish to limit the obligation of solidarity with war victims to those who had links with the population of the State concerned during and after the war, the condition

of residence thereby demonstrating the extent to which those persons are connected to its society. However, while noting the wide margin of appreciation enjoyed by the Member States with regard to benefits that are not covered by Community law, the Court held that a residence condition cannot be a satisfactory indicator of that connection when it is liable to lead to different results for persons resident abroad whose degree of integration is in all respects comparable. A residence criterion based solely on the date on which the application for the benefit is submitted is not a satisfactory indicator of the degree of attachment of the applicant to the society which is demonstrating its solidarity with him and therefore fails to comply with the principle of proportionality.

Free movement of goods

In Joined Cases C-23/04 to C-25/04 *Sfakianakis* [2006] ECR I-1265, the Court was required to interpret the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [11], and more specifically Articles 31(2) and 32 of Protocol No 4 to that agreement, in response to a reference for a preliminary ruling from a Greek court which had to decide a case relating to imports into Greece, under the preferential scheme established by that agreement, of automobiles from Hungary.

The Court held that Articles 31(2) and 32 of Protocol No 4 to the agreement, as amended by Decision No 3/96 of the Association Council between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, are to be interpreted as meaning that the customs authorities of the State of import are bound to take account of judicial decisions delivered in the State of export on actions brought against the results of verifications of the validity of goods movement certificates conducted by the customs authorities of the State of export, once they have been informed of the existence of those actions and the content of those decisions, regardless of whether the verification of the validity of the movement certificates was carried out at the request of the customs authorities of the State of import. In the same judgment the Court held that the effectiveness of the abolition of the imposition of customs duties under the agreement also precludes administrative decisions imposing the payment of customs duties, taxes and penalties taken by the customs authorities of the State of import before the definitive result of actions brought against the findings of the subsequent verification has been communicated to them, when the decisions of the authorities of the State of export which initially issued the goods movement certificates have not been revoked or cancelled.

Agriculture

With regard to the common agricultural policy, mention will be made of Case C-310/04 *Commission* v *Spain* (judgment of 7 September 2006, not yet published in the ECR), where the Kingdom of Spain brought an action for annulment of the new Community support

[11] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, approved by decision of the Council and of the Commission of 13 December 1993 (OJ L 347, 31.12.1993, p. 1).

scheme for cotton which was established by Regulation (EC) No 864/2004 [12], by its insertion in Regulation (EC) No 1782/2003 [13] that implemented the 'Mac Sharry reforms'. Of the various pleas in law put forward by the Kingdom of Spain, the Court upheld the plea relating to breach of the principle of proportionality. It found that the Council, the author of Regulation (EC) No 864/2004, had not shown that in adopting the new cotton support scheme established by that regulation it actually exercised its discretion, which, according to the Court, involved the taking into consideration of all the relevant factors and circumstances of the case, and especially labour costs and the potential effects of the reform of the cotton support scheme on the economic viability of the ginning undertakings. The Court thus held that the information submitted to it did not enable it to ascertain whether the Community legislature had been able, without exceeding the bounds of the broad discretion it enjoys in the matter, to reach the conclusion that fixing the amount of the specific aid for cotton at 35 % of the total existing aid under the previous support scheme would suffice to guarantee the objective set out in recital 5 in the preamble to Regulation (EC) No 864/2004, namely to ensure the profitability and hence the continuation of that crop, an objective reflecting that laid down in paragraph 2 of Protocol 4 annexed to the Act of Accession of the Hellenic Republic. The Court therefore annulled Article 1(20) of Regulation (EC) No 864/2004 which had inserted Chapter 10a of Title IV of Regulation (EC) No 1782/2003. However, it suspended the effects of that annulment until the adoption, within a reasonable time, of a new regulation.

Free movement of persons, services and capital

In this vast field, the year's significant cases must be arranged thematically.

First of all, the Court had to point out the limits preventing application of the provisions on the freedoms of movement in the case of, first, purely internal situations and, second, abuse of rights. It is settled case-law that a situation whose features are entirely confined to a single Member State is not covered by the provisions relating to the freedoms of movement. In this context, the Court is frequently required to examine whether the establishment, by a taxpayer who is a Community resident, of his residence in the territory of a Member State other than the one in which he engages in economic activity constitutes an external element sufficient to enable him to rely on the free movement of persons, services or capital. Two cases in 2006 merit specific attention in this regard: Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711 and Case C-470/04 *N* (judgment of 7 September 2006, not yet published in the ECR).

12 Council Regulation (EC) No 864/2004 of 29 April 2004 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ L 161, 30.4.2004, p. 48).

13 Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ L 270, 21.10.2003, p. 1).

In *Ritter-Coulais*, the dispute before the national court concerned a couple who were German nationals and were employed in Germany, where they were liable to taxation, but who resided in France. The Court was asked whether Mr and Mrs Ritter-Coulais could rely upon the provisions relating to freedom of movement for workers against the German tax authorities in order to have income losses resulting from their own use of the house in France which they owned and were living in taken into account. The Court replied that the situation of Mr and Mrs Ritter-Coulais, who worked in a Member State other than that of their actual place of residence, fell within the scope of Article 39 EC.

N concerned the provisions of Netherlands tax law under which departure from national territory is treated as a disposal of shares, resulting in the payment of tax on increases in value at that date. The main proceedings involved a Netherlands national who was resident in the Netherlands until he moved to the United Kingdom, where he would engage in no economic activity for a long time. In answer to the question whether this Netherlands national, who was the sole shareholder of three Netherlands companies, could rely upon the provisions relating to freedom of establishment against the Netherlands tax authorities in order to contest the use made of the disputed legislation in his regard, the Court, referring expressly to its judgment in *Ritter-Coulais*, stated that since the transfer of his residence N had fallen within the scope of Article 43 EC.

As regards abuse of rights, a national court asked the Court of Justice whether it is an abuse of the freedom of establishment for a company established in a Member State to set up and capitalise companies in another Member State solely to take advantage of the more favourable tax regime in that State. In Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* (judgment of 12 September 2006, not yet published in the ECR), the Court replied in the negative. The fact that a company has been established in a Member State for the avowed purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse and thereby to justify a national measure restricting the freedom of establishment. Such a measure would, on the other hand, be justified if it sought to prevent the creation of wholly artificial arrangements which do not reflect economic reality and are intended to escape the tax normally due on the profits generated by activities carried out on national territory.

While the field of application of the provisions relating to the freedoms of movement is therefore not unlimited, the powers retained by States with regard to direct taxation are not either, and the Court had various opportunities to add to its already plentiful case-law in this area.

Under the common body of rules established by the Court's case-law, not only overt discrimination by reason of nationality is prohibited but also all covert forms of discrimination (all indirect discrimination) which, by the application of ostensibly neutral criteria, lead to the same result. However, in order for a difference in treatment to be classified as discrimination, there must be an intention to apply different rules to comparable situations or the same rules to dissimilar situations. Should indirect discrimination be established, it is possible for it to be justified by overriding reasons in the general interest, subject to compliance with the principle of proportionality.

Of the various national fiscal measures examined by the Court, some were held compatible with Community law, and others incompatible.

National measures recognised as compatible with Community law include, first of all, measures applicable without distinction to objectively comparable situations. That was the position in Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, concerning national legislation under which the estate of a national of a State who dies within 10 years after ceasing to reside in that State is taxed as if that transfer of residence did not take place, apart from relief in respect of inheritance taxes levied by other States. The Court observed that, by laying down identical taxation provisions for nationals who have transferred their residence abroad and those who have remained in the Member State concerned, such legislation cannot discourage investment flows from or to that State or diminish the value of the estate of nationals who have transferred their residence abroad. The difference in treatment existing between residents who are nationals of the Member State concerned and those who are nationals of other Member States cannot be regarded as constituting discrimination prohibited by Article 56 EC because it flows from the Member States' power to define the criteria for allocating their powers of taxation. That was also the position in Case C-513/04 *Kerckhaert and Morres* (judgment of 14 November 2006, not yet published in the ECR), concerning fiscal legislation which taxes at the same rate share dividends from companies established in national territory and those from companies established in another Member State, without taking account of the income tax already levied by deduction at source in the latter Member State. The Court stated that, in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily different merely because he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source. That legislation is therefore not contrary to Article 56 EC. The regrettable consequences, in terms of double taxation, which result from such legislation stem from the exercise in parallel by two Member States of their fiscal sovereignty. It is consequently for them to remedy those consequences by applying, in particular, the apportionment criteria followed in international tax practice.

National measures recognised as compatible with Community law include, next, measures which, although treating objectively comparable situations differently, ultimately prove neutral in light of the objective pursued. Case C-446/04 *Test Claimants in the FII Group Litigation* (judgment of 12 December 2006, not yet published in the ECR) illustrates this well. In generally applicable legislation intended to prevent or mitigate the imposition of a series of charges to tax or economic double taxation (double taxation of the same income in the hands of two different taxpayers), the United Kingdom of Great Britain and Northern Ireland had adopted, for the calculation of tax payable by resident companies, two distinct systems for the taxation of dividends, according to whether they were nationally sourced or foreign sourced. While dividends received by resident companies from other resident companies were subject to an exemption system, dividends received by resident companies from non-resident companies were subject to an imputation system. The Court stated that, in the context of such legislation, the situation of a company receiving foreign-sourced dividends is, however, comparable to that of a company receiving nationally sourced dividends insofar as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax. Provided that the difference in treatment does not prove to be disadvantageous in the case of foreign-sourced dividends it is not contrary to Articles 43 EC and 56 EC, a matter which is for the national courts to establish.

Other national measures recognised as compatible with Community law are measures treating differently situations that are not comparable. That was the position in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* (judgment of 12 December 2006, not yet published in the ECR), concerning another aspect of the legislation in the United Kingdom of Great Britain and Northern Ireland intended to prevent or mitigate the imposition of a series of charges to tax or economic double taxation. The disputed measures related, this time, to the regime governing the taxation of dividends distributed by resident companies. While a resident company receiving dividends from another resident company was granted a tax credit, non-resident companies receiving such dividends were not entitled to any tax credit. The Court stated that this difference in tax treatment is not, however, discriminatory. While the situation of resident shareholders receiving nationally sourced dividends must be regarded as comparable to the situation of resident shareholders receiving foreign-sourced dividends (see *Test Claimants in the FII Group Litigation*), the same is not necessarily true, as regards the application of the tax legislation of the Member State in which the company making the distribution is resident, of the situations in which shareholders receiving dividends resident in that Member State and shareholders receiving dividends resident in another Member State are placed. Where the company making the distribution and the shareholder to whom it is paid are not resident in the same Member State, the Member State in which the company making the distribution is resident, that is to say the Member State in which the profits are derived, is not in the same position, as regards the prevention or mitigation of a series of charges to tax and of economic double taxation, as the Member State in which the shareholder receiving the distribution is resident. The difference in treatment between resident and non-resident companies is therefore not prohibited in a case of that kind by Articles 43 EC and 56 EC.

Finally, national measures have been recognised as compatible with Community law where they give rise to differences in treatment but those differences are justified by overriding reasons in the general interest, as in Case C-290/04 *FKP Scorpio Konzertproduktionen* (judgment of 3 October 2006, not yet published in the ECR). The main proceedings concerned national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to resident providers of services are not subject to a retention. The Court considered the obligation on the recipient of services to make a retention if he is not to incur liability to be an obstacle to the freedom to provide services. It held, however, that such legislation was justified by the need to ensure the effective collection of income tax from persons established outside the State of taxation and constituted a means proportionate to the objective pursued.

National measures held incompatible with Community law include, first, measures which, although dictated by overriding reasons in the general interest, prove disproportionate to the objective pursued. An example of this is provided by *N*. A taxpayer holding shares who becomes liable, simply by reason of transfer of his residence abroad, to taxation of increases in value which have not yet been realised, whereas, if he were to remain in the territory of the Member State of which he is a national, increases in value would become taxable only when, and to the extent that, they are actually realised, is deterred from exercising his right to freedom of movement. The Court acknowledged that the national provisions at issue pursued an objective in the general interest in that they allocated the power to tax between Member States on the basis of the territoriality principle, thereby avoiding cases

of a double legal charge to tax (double taxation of the same income in the hands of the same taxpayer). Nonetheless, both the obligation to provide guarantees in order to obtain a deferral of payment of the tax normally due and the inability to rely on reductions in value arising after the transfer of residence rendered the tax regime at issue disproportionate to the objective pursued.

National measures held incompatible with Community law also include measures treating comparable situations differently. In *Ritter-Coulais,* the Court held that national legislation constitutes an obstacle where it does not permit natural persons in receipt of income from employment in one Member State and assessable to tax on their total income there to request that account be taken, for the purposes of determining the rate of taxation applicable to that income in that State, of income losses resulting from their own use of a house located in another Member State which they own and use as their principal residence, whereas rental income would be taken into account. While that legislation is not specifically directed at non-residents, the latter are more likely to own a home outside national territory than resident citizens and are also more often than not nationals of other Member States. The less favourable treatment accorded to them is consequently contrary to Article 39 EC.

In Case C-386/04 *Centro di Musicologia Walter Stauffer* (judgment of 14 September 2006, not yet published in the ECR), the Court was asked whether a Member State may treat a non-resident foundation which satisfies the conditions in that State for recognition as a charity less favourably than a resident foundation of the same kind. The Court pointed out that, while Article 58 EC authorises the Member States to accord different fiscal treatment to non-resident taxpayers, it prohibits, however, measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital. Accordingly, different treatment of foundations with unlimited tax liability — which resident foundations have — and those with limited liability — which non-resident foundations have — is permissible only if it concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest. Foreign foundations recognised as having charitable status in their Member State of origin which satisfy the requirements imposed for that purpose by the law of another Member State and whose object is to promote the very same interests of the general public as those promoted in the latter State are in a situation comparable to that of resident foundations of the same kind. In the absence of justification, unfavourable treatment of non-resident foundations is consequently contrary to Community law.

In *FKP Scorpio Konzertproduktionen,* the Court was once again confronted with the question of the deductibility of business expenses incurred by a non-resident provider of services. With regard to business expenses directly linked to the economic activity that has generated the taxable income, residents and non-residents are in a comparable situation. The Court had therefore held in Case C-234/01 *Gerritse* [2003] ECR I-5933 that a national provision which refuses to allow non-residents to deduct business expenses, where residents are allowed to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination contrary to the Treaty. Here, the Court held that it was also contrary to the Treaty for national legislation not to allow business expenses to be taken into account in the very procedure for retention of tax at source but only in a subsequent refund procedure.

Lastly, in Case C-520/04 *Turpeinen* (judgment of 9 November 2006, not yet published in the ECR) the Court held that Article 18 EC, relating to freedom of movement of citizens of the Union, is infringed by legislation of a Member State under which a retirement pension paid by an institution of that State to a non-resident is taxed, in certain cases, more heavily than a pension paid to a resident would be, where that pension constitutes all or nearly all of the non-resident's income. In such a case, the situation of a non-resident taxpayer is, so far as concerns income tax, objectively comparable to that of a resident taxpayer.

With regard to freedom of establishment, the Court held in two parallel cases, one of which (Case C-506/04 *Wilson*) resulted from a reference for a preliminary ruling while the other (Case C-193/05 *Commission* v *Luxembourg*) was an action for failure to fulfil obligations (judgments of 19 September 2006, neither yet published in the ECR), that the provisions of Luxembourg law making the registration of lawyers who have obtained their professional qualification in another Member State subject to a prior test to establish proficiency in the three national languages were incompatible with the directive on practice of the profession of lawyer under the home-country professional title [14]. The Court explained that presentation of a certificate attesting to registration in the home Member State, in accordance with Article 3 of the directive, is the only condition to which registration in the host Member State may be subject, enabling the person concerned to practise in the latter State under his home-country professional title. The Court pointed out in this regard that the lack of a system of prior testing of knowledge under the directive is accompanied by a set of rules ensuring the protection of consumers and the proper administration of justice, in particular the obligation on the lawyer to practice under his home-country professional title and the obligation of professional conduct not to handle matters for which he lacks competence, for instance owing to lack of linguistic knowledge. In *Wilson*, the Court also found that the Luxembourg legislation was not compatible with Article 9 of the directive under which, where a decision is made refusing registration, a remedy must be available before a court or tribunal in accordance with the provisions of domestic law. The Court considered that a sufficient guarantee of impartiality was not ensured since in the case in point decisions refusing registration were subject to review by a body composed exclusively — at first instance — or for the most part — on appeal — of national lawyers, and an appeal to the Court of Cassation enabled judicial review of the law only and not the facts.

As regards, finally, freedom to provide services, in Case C-452/04 *Fidium Finanz* (judgment of 3 October 2006, not yet published in the ECR) the Court held that Community law does not preclude national legislation under which the granting of credit on national territory by a company established in a non-member country is subject to prior authorisation and such authorisation can be granted only if that company has its central administration or a branch on national territory. Since the freedom to provide services, unlike the free movement of capital, cannot be relied upon by a company established in a non-member country, the Court sought to determine which of these fundamental freedoms related to the activity in question. It found in this regard that that activity was in principle covered by both of them. Relying on a series of precedents, the Court stated that in such cases it is necessary to consider to what extent the exercise of those freedoms is affected and

14 Directive 98/5/EC of the European 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 L 77, 14.3.1998, p. 36).

whether, in the circumstances of the main proceedings, one of them is entirely secondary in relation to the other and may be considered together with it. Where that is the position, the measure at issue is in principle examined in relation to only one of those two freedoms. In the case in point, the Court held that the contested rules governing authorisation affected primarily the freedom to provide services, the requirement of a permanent establishment being the very negation of that freedom. By contrast, any restrictive effects of such rules on the free movement of capital are merely an inevitable consequence of the restriction imposed on the provision of services.

With regard to social security, attention is drawn to three judgments relating to the interpretation of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended [15].

First of all, in the context of what is sometimes called 'the free movement of patients', the important judgment delivered in Case C-372/04 *Watts* [2006] ECR I-4325 is to be noted. Here, the Court was required to consider the National Health Service (NHS) in the United Kingdom of Great Britain and Northern Ireland in the light of Article 22 of Regulation (EEC) No 1408/71 and of Article 49 EC. The second subparagraph of Article 22(2) of Regulation (EEC) No 1408/71 provides that the competent institution may not refuse a patient authorisation to go to another Member State to receive treatment there (that is to say, in practice, refuse to issue an E112 form) 'where he cannot be given such treatment 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 his disease'. Hospital treatment is free under the NHS but subject to some quite lengthy waiting lists for the least urgent treatment, and the question thus arose as to the extent to which it is permitted to take account of waiting times in the State of residence when assessing the 'time normally necessary for obtaining the treatment', as referred to in Article 22 of the regulation. While the Court acknowledged the legitimacy of a system of waiting lists, it held that, in order to be entitled to refuse authorisation on a ground related to waiting time, the competent institution must establish that the waiting time does not exceed the period which is acceptable having regard to an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought. The Court added that the setting of waiting times should be carried out flexibly and dynamically, so that they may be reconsidered in the light of any deterioration in the patient's state of health. Regarding the freedom to provide services, the Court ruled that Article 49 EC applies where a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates. It then found that a national system, such as that under the NHS, where prior authorisation is a prerequisite for the

15 Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ L 28, 30.1.1997, p. 1).

assumption of the costs of hospital treatment available in another Member State whilst on the other hand the receipt of free treatment under that system does not depend on such authorisation, constitutes an obstacle to the freedom to provide services. That restriction may nevertheless be justified by overriding planning objectives of such a kind as to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment, control costs and prevent any wastage of financial, technical and human resources. The Court added that the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations in question and must satisfy the requirement of proportionality. In this connection, the Court stated with regard to the waiting lists envisaged under the NHS that, where the delay arising from such waiting lists appears to exceed in the individual case concerned a medically acceptable period, the competent institution may not refuse authorisation on the basis of the existence of those waiting lists, an alleged distortion of the normal order of priority of the cases to be treated, the fact that treatment under the national system is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the competent Member State. Finally, where treatment cannot be supplied within a medically acceptable period, the national authorities must provide mechanisms for the reimbursement of the cost of hospital treatment in another Member State.

Second, the Court held in Case C-466/04 *Acereda Herrera* (judgment of 15 June 2006, not yet published in the ECR), with regard to the reimbursement of certain costs incurred by a person insured under the social security system of a Member State when receiving, in another Member State, hospital treatment authorised in advance by the insurance institution, that Article 22(1)(c) and (2) and Article 36 of Regulation (EEC) No 1408/71, as amended, do not confer on the insured person the right to be reimbursed by that institution for the costs of travel, accommodation and subsistence which he and any person accompanying him have incurred in the territory of that other Member State, with the exception of the costs of accommodation and meals in hospital for the insured person himself. The Court pointed out that the term 'cash benefits' in Article 22(1)(c) of the regulation covers the cost of medical services strictly defined and the inextricably linked costs relating to the stay and meals in the hospital, and excludes reimbursement by the competent institution of ancillary costs such as the costs of travel, accommodation and subsistence which the insured person and any person accompanying him have incurred in the territory of that other Member State.

Finally, in Case C-50/05 *Nikula* (judgment of 18 July 2006, not yet published in the ECR), concerning the levying in a Member State of social contributions on pensions paid by an institution of another State, the Court held that Article 33(1) of Regulation (EEC) No 1408/71, as amended and updated by Regulation (EC) No 118/97, does not preclude, when the basis is determined for calculating sickness insurance contributions applied in the Member State of residence of the recipient of pensions paid by the institutions of that Member State responsible for the payment of benefits under Article 27 of that regulation, the inclusion in that basis of calculation, in addition to the pensions paid in the Member State of residence, also of pensions paid by the institutions of another Member State, provided that the sickness insurance contributions do not exceed the amount of pensions paid in the State of residence. However, Article 39 EC precludes the amount of pensions received from institutions of another Member State from being taken into account if

contributions have already been paid in that other State out of the income from work received in that State. It is for the persons concerned to prove that the earlier contributions were in fact paid.

Visas, asylum and immigration

In Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, which was an action for failure to fulfil obligations brought by the Commission against Spain because of the practice of that Member State's authorities of refusing entry onto its territory or issue of a visa to nationals of a third country married to a Member State national on the sole ground that they were persons for whom alerts were entered in the Schengen Information System (SIS), the Court explained the relationship between the Convention implementing the Schengen Agreement ('the CISA') and Community law on freedom of movement for persons. It also ruled on how Member States are expected to act in applying the SIS. On the first point, the Court held that the compliance of an administrative practice with the provisions of the CISA may justify the conduct of the competent national authorities only insofar as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons. It thus stated that it is consistent with the CISA for Member States automatically to refuse entry or a visa to an alien for whom a Schengen alert has been issued for the purposes of refusing him entry. However, insofar as this automatic refusal provided for by the CISA does not distinguish as to whether or not the alien concerned is married to a Member State national, it is also necessary to verify whether, in the circumstances of the case, that automatic refusal is compatible with the rules governing freedom of movement for persons, in particular with Directive 64/221/EEC [16]. More specifically, the Court stated that the inclusion of an entry in the SIS does indeed constitute evidence that there is a reason to justify refusal of entry into the Schengen Area. However, such evidence must be corroborated by information enabling it to be verified before any refusal that the presence of the person concerned in the Schengen Area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court added with regard to that verification that the State consulting the SIS must give due consideration to the information provided by the State which issued the alert and the latter must make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat that the person for whom an alert has been issued is likely to represent.

In Case C-241/05 *Bot* (judgment of 3 October 2006, not yet published in the ECR) the Court, in response to a question referred for a preliminary ruling by the Conseil d'État (France), interpreted Article 20(1) of the CISA [17], which provides that aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry,

16 Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963–1964, p. 117).

17 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.8.2000, p. 19).

provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e) of that Convention. The case before the Conseil d'État concerned a Romanian national not requiring a visa who, after having made successive stays in the Schengen Area amounting to more than three months in all during the six months following the date of his very first entry into that area, entered the area again after that initial six-month period had elapsed and was subject to a check there less than three months after that new entry.

The Court held that Article 20(1) of the CISA is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the territories of the Contracting States to the Schengen Agreement, to the first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

In Case C-540/03 *Parliament* v *Council* (judgment of 27 June 2006, not yet published in the ECR), the Court dismissed an action for annulment brought by the European Parliament challenging the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Directive 2003/86 on family reunification [18]. The Court held, contrary to the European Parliament's assertions, that those provisions — which state that the Member States are to authorise the entry and residence, pursuant to the directive, of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her, and that Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her — respect fundamental rights as recognised in the Community legal order. In order to reach that conclusion, the Court compared the contested provisions with the right to respect for family life as laid down in Article 8 of the European Convention on Human Rights, with the Convention on the Rights of the Child and with the Charter of Fundamental Rights solemnly proclaimed in Nice in 2000 [19], while pointing out that those instruments do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification. The Court rejected the various arguments relied upon by the European Parliament, taking care to establish that, given the manner in which they are laid down, the derogations permitted by the contested provisions cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in themselves or in that they expressly or impliedly authorise the Member States to act in such a way.

Competition rules

In the following presentation of the case-law on competition, a distinction will be drawn between the rules applicable to undertakings and the system of State aid.

18 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, p. 12).

19 Charter of Fundamental Rights of the European Union (OJ C 364, 18.12.2000, p. 1).

As regards the rules applicable to undertakings, 13 judgments are of particular interest. A first judgment is to be noted in that it adds to the definition of 'undertaking', which determines the scope of the competition rules. In Case C-205/03 P *FENIN* v *Commission* (judgment of 11 July 2006, not yet published in the ECR), the Court, after recalling that 'undertaking' covers, in the context of Community competition law, any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed, stated that, in that regard, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, so that, for the purposes of assessing the nature of such an activity, there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must be determined according to the subsequent use of the purchased goods.

In three other judgments, the Court reaffirmed, and defined in greater detail, a number of elements of the definition of an agreement restrictive of competition within the meaning of Article 81 EC. In Case C-551/03 *General Motors* [2006] ECR I-3173, an appeal by the eponymous car manufacturer against the judgment of the Court of First Instance in Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, the Court observed that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives, and that for the purpose of determining whether it pursues an object of that type account must be taken not only of the terms of the agreement but also of other factors, such as the aims pursued by the agreement as such, in the light of the economic and legal context. It thus held that an agreement concerning distribution has a restrictive object for the purposes of Article 81 EC if it clearly manifests the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market in question, and pointed out that such an objective can be achieved not only by direct restrictions on exports but also through indirect measures, such as the implementation by a supplier of motor vehicles, in the context of dealer agreements, of a measure excluding export sales from the system of bonuses paid to dealers, since they influence the economic conditions of such transactions. The Court also recalled that, while proof that the parties to an agreement intended to restrict competition is not a necessary factor in determining whether an agreement has such a restriction as its object, there is nothing to prohibit the Commission or the Community Courts from taking that intention into account. Last, the Court also held, in accordance with consistent case-law, that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute and that, accordingly, in a situation such as that involving the implementation by a supplier of motor vehicles, in the context of dealer agreements, of a measure excluding export sales from the system of bonuses paid to dealers, it is necessary to examine what the conduct of those dealers and the competitive situation on the market in question would have been if export sales had not been excluded from the bonus policy. In Case C-74/04 P *Commission* v *Volkswagen* (judgment of 13 July 2006, not yet published in the ECR), an appeal by the Commission against the judgment of the Court of First Instance in Case T-208/01 *Volkswagen* v *Commission* [2003] ECR II-5141, the Court held, moreover, that in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two

parties and that the form in which that concurrence is expressed is not by itself decisive. It stated, more specifically, in that regard that while a call by a motor vehicle manufacturer to its authorised dealers does not constitute a unilateral act but an agreement within the meaning of Article 81(1) EC, provided that it forms part of a set of continuous business relations governed by a general agreement drawn up in advance, that does not, however, imply that any call by a motor vehicle manufacturer to dealers constitutes an agreement within the meaning of Article 81(1) EC and does not relieve the Commission of its obligation to prove that there was a concurrence of wills on the part of the parties to the dealership agreement in each specific case. According to the Court, such a will on the part of the parties may result from both the clauses of the dealership agreement in question and from the conduct of the parties, and in particular from the possibility of there being tacit acquiescence by the dealers in the measure adopted by the vehicle manufacturer. In another area, in Case C-519/04 P *Meca-Medina and Majcen* v *Commission* (judgment of 18 July 2006, not yet published in the ECR), the Court held, last, after emphasising that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty, and in particular from the scope of the competition rules, a person engaging in the activity governed by that rule or the body which has laid it down, that, while anti-doping rules may be regarded as a decision of an association of undertakings limiting the freedom of action of the persons to whom they are addressed, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. According to the Court, such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes. Acknowledging, however, that the penal nature of such anti-doping rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in, the Court made clear that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by such rules must be limited to what is necessary to ensure the proper conduct of competitive sport.

Three further judgments deserve special mention in regard to the substantive application of the competition rules by the Court. In Joined Cases C-94/04 and C-202/04 *Cipolla and Others* (judgment of 5 December 2006, not yet published in the ECR), on references for a preliminary ruling from the Corte d'appello di Torino (Italy) and the Tribunale di Roma (Italy), respectively, the Court held that Articles 10 EC, 81 EC and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers, a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale. The Court considered, however, that such legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyers' fees for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC and that it is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which

might justify it and whether the restrictions it imposes do not appear disproportionate having regard to those objectives. Last, in Case C-125/05 *Vulcan Silkeborg* (judgment of 7 September 2006, not yet published in the ECR) and in Joined Cases C-376/05 and C-377/05 *A. Brünsteiner* (judgment of 5 December 2006, not yet published in the ECR), also references for a preliminary ruling, the Court had for the first time the opportunity to adjudicate on a number of questions inherent in the entry into force of the last regulation on exemption by category applicable to the motor vehicle sector, Regulation (EC) No 1400/2002 [20], and also to provide its first interpretations of that regulation. In those cases the Court, in particular, held that, while the entry into force of Regulation (EC) No 1400/2002 did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Regulation (EC) No 1475/95 [21], that entry into force might, however, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be truly considered as representing a reorganisation within the meaning of that provision and that in that regard it is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position. In *A. Brünsteiner*, the Court further held that, on a proper construction of Article 4 of Regulation (EC) No 1400/2002, once the transitional period provided for by Article 10 of that regulation had expired, the block exemption under that regulation did not apply to contracts satisfying the conditions for block exemption under Regulation (EC) No 1475/95 which had as their object at least one of the hardcore restrictions listed in Article 4, with the result that all the contractual terms restrictive of competition contained in such contracts were liable to be caught by the prohibition laid down in Article 81(1) EC, if the conditions for exemption under Article 81(3) EC were not satisfied. The Court made clear, in that regard, that the consequences, for all other parts of the agreement or for other obligations flowing from it, of the prohibition of contractual terms incompatible with Article 81 EC are not, however, a matter for Community law and that it is therefore for the national court to determine, in accordance with the national law applicable, the extent and consequences, for the contractual relation as a whole, of the prohibition of certain terms under Article 81 EC.

The other judgments which merit attention owing to the Court's application of the competition rules are more concerned with the questions relating to the implementation of those rules.

The contribution made by two of those judgments lies essentially in questions of procedure and questions relating to the production of evidence. In Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* (judgment of 21 September 2006, not yet published in the ECR) and Case C-113/04 P *Technische Unie* v *Commission* (judgment of 21 September 2006, not yet published in the ECR), the Court, while reaffirming that compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures,

[20] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30).

[21] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](1) [EC] to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25).

held that a finding that the duration of the procedure was excessive, and could not be imputed to the undertakings concerned, can entail annulment, on the ground of a breach of that principle, of a decision finding an infringement only if that duration, by adversely affecting the undertakings' rights of defence, was able to influence the outcome of the proceedings. The Court further observed that examination of any interference with the exercise of the rights of the defence owing to the excessive duration of the administrative procedure cannot be limited solely to the second phase of that procedure, but must also cover the phase preceding notification of the statement of objections and, especially, determine whether that excessive duration was capable of affecting the ability of the undertakings concerned to defend their rights in future. In the same two cases, the Court further held, on the basis of its case-law according to which the existence of an anti-competitive practice or agreement must in most cases be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules, that the fact that evidence of the existence of a continuous infringement had not been produced for certain specific periods did not preclude the infringement from being regarded as established during a longer overall period than those periods provided that such a finding was supported by objective and consistent indicia. Last, the Court also recalled in those judgments that, for the purposes of the application of Article 81(1) EC, where the various actions form part of an 'overall plan', owing to their identical object, which distorts competition within the common market, the Commission is entitled to impute liability for those actions according to participation in the infringement considered as a whole and that there is no need to take account of the actual effects of those actions where it appears that their object is to prevent, restrict or distort competition within the common market. In *Technische Unie* v *Commission*, the Court also referred to its consistent case-law, according to which it is sufficient for the Commission to demonstrate that an undertaking concerned in meetings during which agreements of an anti-competitive nature were concluded, without having manifestly opposed them, in order to prove to the requisite legal standard that the undertaking participated in a cartel and that, where it is established that an undertaking took part in such meetings, that undertaking must put forward indicia of such a kind as to establish that its participation was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

Three other judgments also merit attention in that they supplement the Court's case-law on fines. In two of them, the Court for the first time settled the question of the scope of the principle *non bis in idem* in relation to situations in which the authorities of a non-member State have intervened under their power to impose penalties in the sphere of competition law applicable on the territory of that State. In Case C-289/04 P *Showa Denko* v *Commission* (judgment of 29 June 2006, not yet published in the ECR) and Case C-308/04 *SGL Carbon* v *Commission* (judgment of 29 June 2006, not yet published in the ECR), the Court held, after reaffirming that the principle *non bis in idem*, also enshrined in Article 4 of Protocol No 7 to the European Convention on Human Rights, constitutes a fundamental principle of Community law the observance of which is guaranteed by the judicature, that that principle does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction. The Court considers that when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition

within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC and that thus, on account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-member States. In an extension of that solution, the Court also held that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law and that, although it cannot be ruled out that the Commission may, on grounds of proportionality or fairness, take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.

Still in the context of its examination of those two cases, and of Case C-301/04 *Commission* v *SGL Carbon AG* (judgment of 29 June 2006, not yet published in the ECR), the Court also explained a number of principles of its case-law on fines. In *SGL Carbon* v *Commission*, the Court first of all observed that the Commission, in applying the Guidelines on the method of setting fines imposed for infringement of the competition rules [22], may use a calculation method which adopts a flexible approach while complying with the turnover ceiling laid down in Article 15(2) of Regulation No 17 [23]. The Court proceeded to refer to the consistent case-law according to which the fact of taking aggravating circumstances into account when setting the fine is consistent with the Commission's task of ensuring that undertakings' conduct complies with the competition rules. Conversely, the Commission is not required, when determining the amount of the fine which it imposes on an undertaking, to take its poor financial situation into account, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions. The Court, moreover, reaffirmed in that case that it is only the final amount of the fine imposed for an infringement of the competition rules that must comply with the 10 % limit referred to in Article 15(2) of Regulation No 17 and that, consequently, that article does not prohibit the Commission from arriving, during the various stages of calculation, at an intermediate amount higher than that limit, provided that the final amount of the fine imposed does not exceed it. Last, continuing its case-law according to which the powers conferred on the Commission under Article 15(2) of Regulation No 17 include the power to determine the date on which the fines are payable and that on which default interest begins to accrue, and the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision, the Court stated that the Commission is entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine. In *Commission* v *SGL Carbon AG* the Court applied its case-law according to which a reduction under the Leniency Notice [24] can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate a genuine spirit of cooperation on its part, holding that the conduct of an undertaking

22 Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ C 9, 14.1.1998, p. 3).

23 Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959–62, p. 87).

24 Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ C 207, 18.7.1996, p. 4).

which, although it was not obliged to answer a question asked by the Commission, did answer it, but in an incomplete and misleading way, cannot be considered to reflect a spirit of cooperation. In *Showa Denko* v *Commission*, moreover, the Court also recalled that the fine imposed on an undertaking for an infringement of the competition rules may be calculated by including a deterrence factor and that that factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.

Last, a final judgment must be mentioned in connection with fines, especially because it confirms the Court's *Courage* case-law (Case C-453/99 *Courage* v *Crehan* [2001] ECR I-6297). In Joined Cases C-295/04 to C-298/04 *Manfredi and Others* (judgment of 13 July 2006, not yet published in the ECR), the Court recalled that, as Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard, any individual is entitled to rely on the invalidity of an agreement or practice prohibited under Article 81 EC and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm. In that regard, the Court also recalled that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to determine the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that those rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

As regards State aid, five cases are particularly noteworthy. They allowed the Court to confirm its case-law, while providing certain information on matters as diverse as the concept of an 'undertaking' within the context of Article 87(1) EC, the definition of 'aid', or, again, the application of the principle of protection of legitimate expectations and the role of the national courts in implementing the system of control of State aid. In Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, a reference had been made to the Court by the Corte suprema di cassazione (Italy) for a preliminary ruling on a number of questions concerning the compatibility with Community law of the tax arrangements of entities which had arisen as a result of the privatisation of banks in the Italian public sector and, more specifically, of that compatibility in relation to the tax arrangements applicable to the banking foundations that replaced the traditional savings banks on that occasion. In answer to the first two questions, and on the basis of its consistent case-law on the concept of 'undertaking' in the context of competition law and also of its case-law relating to the concept of 'economic activity', the Court, first, held that an entity which, through owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking and must therefore itself, on that basis, be regarded as an undertaking within the meaning of Article 87(1) EC. The Court concluded that a banking foundation which controls the capital of a banking company whose system includes rules which reflect a purpose going beyond the simple placing of capital by an investor and make possible the exercise of functions relating to control, such as direction and financial support, thus illustrating the existence of organic and functional links between the banking foundations and the banking companies, must be treated as an 'undertaking' within the meaning of that provision. In view of the role

entrusted to banking foundations by the national legislation in the fields of public interest and social assistance, the Court nonetheless took care to distinguish the simple payment of contributions to non-profit-making organisations and the activity carried on directly in those fields. It held that the Community rules on State aid were applicable only in the second hypothesis, emphasising that where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators and, accordingly, must be regarded as an undertaking and thus be subject to the application of the Community rules relating to State aid. In answer to the third question, the Court, after observing that the concept of aid is more general than that of a subsidy and that a measure by which the public authorities grant certain undertakings a tax emption which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC, further held that an exemption from retention on dividends which benefits banking foundations holding shares in banking companies and which pursue exclusively aims of social welfare, education, teaching, and study and scientific research, may be categorised as State aid.

In Joined Cases C-182/03 and C-217/03 *Belgique and Forum 187* v *Commission* (judgment of 22 June 2006, not yet published in the ECR), the Kingdom of Belgium and the limited company Forum 187, the representative body for the coordination centres in Belgium, sought annulment of Decision 2003/757/EC [25], particularly insofar as it did not authorise the Kingdom of Belgium to grant, even temporarily, renewal of coordination centre status to the centres which benefited from that scheme as at 31 December 2000. As the basis for its finding that one of the applicants' pleas, alleging breach of the principle of protection of legitimate expectations, was well founded, the Court recalled that, in the absence of an overriding public interest, the Commission had infringed a superior rule of law by failing to couple the repeal of a set of rules with transitional measures for the protection of the expectations which a trader might legitimately have derived from the Community rules. The Court further held that there is a breach of both the principle of protection of legitimate expectations and the principle of equality when a Commission decision which reverses previous findings to the contrary requires the abolition of a specific tax regime, on the ground that it constitutes State aid incompatible with the common market, without providing for transitional measures in favour of traders whose approval, reviewable without difficulty and necessary to benefit from that scheme, expires at the same time as or shortly after the date of notification of the decision, but does not prevent authorisations in force on that date from continuing to produce their effects for several years, since the abovementioned traders, who cannot adapt to the change in the scheme in question at short notice, could, in any event, expect that a Commission decision reversing its previous finding would allow them the necessary time to take that change in assessment into account and since no overriding public interest prevents that time from being granted to them.

In Case C-88/03 *Portugal* v *Commission* (judgment of 6 September 2006, not yet published in the ECR) the Court heard an application by the Portuguese Republic for annulment of

[25] Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25).

Decision 2003/442/EC [26]. The Court referred to its consistent case-law according to which the concept of State aid does not refer to State measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of charges of which they are part and held, first of all, that a measure which creates an exception to the application of the general tax system may be justified on that ground only if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system and stated, in that connection, that a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives. After observing that, when it is a question of examining whether a measure is selective, it is essential to determine the reference framework, the Court further held that that framework is not necessarily defined within the limits of the national territory and that thus, in a situation in which a regional or local authority, in the exercise of powers which are sufficiently autonomous vis-à-vis the central power, a tax rate which is lower than the national rate and which is applicable solely to undertakings present on the territory within its competence, the relevant legal framework for the purpose of determining the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate. According to the Court, in order that a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that decision must, first of all, have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government. Next, it must have been adopted without the central government being able to directly intervene as regards its content. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.

In Case C-526/00 *Laboratoires Boiron* (judgment of 7 September 2006, not yet published in the ECR), the Court, on a reference for a preliminary ruling by the Cour de cassation (France), examined two questions which had been raised in proceedings concerning the 'contribution' introduced by Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (Article L-245-6-1 of the French Social Security Code) and payable by pharmaceutical laboratories on their bulk sales of medicines reimbursable by the sickness insurance funds, but not paid by wholesale distributors and in respect of which the Court had already given a ruling on other points in Case C-53/00 *Ferring* [2001] ECR I-9607. In answer to the first question, the Court stated, with reference to its decision in Case C-390/98 *Banks* [2001] ECR I-6117, according to which persons liable to pay a charge cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of or obtain reimbursement of that charge, that that is true only in the case of an exemption in favour of certain traders of a charge having general scope and that the situation is quite different in the case of a situation involving a charge for which only one

[26] Commission Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ L 150, 18.6.2003, p. 52).

of the two categories of competing operators is liable. In such a case of unequal liability for a charge, the Court considers that the aid may derive from the fact that another category of economic operators with which the category subject to the charge is in direct competition is not liable for that charge and that, accordingly, in a system in which there are two directly competing distribution channels for medicines and in which the exemption of wholesale distributors seeks, in particular, to restore the balance of competition between the two distribution channels for medicines which, according to the legislature, are distorted by the imposition of public-service obligations on wholesale distributors alone it is the tax on direct sales itself and not some exemption which is separable from that tax that constitutes the aid measure in question. The Court concluded that it should be accepted that a pharmaceutical laboratory required to pay such a contribution is entitled to plead that the fact that wholesale distributors are not liable for that contribution constitutes State aid, in order to obtain reimbursement of the part of the sums paid which corresponds to the economic advantage unfairly obtained by wholesale distributors in that regard, and in answer to the second question, the Court ruled, with reference to its case-law on the procedural autonomy which, in the absence of Community rules governing the matter, is left to the domestic legal orders to ensure the protection of the rights which individuals derive from the direct effects of Community law and also to the dual limit relating to the need to comply with the principles of equivalence and effectiveness, that Community law does not preclude the application of rules of national law which make reimbursement of a mandatory contribution such as the tax at issue in the main proceedings subject to proof by the claimant seeking reimbursement that the advantage derived by wholesale distributors from their not being liable to pay that contribution exceeds the costs which they bear in discharging the public-service obligations imposed on them by the national rules and, in particular, that at least one of the so-called *Altmark* conditions [27] is not satisfied.

In Case C-368/04 *Transalpine Ölleitung in Österreich* (judgment of 5 October 2006, not yet published in the ECR), the Court had received a reference from the Verwaltungsgerichtshof (Austria) concerning the interpretation of the last sentence of Article 88(3) EC, which gave it the opportunity to confirm, and at the same time provide clarification of, a number of points on the role of the national courts in the implementation of the system of monitoring State aid, especially in a situation involving aid that is illegal on the ground that it is granted in breach of the obligation to notify aid laid down in that provision but is subsequently declared compatible with the common market by a Commission decision. In accordance with a consistent line of decisions, the Court, first, ruled that the last sentence of Article 88(3) EC must be interpreted as meaning that it is for the national courts to safeguard the rights of individuals against possible disregard, by the national authorities, of the prohibition on putting aid into effect before the Commission has adopted a decision authorising that aid and emphasised, as it had done shortly beforehand in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* (judgment of 15 June 2006, not yet published in the ECR), that in doing so the national courts must take the Community interest fully into consideration, which precludes them from adopting a measure which would have the sole effect of extending the circle of recipients of the aid. Second, the Court also recalled that a Commission decision declaring aid that has not been notified

27 Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

compatible with the common market does not have the effect of regularising *ex post facto* implementing measures which, at the time of their adoption, were invalid because they had been taken in disregard of the prohibition laid down in the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. In that regard, it is little consequence, according to the Court, that the Commission decision states that its assessment of the aid in question relates to a period preceding the adoption of the decision or that an application for reimbursement is made before or after adoption of the decision declaring the aid compatible with the common market, since that application relates to the unlawful situation resulting from the lack of notification. Referring, last, to the decided principle that the national courts must offer to individuals who are entitled to rely on disregard of the obligation to notify State aid the certain prospect that all appropriate conclusions will be drawn, in accordance with national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision or possible interim measures, the Court ruled that, depending on what is possible under national law and the remedies available thereunder, a national court may, according to the case, be called upon to order recovery of unlawful aid from its recipients, even if that aid has subsequently been declared compatible with the common market by the Commission, or required to rule on an application for compensation for the damage caused by reason of the unlawful nature of such a measure.

Approximation of laws and uniform laws

In this field, the Court had to turn its attention to various pieces of Community legislation.

In *International Air Transport Association and Others*, the Court, having been asked whether Article 6 of Regulation (EC) No 261/2004 [28] relating to the rights of air passengers is consistent with the Montreal Convention, held that the measures laid down in that article for assisting and taking care of passengers in the event of a long delay to a flight are standardised and immediate compensatory measures which do not prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able also to bring actions to redress that damage under the conditions laid down by the Montreal Convention. The Court also held that the obligation to state reasons was complied with since the regulation clearly discloses the essential objective pursued by the institutions and it therefore cannot be required to contain a specific statement of reasons for each of the technical choices made. So far as concerns compliance with the principle of proportionality, a general principle of Community law requiring that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it, the Court held that the measures to assist, care for and compensate passengers that are prescribed by the regulation are not manifestly inappropriate in relation to the

28 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

objective pursued by the Community legislature, which is to strengthen the protection of passengers whose flights are cancelled or subject to a long delay. The Court found with regard to the principle of equal treatment that the obligations resulting from the regulation are not invalid even though such obligations are not imposed on other means of transport. Different modes of transport are not interchangeable and the situation of a passenger whose flight is cancelled or subject to a long delay is objectively different from that of a passenger using another means of transport. Furthermore, the damage suffered by passengers of air carriers in the event of cancellation of, or a long delay to, a flight is similar whatever the airline with which they have a contract and is unrelated to pricing policies. All airlines must accordingly be treated identically.

Two judgments concerning Directive 85/374/EEC [29] are of particular interest. One relates to the possibility of transferring the producer's liability to the supplier, the other to the moment at which a product is put into circulation. In Case C-402/03 *Skov and Bilka* [2006] ECR I-199, the Court was asked whether Directive 85/734/EEC precludes a national rule under which a supplier bears unlimited responsibility for the producer's no-fault liability under the directive. After stating that the directive introduces no-fault liability and imposes it on the producer, and that the directive seeks to achieve complete harmonisation in the matters regulated by it, the Court reached the conclusion that the determination of the class of persons liable must be regarded as exhaustive. Since the directive provides for the supplier to be liable only in the case where the producer cannot be identified, national legislation laying down that the supplier is to be answerable directly to injured persons for defects in a product extends the class of persons liable and is therefore not permissible. With regard to fault-based liability of producers, on the other hand, the Court held that the directive does not prevent a national rule under which the supplier is answerable without restriction for the fault-based liability of the producer, since the system of rules put in place by the directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

Case C-127/04 *O'Byrne* [2006] ECR I-1313 was concerned, first, with determining the moment at which a product may be regarded as put into circulation, given that the period of limitation in respect of the rights conferred on the injured person is 10 years from when the product is put into circulation, and second, with ascertaining whether one party may be substituted for another when an action is mistakenly brought against a company which is not the actual producer of the product. The Court held that a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed. It is unimportant whether the product is sold directly by the producer to the user or to the consumer or whether that sale is carried out using one or more links in a distribution chain. Accordingly, when one of the links in the distribution chain is closely connected to the producer, that connection can have the effect that that entity is to be regarded as involved in the manufacturing process of the product concerned. When an action is brought against a company mistakenly considered to be the producer of a product, it is for national law to determine the conditions in accordance with which

[29] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 25).

one party may be substituted for another, while ensuring that due regard is had to the personal scope of Directive 85/374/EEC, whose determination of the class of persons liable is exhaustive.

In Case C-356/04 *Lidl Belgium* (judgment of 19 September 2006, not yet published in the ECR), the Court was required to interpret Directive 84/450/EEC [30] in relation to comparative advertising. The Court was asked whether two specific forms of comparative advertising are legitimate, both founded on a price comparison without the advertisement specifying the goods compared and the corresponding prices. First, the Court held that the directive does not preclude comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores insofar as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by the directive. Nor does the requirement that the advertising 'objectively compares' the features of the goods at issue signify that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement. The features of those goods must, however, be verifiable, a requirement which is met by their prices, by the general level of the prices charged by a chain of stores in respect of its selection of comparable products and by the amount liable to be saved by consumers who purchase such products from one chain rather than the other. In cases where the details of the comparison which form the basis for the mention of a feature are not set out in the comparative advertising, the advertiser must indicate, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying their accuracy or to having it verified. Second, comparative advertising claiming that the advertiser's general price level is lower than his main competitors', where the comparison has related to a sample of products, may be misleading when the advertisement (i) does not reveal that the comparison related only to such a sample and not to all the advertiser's products, (ii) does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible, or (iii) contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from his competitors without specifying individually the general level of the prices charged, respectively, by each of those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.

In Case C-168/05 *Mostaza Claro* (judgment of 26 October 2006, not yet published in the ECR), the Court was required to interpret Directive 93/13/EEC [31]. It was asked whether, where an action has been brought before a national court for annulment of an arbitration award against the consumer made following arbitration proceedings which were required by a clause, contained in a mobile telephone contract, that has to be classified as unfair,

[30] 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 and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ L 250, 19.9.1984, p. 17).

[31] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

the national court can uphold the action although the consumer did not plead that the clause was unfair before the arbitrator. The Court held that Directive 93/13/EEC is to be interpreted as meaning that a national court must determine whether the arbitration agreement is void and annul the award where the agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in the course of the action for annulment.

So far as concerns copyright and related rights, in Case C-306/05 *SGAE* (judgment of 7 December 2006, not yet published in the ECR), the Court explained the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC [32], which establishes the exclusive right for authors to authorise or prohibit such communication of their works. On a reference from the Audiencia Provincial de Barcelona (Spain) in proceedings between the SGAE, which is a Spanish body responsible for copyright management, and a hotel company, the Court was required, in particular, to determine whether that concept covers the broadcasting of programmes through television sets in hotel rooms. Interpreting the provision in question of Directive 2001/29/EC in the light of the international law to which the directive is intended to give effect at Community level, in the case in point the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971 and the World Intellectual Property Organisation (WIPO) Copyright Treaty of 20 December 1996, the Court adopted a global approach. It observed that the potential television viewers of the works are not only customers in rooms and customers present in other areas of the hotel where a television set is available, but also the hotel's successive customers. This amounts to a large number of persons, who must be considered to be a public within the meaning of Directive 2001/19/EC. The Court accordingly held that, while the installation of television sets in hotel rooms does not in itself constitute a communication to the public, on the other hand the distribution of a signal by means of those television sets by the hotel to customers is such a communication. In addition, the private nature of the rooms is not material.

Trade marks

In the field of trade mark law, Case C-108/05 *Bovemij Verzekeringen* (judgment of 7 September 2006, not yet published in the ECR) is to be noted. This judgment explains which territory must be taken into account in order to assess whether a sign has acquired a distinctive character through use, within the meaning of Article 3(3) of Directive 89/104/EEC [33], in a Member State or in a group of Member States which have common legislation on trade marks, such as, as in the case in point, Benelux (which is treated like a Member State under the Court's case-law). The Court held that, in order to assess whether the grounds for refusal listed in Article 3(1)(b) to (d) of that directive must be disregarded because of the acquisition of distinctive character through use under Article 3(3), only the situation prevailing in the part of the territory of the Member State concerned where the

[32] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

[33] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1).

grounds for refusal have been noted is relevant. Consequently, in order for the exception to the grounds for refusal which is laid down in Article 3(3) to apply, the trade mark must have acquired distinctive character through use throughout the part of the territory of the Member State or throughout the part of the territory of Benelux in which there exists a ground for refusal. In addition, where a mark is composed of one or more words of an official language of the Member State concerned and the ground for refusal exists only in one of the linguistic areas of that Member State, it must be established that the mark has acquired distinctive character through use throughout that linguistic area. Thus, since the sign at issue in the case (EUROPOLIS) included a Dutch word (polis), it was necessary to take into account the part of Benelux where Dutch is spoken.

Taxation

In this field, one case concerned the prohibition on discriminatory internal taxation and three concerned the Community value added tax regime.

In Joined Cases C-290/05 and C-333/05 *Nádasdi* (judgment of 5 October 2006, not yet published in the ECR), the Court found Hungarian registration duty to be incompatible with Community law in that it is applied to used vehicles imported from other Member States without account being taken of their depreciation in value and therefore taxes them more heavily than similar used vehicles already registered in Hungary, which have borne the duty on first registration. Examining the duty at issue in the light of the prohibition, laid down in Article 90 EC, on internal taxation that discriminates against products from other Member States, the Court compared the effects of the duty in respect of a used vehicle imported from another Member State with the effects on a similar vehicle from Hungary. It stated that the vehicle from Hungary, upon which the duty is paid when it is new, loses with time part of its market value and the amount of the duty included in the residual value diminishes proportionately. By contrast, a vehicle of the same model, age, mileage and other characteristics, bought second-hand in another Member State, is subject to the duty without its being reduced in proportion to the vehicle's depreciation, so that the vehicle is taxed more heavily. The Court concluded that Article 90 EC requires account to be taken of the depreciation of used vehicles subject to the duty.

In Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I-1385, the Court was required to rule on the exemption from value added tax ('VAT') of the activities in the general interest referred to in Article 13A(1)(g) and (h) of Sixth Directive 77/388/EEC [34], namely activities closely linked to welfare and social security work and to the protection of children or young people. The case in point concerned services supplied by a non-profit-making organisation operating as an intermediary between persons seeking, and persons offering, a childcare service. The Court held that exemption of such an activity from VAT is subject to three conditions, it being for the national courts to establish whether they are met. First, the childcare service provided by the host parents, as the main transaction to which the organisation's activity is closely linked, must itself meet the conditions for exemption, in

[34] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ L 102, 5.5.1995, p. 18).

particular the requirement that the service provider must fulfil the criterion of 'charitable'. Second, the services supplied by the organisation in question as an intermediary must be essential to the childcare service, in the sense that the effect of the selection and training of the host parents by the organisation must be to render the childcare service of such a nature or quality that it would be impossible to obtain a service of the same value without the assistance of that intermediary. Finally, the basic purpose of the intermediary services must not be to obtain additional income by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

In Case C-223/03 *University of Huddersfield* [2006] ECR I-1751 and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, the Court stated that transactions constitute supplies of goods or services and an economic activity within the meaning of the Sixth Directive provided that they satisfy the objective criteria on which those concepts are based. Save for cases of tax evasion, the question whether the transaction concerned is carried out with the sole aim of obtaining a tax advantage is entirely irrelevant. The questions asked in *Halifax and Others* enabled the Court to add, however, that the principle prohibiting abusive practices, understood in the sense of transactions carried out not in the context of normal commercial operations but solely for the purpose of wrongfully obtaining advantages provided for by Community law, also applies in the field of VAT. Consequently, a taxable person cannot deduct input VAT where the transactions from which that right derives constitute an abusive practice. The Court explained that in the sphere of VAT two conditions must be met in order for there to be an abusive practice. First, the transactions concerned, notwithstanding formal application of the conditions laid down in the Sixth Directive and the national legislation transposing it, must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage, since the prohibition of abuse is not relevant where the economic activity carried out may have some other explanation.

In this context a third judgment, in Case C-419/02 *BUPA Hospitals and Goldsborough Developments* [2006] ECR I-1685, may also be noted. Here the Court held that the second subparagraph of Article 10(2) of the Sixth Directive, which provides that, where a payment is made on account, the VAT becomes chargeable without the supply having yet been made, does not apply to payments on account of supplies of goods or services that have not yet been clearly identified.

In Case C-475/03 *Banca popolare di Cremona* (judgment of 3 October 2006, not yet published in the ECR), the Court held the Italian regional tax on productive activities (IRAP) to be compatible with Sixth Directive 77/388/EEC, in particular with Article 33 of the directive which prohibits the Member States from introducing or retaining tax regimes which are in the nature of turnover taxes. In reaching this conclusion, the Court compared the characteristics of IRAP with those of VAT. It found that IRAP is calculated on the basis of the net value of the production of an undertaking in a given period (the difference between the 'value of production' and the 'production costs'), which includes elements that have no direct connection with the supply of goods or services as such. IRAP is therefore not proportional to the price of goods or services supplied, unlike VAT. Next, the Court observed that not all taxable persons have the possibility of passing on the burden of the tax at

issue, which is therefore not intended to be passed on to the final consumer, whereas VAT taxes only the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved. Thus, since IRAP does not exhibit all the essential characteristics of VAT, it does not constitute a tax that can be characterised as a turnover tax within the meaning of Article 33(1) of the Sixth Directive and that provision does not preclude its retention.

Social policy

Directive 93/104/EC concerning certain aspects of the organisation of working time [35] was central to three cases, while a fourth case concerned the prohibition on discrimination between male and female workers and a fifth case concerned the framework agreement on fixed-term work.

In Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, the Court, which had been asked whether the possibility of redeeming days of the minimum period of annual leave which have been saved up over the course of previous years is contrary to Article 7(2) of Directive 93/104/EC, ruled that that provision must be interpreted as precluding a national provision which, during a contract of employment, permits days of annual leave, within the meaning of Article 7(1) of the directive, that are not taken in the course of a given year to be replaced by an allowance in lieu in the course of a subsequent year. The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by the directive itself. The directive embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his safety and health, since it is only where the employment relationship is terminated that Article 7(2) permits an allowance to be paid in lieu of paid annual leave.

In Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, the Court ruled on whether the payment for minimum annual leave is compatible with Article 7(1) of Directive 93/104/EC where it takes the form, under a local collective agreement, of attribution of part of the remuneration payable to a worker for work done, without the worker receiving, in that respect, a payment additional to that for work done. The Court clearly stated that Article 7 of the directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave.

In Case C-484/04 *Commission* v *United Kingdom* (judgment of 7 September 2006, not yet published in the ECR), the Court ruled on an action for failure to fulfil obligations. By virtue

35 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L 307, 13.12.1993, p. 18), as amended by Directive 2000/34/EC of 22 June 2000 (OJ L 195, 1.8.2000, p. 41).

of Directive 93/104/EC, as amended by Directive 2000/34/EC, a Member State fails to fulfil its obligations if it applies the derogation from certain rules concerning the right to rest to workers whose working time is partially not measured or predetermined, or can be determined partially by the worker himself, on account of the specific characteristics of his activity, or if it fails to adopt the measures necessary to implement the rights of workers to daily and weekly rest. The need for the rights conferred on workers by the directive to be effective means that Member States are under an obligation to guarantee that the right to benefit from effective rest is observed. A Member State which, upon transposition, provides for rights of workers to rest and which, in the guidelines for employers and workers on the implementation of those rights, indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements laid down by that directive or its essential objective. By letting it be understood that, while employers cannot prevent the minimum rest periods from being taken by workers, they are under no obligation to ensure that the latter are actually able to exercise such a right, such guidelines are clearly liable to render the rights enshrined in the directive meaningless and are incompatible with the objective of the directive, in which minimum rest periods are considered to be essential for the protection of workers' health and safety.

In Case C-17/05 *Cadman* (judgment of 3 October 2006, not yet published in the ECR), the Court found it necessary to interpret Article 141 EC and to explain the judgment in Case 109/88 *Danfoss* [1989] ECR 3199 where, after stating that recourse to the criterion of length of service may involve less advantageous treatment of women than of men, the Court had held that the employer does not have to provide special justification for recourse to that criterion. The Court confirmed that since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, where recourse to that criterion as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question. Also, where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better. By contrast, the nature of the work to be carried out must be considered objectively.

In Case C-212/04 *Adeneler and Others* (judgment of 4 July 2006, not yet published in the ECR), the Court was called upon to interpret clauses 1 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [36]. While stating that the framework agreement does not lay down a general

[36] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175, 10.7.1999, p. 43).

obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, it held that the use of successive fixed-term employment contracts where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State is contrary to clause 5(1)(a) of the framework agreement. The concept of 'objective reasons', within the meaning of that clause, which justify the renewal of successive fixed-term employment contracts or relationships requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out. In addition, a national rule under which only fixed-term employment contracts or relationships that are not separated from one another by a period of time longer than 20 working days are to be regarded as 'successive' within the meaning of that clause is contrary to the framework agreement. Such a national provision compromises the object, the aim and the practical effect of the framework agreement inasmuch as it allows insecure employment of a worker for years since, in practice, the worker would as often as not have no choice but to accept breaks in the order of 20 working days in the course of a series of contracts with his employer. Finally, the framework agreement precludes the application of national legislation which, in the public sector alone, prohibits absolutely the conversion into an employment contract of indefinite duration of a succession of fixed-term contracts that, in fact, have been intended to cover 'fixed and permanent needs' of the employer and must therefore be regarded as constituting an abuse.

Cooperation in civil and judicial matters

In this field, the Court had to interpret the Brussels Convention of 1968 and Regulation (EC) No 1346/2000 on insolvency proceedings.

Within the framework of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [37], the Court ruled on the scope of the rule of exclusive jurisdiction, laid down in Article 16(4) of the Convention, for proceedings concerning the registration or validity of patents. In Case C-4/03 *GAT* (judgment of 13 July 2006, not yet published in the ECR) the question referred to the Court was whether the jurisdiction of the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place concerns all proceedings regarding the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection, or solely those cases in which the issue is raised by way of an action. The Court interpreted Article 16(4) of the Convention teleologically and concluded that the exclusive jurisdiction provided for by that provision should apply whatever the form of proceedings in which the issue of a patent's registration or validity is raised, be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings. Only this solution can ensure that the mandatory nature of the rule of jurisdiction laid

37 OJ L 204, 2.8.1975, p. 28.

down is not circumvented, that the predictability of the rules of jurisdiction laid down by the Convention is safeguarded and that the risk of conflicting decisions is avoided.

In Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, the Court laid down some important case-law concerning Regulation (EC) No 1346/2000 on insolvency proceedings [38]. In particular, it explained the concept of 'the centre of main interests' of a debtor, which determines which courts have jurisdiction to open insolvency proceedings and, in the case of companies, is presumed to be the place of the registered office in the absence of proof to the contrary. Where a parent company and its subsidiary have their respective registered offices in two different Member States, identifying the centre of main interests of the subsidiary company thus proves to be particularly important in the system established by the regulation for determining the jurisdiction of the courts of the Member States (the case in point concerned an Irish subsidiary of the Italian company Parmalat). After stating that, in that system, each debtor constituting a distinct legal entity is subject to its own court jurisdiction, the Court held that, in order to ensure legal certainty and foreseeability concerning the determination of the court having jurisdiction, the presumption in favour of the registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating the centre of the main interests at that registered office is deemed to reflect. The Court gave the example of a 'letterbox' company not carrying out any business in the Member State where its registered office is situated. It stressed, on the other hand, that the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption. A further point to be noted from this judgment is that the principle of mutual trust prevents the courts of a Member State from reviewing the jurisdiction of the State in which the main insolvency proceedings have been opened.

Police and judicial cooperation in criminal matters

In two cases concerning a reference for a preliminary ruling, the Court interpreted Article 54 of the Convention implementing the Schengen Agreement [39], which lays down the *non bis in idem* principle in the context of police and judicial cooperation in criminal matters; more specifically, the Court explained how 'the same acts' within the meaning of that provision is to be understood.

In Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, the Court stated first that the *non bis in idem* principle must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, insofar as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings

38 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).

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

were brought, of the conditions of applicability of the *non bis in idem* principle. It then held that Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning (i) that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected and (ii) that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment on this point being the task of the competent national courts.

In Case C-150/05 *Van Straaten* (judgment of 28 September 2006, not yet published in the ECR), where a similar question was asked and was given an identical answer, the Court stated that the *non bis in idem* principle falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

B — Composition of the Court of Justice

(Order of precedence as at 12 October 2006)

First row, from left to right:

E. Juhász, President of Chamber; P. Kūris, President of Chamber; R. Schintgen, President of Chamber; A. Rosas, President of Chamber; P. Jann, President of Chamber; V. Skouris, President of the Court; C. W. A. Timmermans, President of Chamber; K. Lenaerts, President of Chamber; J. Kokott, First Advocate General; J. Klučka, President of Chamber.

Second row, from left to right:

G. Arestis, Judge; K. Schiemann, Judge; R. Silva de Lapuerta, Judge; A. Tizzano, Judge; D. Ruiz-Jarabo Colomer, Advocate General; J. N. Cunha Rodrigues, Judge; M. Poiares Maduro, Advocate General; J. Makarczyk, Judge; M. Ilešič, Judge.

Third row, from left to right:

E. Levits, Judge; P. Mengozzi, Advocate General; L. Bay Larsen, Judge; U. Lõhmus, Judge; J. Malenovský, Judge; A. Borg Barthet, Judge; E. Sharpston, Advocate General; P. Lindh, Judge.

Fourth row, from left to right:

V. Trstenjak, Advocate General; J.-C. Bonichot, Judge; A. Ó Caoimh, Judge; Y. Bot, Advocate General; J. Mazák, Advocate General; T. von Danwitz, Judge; R. Grass, Registrar.

1. Members of the Court of Justice

(in order of their entry into office)

Vassilios Skouris

Born 1948; graduated in law from the Free University, Berlin (1970); awarded doctorate in constitutional and administrative law at Hamburg University (1973); Assistant Professor at Hamburg University (1972–77); Professor of Public Law at Bielefeld University (1978); Professor of Public Law at the University of Thessaloniki (1982); Minister of Internal Affairs (1989 and 1996); Member of the Administrative Board of the University of Crete (1983–87); Director of the Centre for International and European Economic Law, Thessaloniki (1997–2005); President of the Greek Association for European Law (1992–94); Member of the Greek National Research Committee (1993–95); Member of the Higher Selection Board for Greek Civil Servants (1994–96); Member of the Academic Council of the Academy of European Law, Trier (from 1995); Member of the Administrative Board of the Greek National Judges' College (1995–96); Member of the Scientific Committee of the Ministry of Foreign Affairs (1997–99); President of the Greek Economic and Social Council in 1998; Judge at the Court of Justice since 8 June 1999; President of the Court of Justice since 7 October 2003.

Francis Geoffrey Jacobs

Born 1939; Barrister; Queen's Counsel; Official in the Secretariat of the European Commission of Human Rights; Legal Secretary to Advocate General J.-P. Warner; Professor of European Law, University of London; Director, Centre of European Law, King's College London; Author of several works on European law; Advocate General at the Court of Justice from 7 October 1988 to 10 January 2006.

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 from 7 October 1994 to 10 January 2006.

Antonio Mario La Pergola

Born 1931; Professor of Constitutional Law and General and Comparative Public Law at the Universities of Padua, Bologna and Rome; Member of the High Council of the Judiciary (1976–78); Member of the Constitutional Court and President of the Constitutional Court (1986–87); Minister for Community Policy (1987–89); elected to the European Parliament (1989–94); Judge at the Court of Justice from 7 October 1994 to 31 December 1994; Advocate General at the Court of Justice from 1 January 1995 to 14 December 1999; Judge at the Court of Justice from 15 December 1999 to 3 May 2006.

Jean-Pierre Puissochet

Born 1936; State Counsellor (France); Director, subsequently Director-General, of the Legal Service of the Council of the European Communities (1968–73); Director-General of the Agence nationale pour l'emploi (1973–75); Director of General Administration, Ministry of Industry (1977–79); Director of Legal Affairs at the OECD (1979–85); Director of the Institut international d'administration publique (1985–87); Jurisconsult, Director of Legal Affairs at the Ministry of Foreign Affairs (1987–94); Judge at the Court of Justice from 7 October 1994 to 6 October 2006.

Philippe Léger

Born 1938; A member of the judiciary serving at the Ministry of Justice (1966–70); Head of, and subsequently Technical Adviser at, the Private Office of the Minister for Living Standards in 1976; Technical Adviser at the Private Office of the Minister for Justice (1976–78); Deputy Director of Criminal Affairs and Reprieves at the Ministry of Justice (1978–83); Senior Member of the Court of Appeal, Paris (1983–86); Deputy Director of the Private Office of the Minister for Justice (1986); President of the Regional Court at Bobigny (1986–93); Head of the Private Office of the Minister for Justice, and Advocate General at the Court of Appeal, Paris (1993–94); Associate Professor at René Descartes University (Paris V) (1988–93); Advocate General at the Court of Justice from 7 October 1994 to 6 October 2006.

Peter Jann

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

Dámaso Ruiz-Jarabo Colomer

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

Romain Schintgen

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

Ninon Colneric

Born 1948; studied in Tübingen, Munich and Geneva; following a period of academic research in London, awarded a doctorate in law by the university of Munich; Judge at the Arbeitsgericht Oldenburg; authorised, by the University of Bremen, to teach labour law, sociology of law and social law; Professor *ad interim* at the faculty of law of the universities of Frankfurt and Bremen; President of the Landesarbeitsgericht Schleswig-Holstein (1989); collaboration, as expert, on the European Expertise Service (EU) project for the reform of the labour law of Kirghizstan (1994–95); Honorary Professor at the University of Bremen in labour law, specifically in European labour law; Judge at the Court of Justice from 15 July 2000 to 6 October 2006.

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 from 7 October 2000 to 6 October 2006.

Antonio Tizzano

Born 1940; various teaching assignments at Italian universities; Legal Counsel to Italy's Permanent Representation to the European Communities (1984–92); Member of the Bar at the Court of Cassation and other higher courts; Member of the Italian delegation in international negotiations and at intergovernmental conferences including those on the Single European Act and the Maastricht Treaty; various editorial positions; Member of the 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 from 7 October 2000 to 3 May 2006; Judge at the Court of Justice since 4 May 2006.

José Narciso da Cunha Rodrigues

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

Christiaan Willem Anton Timmermans

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

Leendert A. Geelhoed

Born 1942; Research Assistant, University of Utrecht (1970–71); Legal Secretary at the Court of Justice of the European Communities (1971–74); Senior Adviser, Ministry of Justice (1975–82); Member of the Advisory Council on Government Policy (1983–90); various teaching assignments; Secretary-General, Ministry of Economic Affairs (1990–97); Secretary-General, Ministry of General Affairs (1997–2000); Advocate General at the Court of Justice from 7 October 2000 to 6 October 2006.

Christine Stix-Hackl

Born 1957; Doctor of Laws (University of Vienna), postgraduate studies in European Law at the College of Europe, Bruges; member of the Austrian Diplomatic Service (from 1982); expert on European Union matters in the office of the Legal Adviser to the Ministry of Foreign Affairs (1985–88); Legal Service of the European Commission (1989); Head of the 'Legal Service — EU' in the Ministry of Foreign Affairs (1992–2000, Minister Plenipotentiary); participated in the negotiations on the European Economic Area and on the accession of the Republic of Austria to the European Union; Agent of the Republic of Austria at the Court of Justice of the European Communities from 1995; Austrian Consul-General in Zurich (2000); teaching assignments and publications; Advocate-General at the Court of Justice from 7 October 2000 to 6 October 2006.

Allan Rosas

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

Rosario Silva de Lapuerta

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

Koen Lenaerts

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

Juliane Kokott

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

Luís Miguel Poiares Pessoa Maduro

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

Konrad Hermann Theodor Schiemann

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

Jerzy Makarczyk

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

Pranas Kūris

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

Endre Juhász

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

George Arestis

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

Anthony Borg Barthet U.O.M.

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

Marko Ilešič

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

Jiří Malenovský

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

Ján Klučka

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

Uno Lõhmus

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

Egils Levits

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

Aindrias Ó Caoimh

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

Lars Bay Larsen

Born 1953; awarded degrees in political science (1976) and law (1983) at the University of Copenhagen; Official at the Ministry of Justice (1983–85); Lecturer (1984–91), then Associate Professor (1991–96), in family law at the University of Copenhagen; Head of Section at the Advokatsamfund (Danish Bar Association) (1985–86); Head of Section (1986–91) at the Ministry of Justice; called to the Bar (1991); Head of Division (1991–95), Head of the Police Department (1995–99) and Head of the Law Department (2000–03) at the Ministry of Justice; Danish representative on the K-4 Committee (1995–2000), the Schengen Central Group (1996–98) and the Europol Management Board (1998–2000); Judge at the Højesteret (Supreme Court) (2003–06); Judge at the Court of Justice since 11 January 2006.

Eleanor Sharpston

Born 1955; studied economics, languages and law at King's College, Cambridge (1973–77); university teaching and research at Corpus Christi College, Oxford (1977–80); called to the Bar (Middle Temple, 1980); Barrister (1980–87 and 1990–2005); Legal Secretary in the Chambers of Advocate General, subsequently Judge, Sir Gordon Slynn (1987–90); Lecturer in EC and comparative law (Director of European Legal Studies) at University College London (1990–92); Lecturer in the Faculty of Law (1992–98), and subsequently Affiliated Lecturer (1998–2005), at the University of Cambridge; Fellow of King's College, Cambridge (since 1992); Senior Research Fellow at the Centre for European Legal Studies of the University of Cambridge (1998–2005); Queen's Counsel (1999); Bencher of Middle Temple (2005); Advocate General at the Court of Justice since 11 January 2006.

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 and Georgia (Athens) and the Institut universitaire international (Luxembourg); coordinator 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 research centre of The Hague Academy of International Law, devoted to the WTO; Judge at the Court of First Instance from 4 March 1998 to 3 May 2006; Advocate General at the Court of Justice since 4 May 2006.

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 from 18 January 1995 to 6 October 2006; Judge at the Court of Justice since 7 October 2006.

Yves Bot

Born 1947; Graduate of the Faculty of Law, Rouen; Doctor of Laws (University of Paris II, Panthéon-Assas); Lecturer at the Faculty of Law, Le Mans; Deputy Public Prosecutor, then Senior Deputy Public Prosecutor, at the Public Prosecutor's Office, Le Mans (1974–82); Public Prosecutor at the Regional Court, Dieppe (1982–84); Deputy Public Prosecutor at the Regional Court, Strasbourg (1984–86); Public Prosecutor at the Regional Court, Bastia (1986–88); Advocate General at the Court of Appeal, Caen (1988–91); Public Prosecutor at the Regional Court, Le Mans (1991–93); Special Adviser to the Minister for Justice (1993–95); Public Prosecutor at the Regional Court, Nanterre (1995–2002); Public Prosecutor at the Regional Court, Paris (2002–04); Principal State Prosecutor at the Court of Appeal, Paris (2004–06); Advocate General at the Court of Justice since 7 October 2006.

Ján Mazák

Born 1954; Doctor of Laws (Pavol Jozef Šafárik University, Košice, 1978); Professor of civil law (1994) and of Community law (2004); Head of the Community Law Institute at the Faculty of Law, Košice (2004); Judge at the Krajský súd (Regional Court), Košice (1980); Vice-President (1982) and President (1990) of the Mestský súd (City Court), Košice; Member of the Slovak Bar (1991); Legal Adviser at the Constitutional Court (1993–98); Deputy Minister for Justice (1998–2000); President of the Constitutional Court (2000–06); Member of the Venice Commission (2004); Advocate General at the Court of Justice since 7 October 2006.

Jean-Claude Bonichot

Born 1955; Graduate of the University of Metz, degree from the Institut d'études politiques, Paris, former student at the École nationale d'administration; rapporteur (1982–85), commissaire du gouvernement (1985–87 and 1992–99), Judge (1999–2000), President of the Sixth Sub-Division of the Judicial Division (2000–06), at the Council of State; Legal Secretary at the Court of Justice (1987–91); Director of the Private Office of the Minister for Labour, Employment and Vocational Training, then Minister for the Civil Service and Modernisation of Administration (1991–92); Head of the Legal Mission of the Council of State at the National Health Insurance Fund for Employed Persons (2001–06); Lecturer at the University of Metz (1988–2000), then at the University of Paris I, Panthéon-Sorbonne (from 2000); author of numerous publications on administrative law, Community law and European human rights law; Founder and chairman of the editorial committee of the *Bulletin de jurisprudence de droit de l'urbanisme*, co-founder and member of the editorial committee of the *Bulletin juridique des collectivités locales*; President of the Scientific Council of the Research Group on Institutions and Law governing Regional and Urban Planning and Habitats; Judge at the Court of Justice since 7 October 2006.

Thomas von Danwitz

Born 1962; studied at Bonn, Geneva and Paris; State examination in law (1986 and 1992); Doctor of Laws (University of Bonn, 1988); International diploma in public administration (École nationale d'administration, 1990); teaching authorisation (University of Bonn, 1996); Professor of German public law and European law (1996–2003), Dean of the Faculty of Law of the Ruhr University, Bochum (2000–01); Professor of German public law and European law (University of Cologne, 2003–06); Director of the Institute of Public Law and Administrative Science (2006); Visiting Professor at the Fletcher School of Law and Diplomacy (2000), François Rabelais University, Tours (2001–06), and the University of Paris I, Panthéon-Sorbonne (2005–06); Judge at the Court of Justice since 7 October 2006.

Verica Trstenjak

Born 1962; Judicial service examination (1987); Doctor of Laws of the University of Ljubljana (1995); professor (since 1996) of theory of law and State (jurisprudence) and of private law; researcher; postgraduate study at the University of Zurich, the Institute of Comparative Law of the University of Vienna, the Max Planck Institute for private international law in Hamburg, the Free University of Amsterdam; Visiting Professor at the Universities of Vienna and Freiburg (Germany) and at the Bucerius School of Law in Hamburg; Head of the Legal Service (1994–96) and State Secretary in the Ministry of Science and Technology (1996–2000); Secretary-General of the Government (2000); Member of the Study Group on a European Civil Code since 2003; responsible for a Humboldt research project (Humboldt Foundation); publication of more than 100 legal articles and several books on European and private law; Prize of the Association of Slovene Lawyers 'Lawyer of the Year 2003'; Member of the editorial board of a number of legal periodicals; Secretary-General of the Association of Slovene Lawyers and member of a number of lawyers' associations, including the Gesellschaft für Rechtsvergleichung; Judge at the Court of First Instance from 7 July 2004 to 6 October 2006; Advocate General at the Court of Justice since 7 October 2006.

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 2006

Formal sitting on 10 January 2006

By decisions of the representatives of the Governments of the Member States of the European Communities of 20 July 2005 and 14 October 2005, Mr Lars Bay Larsen and Ms Eleanor V. E. Sharpston were respectively appointed Judge and Advocate General at the Court of Justice until 6 October 2009.

Mr Lars Bay Larsen succeeded Mr Claus Christian Gulmann who had held the office of Advocate General at the Court of Justice from 7 October 1991 to 6 October 1994 and that of Judge from 7 October 1994. Ms Eleanor V. E. Sharpston succeeded Mr Francis Geoffrey Jacobs who had held the office of Advocate General at the Court of Justice from 7 October 1988.

Formal sitting on 3 May 2006

By decisions of the representatives of the Governments of the Member States of the European Communities of 6 April 2006, Mr Antonio Tizzano and Mr Paolo Mengozzi were respectively appointed Judge and Advocate General at the Court of Justice until 6 October 2006.

Mr Antonio Tizzano, who had been Advocate General at the Court of Justice since 7 October 2000, succeeded Mr Antonio Mario La Pergola. Mr Paolo Mengozzi, who had been a Judge of the Court of First Instance since 4 March 1998, succeeded Mr Antonio Tizzano in the office of Advocate General at the Court of Justice.

Formal sitting on 6 October 2006

By decisions of 6 April 2006 and 20 September 2006, the representatives of the Governments of the Member States renewed, for the period from 7 October 2006 to 6 October 2012, the terms of office of Judges Peter Jann, Christiaan Timmermans, Konrad Schiemann, Jiří Malenovský, Antonio Tizzano, José Narciso da Cunha Rodrigues, Pranas Kūris, George Arestis, Anthony Borg Barthet and Egils Levits and of Advocate General Paolo Mengozzi.

By the same decisions, Ms Pernilla Lindh, Mr Jean-Claude Bonichot and Mr Thomas von Danwitz were appointed as Judges, respectively replacing Mr Stig von Bahr, Mr Jean-Pierre Puissochet and Ms Ninon Colneric, while Mr Yves Bot was appointed as an Advocate General, replacing Mr Philippe Léger. In addition, under the system of rotation of Advocates General by reference to the alphabetical order of the Member States, Ms Verica Trstenjak was appointed to replace Mr Leendert A. Geelhoed, and Mr Ján Mazák to replace Mrs Christine Stix-Hackl.

3. Order of precedence

from 1 January to 10 January 2006

V. SKOURIS, President of the Court
P. JANN, President of the First Chamber
C. W. A. TIMMERMANS, President of the Second Chamber
A. ROSAS, President of the Third Chamber
C. STIX-HACKL, First Advocate General
K. SCHIEMANN, President of the Fourth Chamber
J. MAKARCZYK, President of the Fifth Chamber
J. MALENOVSKÝ, President of the Sixth Chamber
F. G. JACOBS, Advocate General
C. GULMANN, Judge
A. LA PERGOLA, Judge
J.-P. PUISSOCHET, Judge
P. LÉGER, Advocate General
D. RUIZ-JARABO COLOMER, Advocate General
R. SCHINTGEN, Judge
N. COLNERIC, Judge
S. von BAHR, Judge
A. TIZZANO, Advocate General
J. N. CUNHA RODRIGUES, Judge
L. A. GEELHOED, Advocate General
R. SILVA de LAPUERTA, Judge
K. LENAERTS, Judge
J. KOKOTT, Advocate General
M. POIARES MADURO, Advocate General
P. KŪRIS, Judge
E. JUHÁSZ, Judge
G. ARESTIS, Judge
A. BORG BARTHET, Judge
M. ILEŠIČ, Judge
J. KLUČKA, Judge
U. LÕHMUS, Judge
E. LEVITS, Judge
A. Ó CAOIMH, Judge

R. GRASS, Registrar

from 11 January to 3 May 2006

V. SKOURIS, President of the Court
P. JANN, President of the First Chamber
C. W. A. TIMMERMANS, President of the Second Chamber
A. ROSAS, President of the Third Chamber
C. STIX-HACKL, First Advocate General
K. SCHIEMANN, President of the Fourth Chamber
J. MAKARCZYK, President of the Fifth Chamber
J. MALENOVSKÝ, President of the Sixth Chamber
A. LA PERGOLA, Judge
J.-P. PUISSOCHET, Judge
P. LÉGER, Advocate General
D. RUIZ-JARABO COLOMER, Advocate General
R. SCHINTGEN, Judge
N. COLNERIC, Judge
S. von BAHR, Judge
A. TIZZANO, Advocate General
J. N. CUNHA RODRIGUES, Judge
L. A. GEELHOED, Advocate General
R. SILVA de LAPUERTA, Judge
K. LENAERTS, Judge
J. KOKOTT, Advocate General
M. POIARES MADURO, Advocate General
P. KŪRIS, Judge
E. JUHÁSZ, Judge
G. ARESTIS, Judge
A. BORG BARTHET, Judge
M. ILEŠIČ, Judge
J. KLUČKA, Judge
U. LÕHMUS, Judge
E. LEVITS, Judge
A. Ó CAOIMH, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General

R. GRASS, Registrar

from 4 May to 6 October 2006

V. SKOURIS, President of the Court
P. JANN, President of the First Chamber
C. W. A. TIMMERMANS, President of the Second Chamber
A. ROSAS, President of the Third Chamber
C. STIX-HACKL, First Advocate General
K. SCHIEMANN, President of the Fourth Chamber
J. MAKARCZYK, President of the Fifth Chamber
J. MALENOVSKÝ, President of the Sixth Chamber
J.-P. PUISSOCHET, Judge
P. LEGER, Advocate General
D. RUIZ-JARABO COLOMER, Advocate General
R. SCHINTGEN, Judge
N. COLNERIC, Judge
S. von BAHR, Judge
A. TIZZANO, Judge
J. N. CUNHA RODRIGUES, Judge
L. A. GEELHOED, Advocate General
R. SILVA de LAPUERTA, Judge
K. LENAERTS, Judge
J. KOKOTT, Advocate General
M. POIARES MADURO, Advocate General
P. KŪRIS, Judge
E. JUHÁSZ, Judge
G. ARESTIS, Judge
A. BORG BARTHET, Judge
M. ILEŠIČ, Judge
J. KLUČKA, Judge
U. LÕHMUS, Judge
E. LEVITS, Judge
A. Ó CAOIMH, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
P. MENGOZZI, Advocate General

R. GRASS, Registrar

from 12 October to 31 December 2006

V. SKOURIS, President of the Court
P. JANN, President of the First Chamber
C. W. A. TIMMERMANS, President of the Second Chamber
A. ROSAS, President of the Third Chamber
K. LENAERTS, President of the Fourth Chamber
R. SCHINTGEN, President of the Fifth Chamber
J. KOKOTT, First Advocate General
P. KŪRIS, President of the Sixth Chamber
E. JUHÁSZ, President of the Eighth Chamber
J. KLUČKA, President of the Seventh Chamber
D. RUIZ-JARABO COLOMER, Advocate General
A. TIZZANO, Judge
J. N. CUNHA RODRIGUES, Judge
R. SILVA de LAPUERTA, Judge
M. POIARES MADURO, Advocate General
K. SCHIEMANN, Judge
J. MAKARCZYK, Judge
G. ARESTIS, Judge
A. BORG BARTHET, Judge
M. ILEŠIČ, Judge
J. MALENOVSKÝ, Judge
U. LÕHMUS, Judge
E. LEVITS, Judge
A. Ó CAOIMH, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
P. MENGOZZI, Advocate General
P. LINDH, Judge
Y. BOT, Advocate General
J. MAZÁK, Advocate General
J.-C. BONICHOT, Judge
T. von DANWITZ, Judge
V. TRSTENJAK, Advocate General

R. GRASS, Registrar

4. Former Members of the Court of Justice

Massimo Pilotti, Judge (1952–58), President from 1952 to 1958
Petrus Josephus Servatius Serrarens, Judge (1952–58)
Otto Riese, Judge (1952–63)
Louis Delvaux, Judge (1952–67)
Jacques Rueff, Judge (1952–59 and 1960–62)
Charles Léon Hammes, Judge (1952–67), President from 1964 to 1967
Adrianus Van Kleffens, Judge (1952–58)
Maurice Lagrange, Advocate General (1952–64)
Karl Roemer, Advocate General (1953–73)
Rino Rossi, Judge (1958–64)
Andreas Matthias Donner, Judge (1958–79), President from 1958 to 1964
Nicola Catalano, Judge (1958–62)
Alberto Trabucchi, Judge (1962–72), then Advocate General (1973–76)
Robert Lecourt, Judge (1962–76), President from 1967 to 1976
Walter Strauss, Judge (1963–70)
Riccardo Monaco, Judge (1964–76)
Joseph Gand, Advocate General (1964–70)
Josse J. Mertens de Wilmars, Judge (1967–84), President from 1980 to 1984
Pierre Pescatore, Judge (1967–85)
Hans Kutscher, Judge (1970–80), President from 1976 to 1980
Alain Louis Dutheillet de Lamothe, Advocate General (1970–72)
Henri Mayras, Advocate General (1972–81)
Cearbhall O'Dalaigh, Judge (1973–74)
Max Sørensen, Judge (1973–79)
Alexander J. Mackenzie Stuart, Judge (1973–88), President from 1984 to 1988
Jean-Pierre Warner, Advocate General (1973–81)
Gerhard Reischl, Advocate General (1973–81)
Aindrias O'Keeffe, Judge (1975–85)
Francesco Capotorti, Judge (1976), then Advocate General (1976–82)
Giacinto Bosco, Judge (1976–88)
Adolphe Touffait, Judge (1976–82)
Thymen Koopmans, Judge (1979–90)
Ole Due, Judge (1979–94), President from 1988 to 1994
Ulrich Everling, Judge (1980–88)
Alexandros Chloros, Judge (1981–82)
Sir Gordon Slynn, Advocate General (1981–88), then Judge (1988–92)
Simone Rozès, Advocate General (1981–84)
Pieter VerLoren van Themaat, Advocate General (1981–86)
Fernand Grévisse, Judge (1981–82 and 1988–94)
Kai Bahlmann, Judge (1982–88)
G. Federico Mancini, Advocate General (1982–88), then Judge (1988–99)
Yves Galmot, Judge (1982–88)
Constantinos Kakouris, Judge (1983–97)
Carl Otto Lenz, Advocate General (1984–97)

Marco Darmon, Advocate General (1984–94)
René Joliet, Judge (1984–95)
Thomas Francis O'Higgins, Judge (1985–91)
Fernand Schockweiler, Judge (1985–96)
Jean Mischo, Advocate General (1986–91 and 1997–2003)
José Carlos De Carvalho Moithinho de Almeida, Judge (1986–2000)
José Luis da Cruz Vilaça, Advocate General (1986–88)
Gil Carlos Rodríguez Iglesias, Judge (1986–2003), President from 1994 to 2003
Manuel Diez de Velasco, Judge (1988–94)
Manfred Zuleeg, Judge (1988–94)
Walter Van Gerven, Advocate General (1988–94)
Giuseppe Tesauro, Advocate General (1988–98)
Paul Joan George Kapteyn, Judge (1990–2000)
John L. Murray, Judge (1991–99)
David Alexander Ogilvy Edward, Judge (1992–2004)
Georges Cosmas, Advocate General (1994–2000)
Günter Hirsch, Judge (1994–2000)
Michael Bendik Elmer, Advocate General (1994–97)
Hans Ragnemalm, Judge (1995–2000)
Leif Sevón, Judge (1995–2002)
Nial Fennelly, Advocate General (1995–2000)
Melchior Wathelet, Judge (1995–2003)
Krateros Ioannou, Judge (1997–99)
Siegbert Alber, Advocate General (1997–2003)
Antonio Saggio, Advocate General (1998–2000)
Fidelma O'Kelly Macken, Judge (1999–2004)

— Presidents

Massimo Pilotti (1952–58)
Andreas Matthias Donner (1958–64)
Charles Léon Hammes (1964–67)
Robert Lecourt (1967–76)
Hans Kutscher (1976–80)
Josse J. Mertens de Wilmars (1980–84)
Alexander John Mackenzie Stuart (1984–88)
Ole Due (1988–94)
Gil Carlos Rodríguez Iglésias (1994–2003)

— Registrars

Albert Van Houtte (1953–82)
Paul Heim (1982–88)
Jean-Guy Giraud (1988–94)

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

General activity of the Court of Justice

1. Cases completed, new cases, cases pending (2000–06)

Completed cases

2. Nature of proceedings (2000–06)
3. Judgments, orders, opinions (2006)
4. Bench hearing action (2000–06)
5. Subject-matter of the action (2006)
6. Proceedings for interim measures: outcome (2006)
7. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2006)
8. Duration of proceedings (2000–06)

New cases

9. Nature of proceedings (2000–06)
10. Direct actions — Type of action (2006)
11. Subject-matter of the action (2006)
12. Actions for failure of a Member State to fulfil its obligations (2000–06)
13. Expedited and accelerated procedures (2000–06)

Cases pending as at 31 December

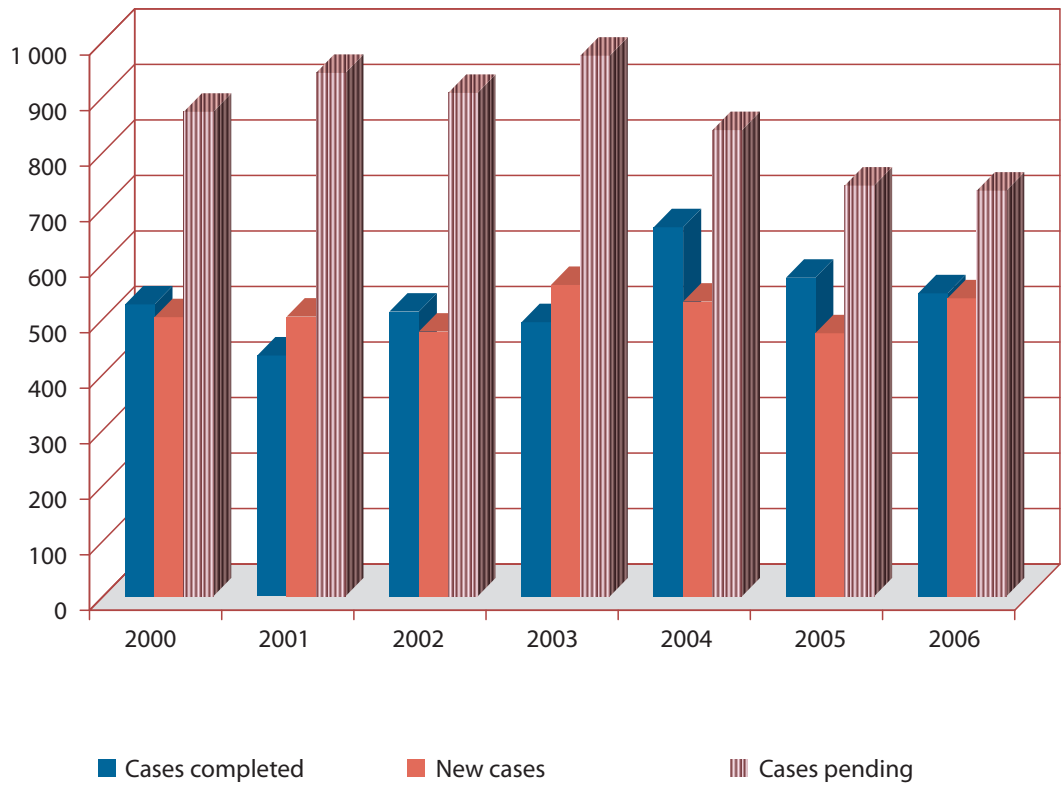
14. Nature of proceedings (2000–06)
15. Bench hearing action (2006)

General trend in the work of the Court (1952–2006)

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

General activity of the Court of Justice

1. Cases completed, new cases, cases pending (2000–06)[1]

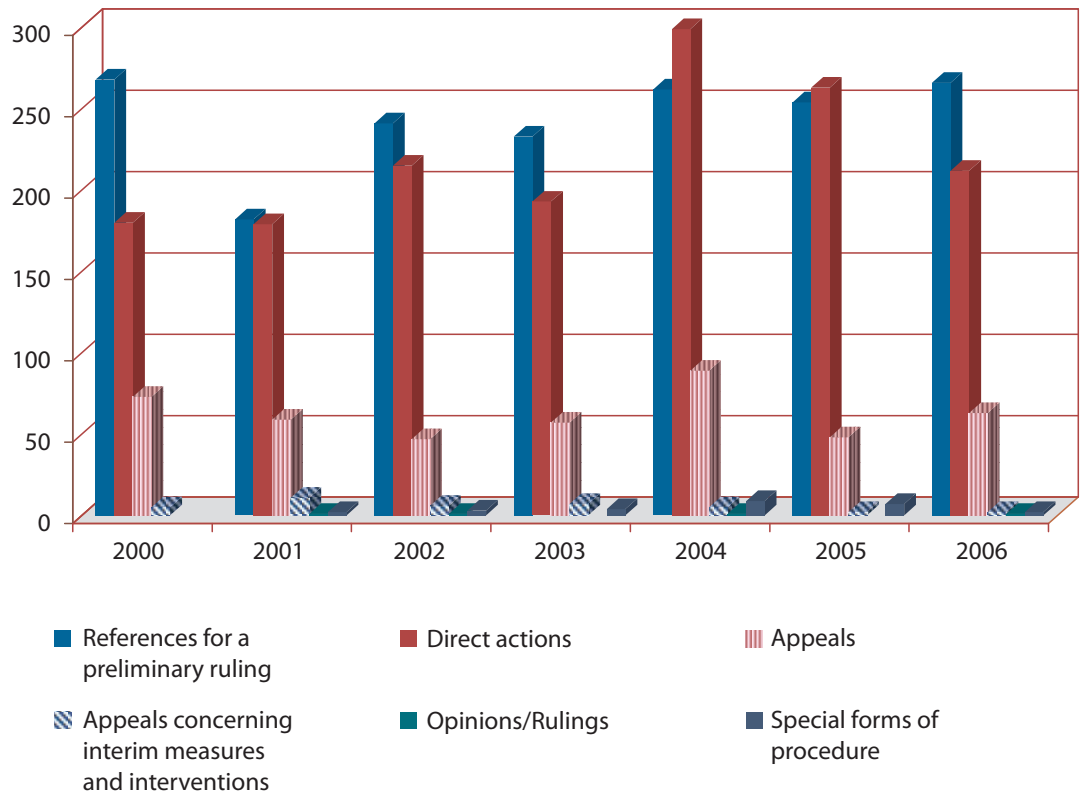


	2000	2001	2002	2003	2004	2005	2006
Cases completed	526	434	513	494	665	574	546
New cases	503	504	477	561	531	474	537
Cases pending	873	943	907	974	840	740	731

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

Completed cases

2. Nature of proceedings (2000–06)[1] [2]

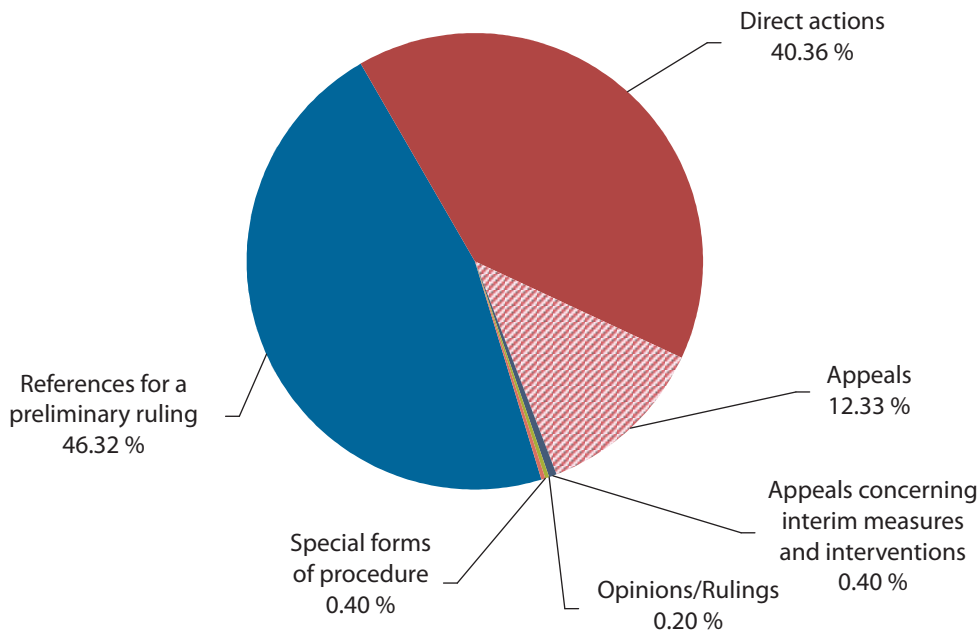


	2000	2001	2002	2003	2004	2005	2006
References for a preliminary ruling	268	182	241	233	262	254	266
Direct actions	180	179	215	193	299	263	212
Appeals	73	59	47	57	89	48	63
Appeals concerning interim measures and interventions	5	11	6	7	5	2	2
Opinions/Rulings		1	1		1		1
Special forms of procedure		2	3	4	9	7	2
Total	**526**	**434**	**513**	**494**	**665**	**574**	**546**

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

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

3. Completed cases — Judgments, orders, opinions (2006)[1]



	Judgments	Non-interlocutory orders[2]	Interlocutory orders[3]	Other orders[4]	Opinions of the Court	Total
References for a preliminary ruling	192	18		23		233
Direct actions	130			73		203
Appeals	28	30		4		62
Appeals concerning interim measures and interventions			1	1		2
Opinions/Rulings					1	1
Special forms of procedure	1	1				2
Total	**351**	**49**	**1**	**101**	**1**	**503**

1 The figures given (net figures) represent the number of cases after joinder on the ground 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 EA and CS 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 action (2000–06)[1]

	2000			2001			2002			2003			2004			2005			2006		
	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total	Judgments/ Opinions	Orders[2]	Total
Full Court	31	6	37	33	2	35	27	4	31	48	2	50	21		21	1		1	2		2
Small plenary	91		91	24		24	52		52	35		35	1		1						
Grand Chamber													31	1	32	59		59	55		55
Chambers (5 judges)	162	3	165	155	13	168	177	10	187	200	8	208	257	18	275	245	5	250	265	13	278
Chambers (3 judges)	50	40	90	59	42	101	60	27	87	51	27	78	113	61	174	103	51	154	67	41	108
President		4	4		11	11		3	3		7	7		6	6		2	2		1	1
Total	**334**	**53**	**387**	**271**	**68**	**339**	**316**	**44**	**360**	**334**	**44**	**378**	**423**	**86**	**509**	**408**	**58**	**466**	**389**	**55**	**444**

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground 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 (2006)[1]

	Judgments/ Opinions	Orders[2]	Total
Agriculture	28	2	30
Approximation of laws	17	2	19
Area of freedom, security and justice	9		9
Brussels Convention	4		4
Commercial policy	1		1
Common Customs Tariff	7		7
Community own resources	6		6
Company law	5	5	10
Competition	26	4	30
Customs union	8	1	9
Energy	6		6
Environment and consumers	39	1	40
European citizenship	4		4
External relations	9	2	11
Fisheries policy	7		7
Free movement of capital	4		4
Free movement of goods	8		8
Freedom of establishment	18	3	21
Freedom of movement for persons	18	2	20
Freedom to provide services	14	3	17
Intellectual property	14	5	19
Justice and home affairs	1	1	2
Law governing the institutions	12	3	15
Principles of Community law		1	1
Privileges and immunities	1		1
Regional policy	2		2
Social policy	25	4	29
Social security for migrant workers	6	1	7
State aid	21	2	23
Taxation	51	4	55
Transport	8	1	9
EC Treaty	379	47	426
EU Treaty	3		3
CS Treaty			
EA Treaty	3	1	4
Procedure	1	1	2
Staff Regulations	3	6	9
Others	4	7	11
OVERALL TOTAL	**389**	**55**	**444**

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

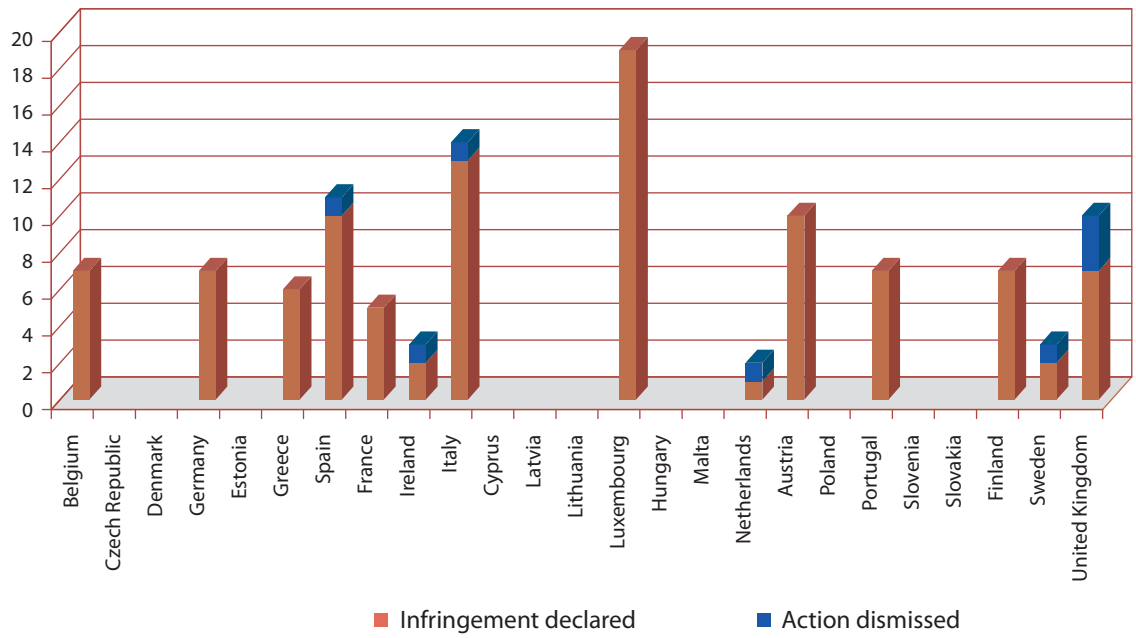
2 Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

6. Proceedings for interim measures: outcome (2006)[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
Competition		2	2	
Total EC Treaty		2	2	
EA Treaty				
Others				
OVERALL TOTAL		**2**	**2**	

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

7. Completed cases — Judgments concerning failure of a Member State to fulfil its obligations: outcome (2006)[1]

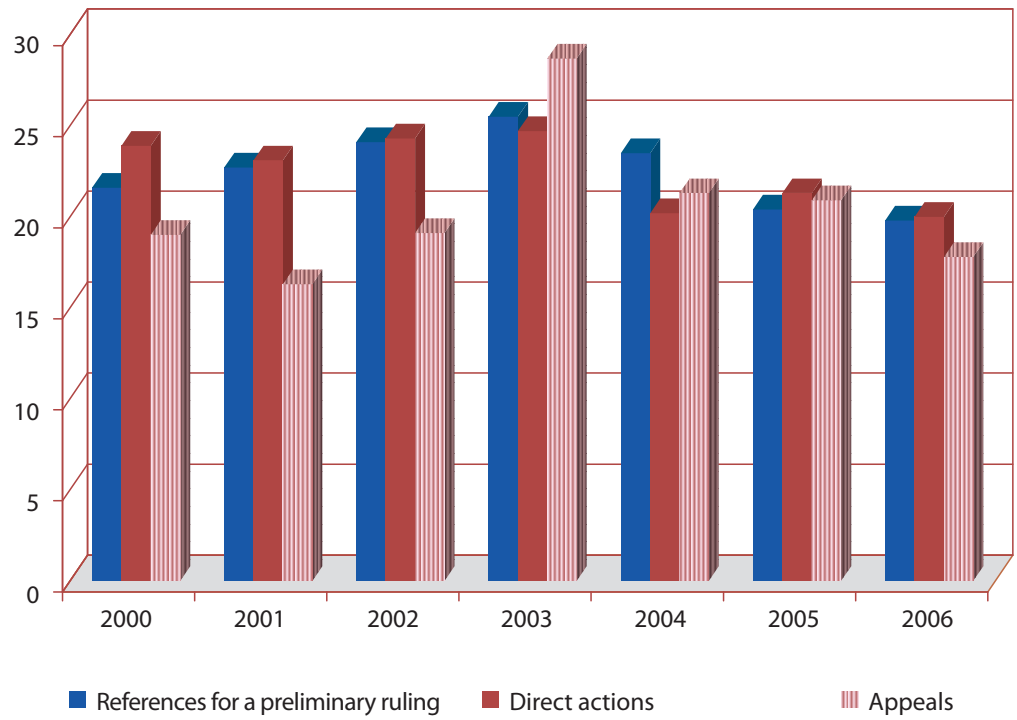


	Infringement declared	Action dismissed	Total
Belgium	7		7
Czech Republic			
Denmark			
Germany	7		7
Estonia			
Greece	6		6
Spain	10	1	11
France	5		5
Ireland	2	1	3
Italy	13	1	14
Cyprus			
Latvia			
Lithuania			
Luxembourg	19		19
Hungary			
Malta			
Netherlands	1	1	2
Austria	10		10
Poland			
Portugal	7		7
Slovenia			
Slovakia			
Finland	7		7
Sweden	2	1	3
United Kingdom	7	3	10
Total	**103**	**8**	**111**

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

8. Completed cases — Duration of proceedings (2000–06)[1]

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



	2000	2001	2002	2003	2004	2005	2006
References for a preliminary ruling	21.6	22.7	24.1	25.5	23.5	20.4	19.8
Direct actions	23.9	23.1	24.3	24.7	20.2	21.3	20
Appeals	19	16.3	19.1	28.7	21.3	20.9	17.8

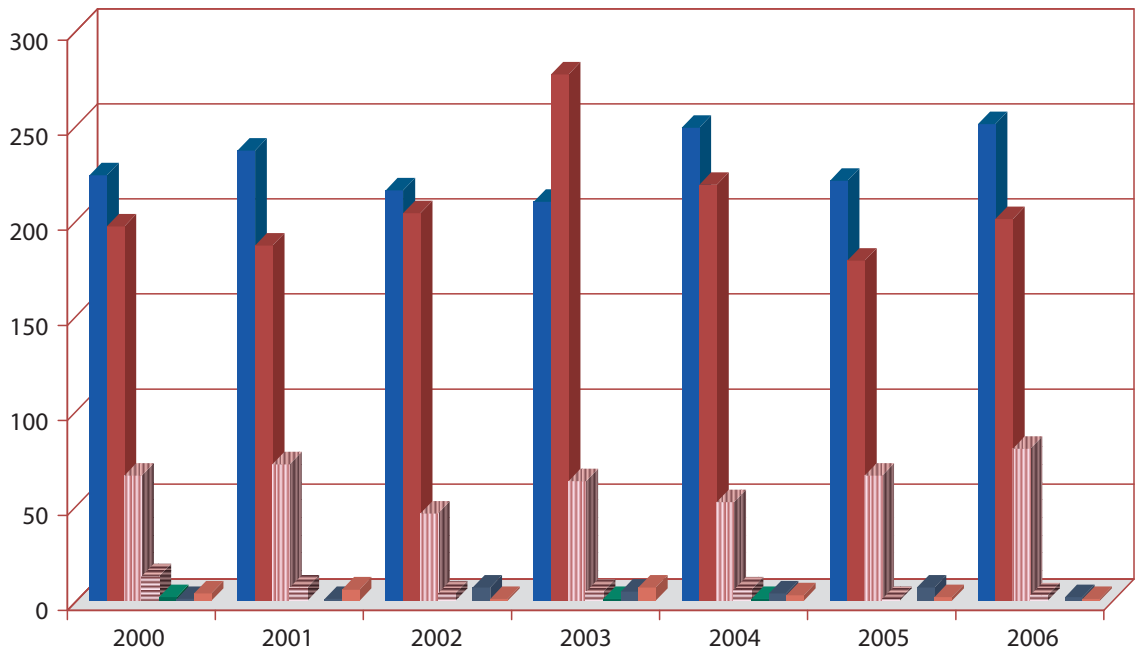
[1] The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions and rulings on agreements; special forms of procedure (namely taxation of costs, legal aid, application to set a judgment aside,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

The duration of proceedings is expressed in months and tenths of months.

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

New cases

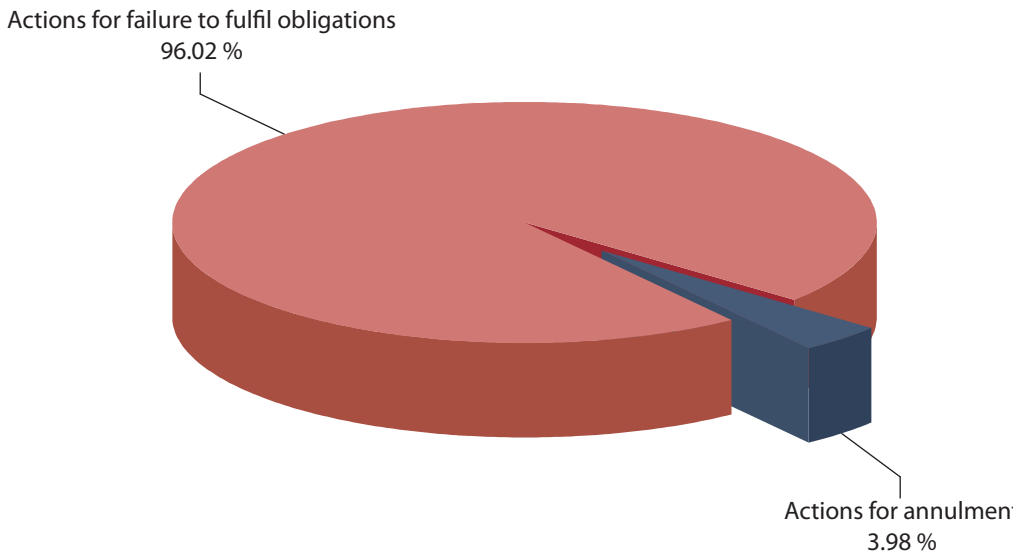
9. Nature of proceedings (2000–06)[1]



	2000	2001	2002	2003	2004	2005	2006
References for a preliminary ruling	224	237	216	210	249	221	251
Direct actions	197	187	204	277	219	179	201
Appeals	66	72	46	63	52	66	80
Appeals concerning interim measures and interventions	13	7	4	5	6	1	3
Opinion/Rulings	2			1	1		
Special forms of procedure	1	1	7	5	4	7	2
Total	**503**	**504**	**477**	**561**	**531**	**474**	**537**
Applications for interim measures	4	6	1	7	3	2	1

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

10. New cases — Direct actions — Type of action (2006)[1]



Actions for annulment	8
Actions for failure to act	
Actions for damages	
Actions for failure to fulfil obligations	193
Total	**201**

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

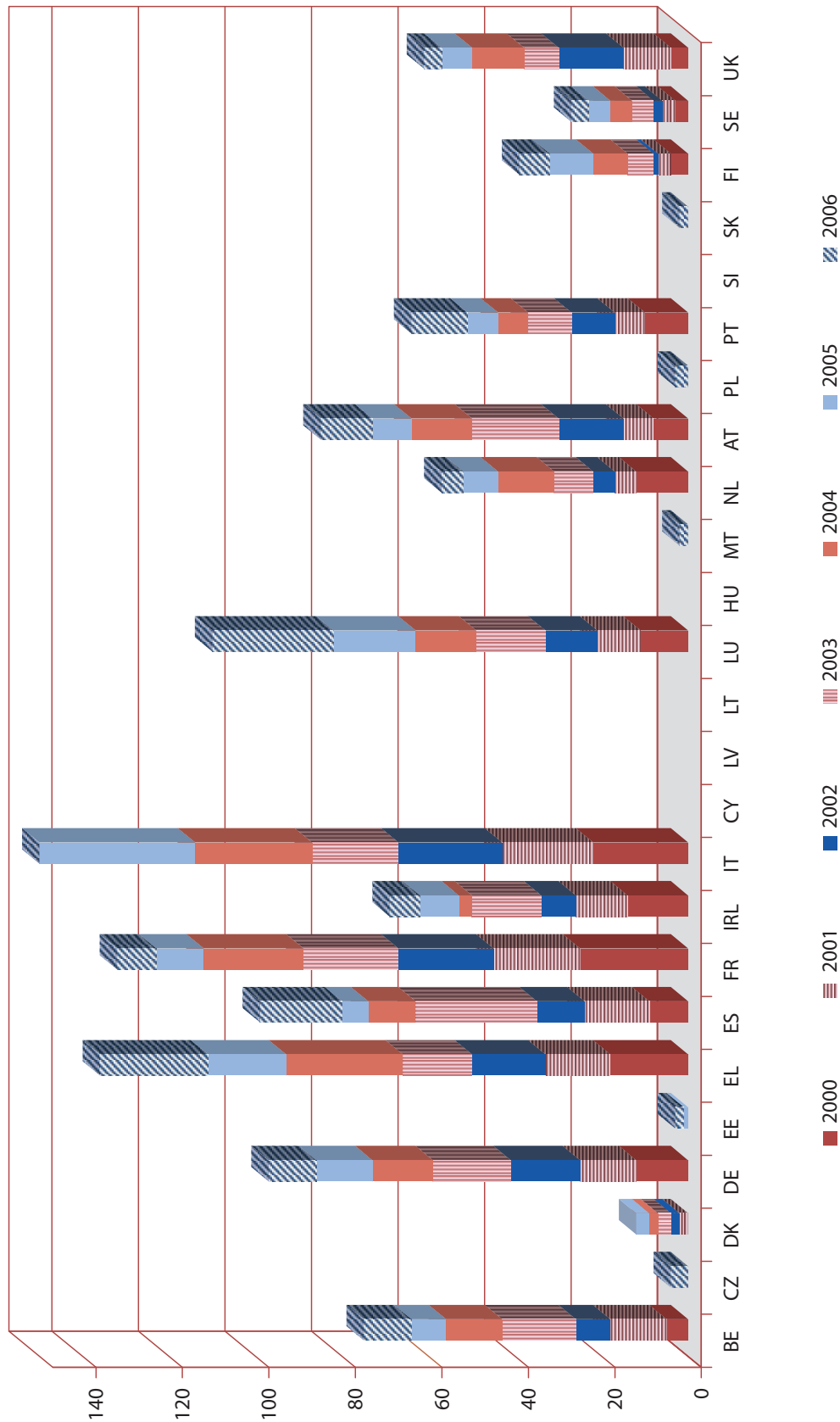
11. New cases[1] — Subject-matter of the action (2006)[2]

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Special forms of procedure
Agriculture	11	43	3		57	
Approximation of laws	10	8			18	
Area of freedom, security and justice	8	5			13	
Brussels Convention		2			2	
Commercial policy			1		1	
Common Customs Tariff		9			9	
Common foreign and security policy		1	2		3	
Community own resources	2		2		4	
Company law	13	12	1		26	
Competition	1	14	15	2	32	
Customs union		7			7	
Energy	2	4			6	
Environment and consumers	54	3	2	1	60	
European citizenship		5			5	
External relations	2	5	4		11	
Fisheries policy	1		4		5	
Free movement of capital	2	5			7	
Free movement of goods	5	8			13	
Freedom of establishment	14	17			31	
Freedom of movement for persons	5	8	1		14	
Freedom to provide services	12	10			22	
Industrial policy	10	6			16	
Intellectual property		4	19		23	
Justice and home affairs	1	1			2	
Law governing the institutions	7	1	2		10	
Principles of Community law		5			5	
Regional policy		2	4		6	
Social policy	21	17			38	
Social security for migrant workers		9			9	
State aid	5	9	6		20	
Taxation	7	27			34	
Transport	7	2			9	
EC Treaty	200	249	66	3	518	
EU Treaty						
CS Treaty		1			1	
EA Treaty	1		1		2	
Procedure						2
Staff Regulations		1	13		14	
Others		1	13		14	2
OVERALL TOTAL	**201**	**251**	**80**	**3**	**535**	**2**

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 ground of similarity (one case number = one case).

12. New cases — Actions for failure of a Member State to fulfil its obligations (2000–06)[1]



	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total[2]
2000	5			12		18	9	25	14	22				11			12	8		10			4	3	4	157
2001	13		2	13		15	15	20	12	21				10			5	7		7			3	3	11	157
2002	8		2	16		17	11	22	8	24				12			5	15		10			1	2	15	168
2003	17		3	18		16	28	22	16	20				16			9	20		10			6	5	8	214
2004	13		2	14		27	11	23	3	27				14			13	14		7			8	5	12	193
2005	8		3	13	1	18	6	11	9	36				19			8	9		7			10	5	7	170
2006	11	4		11	2	25	19	9	7	25				28		2	5	12	3	13		2	7	4	4	193

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground 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] Including one action brought under Article 170 of the EC Treaty (now Article 227 EC).

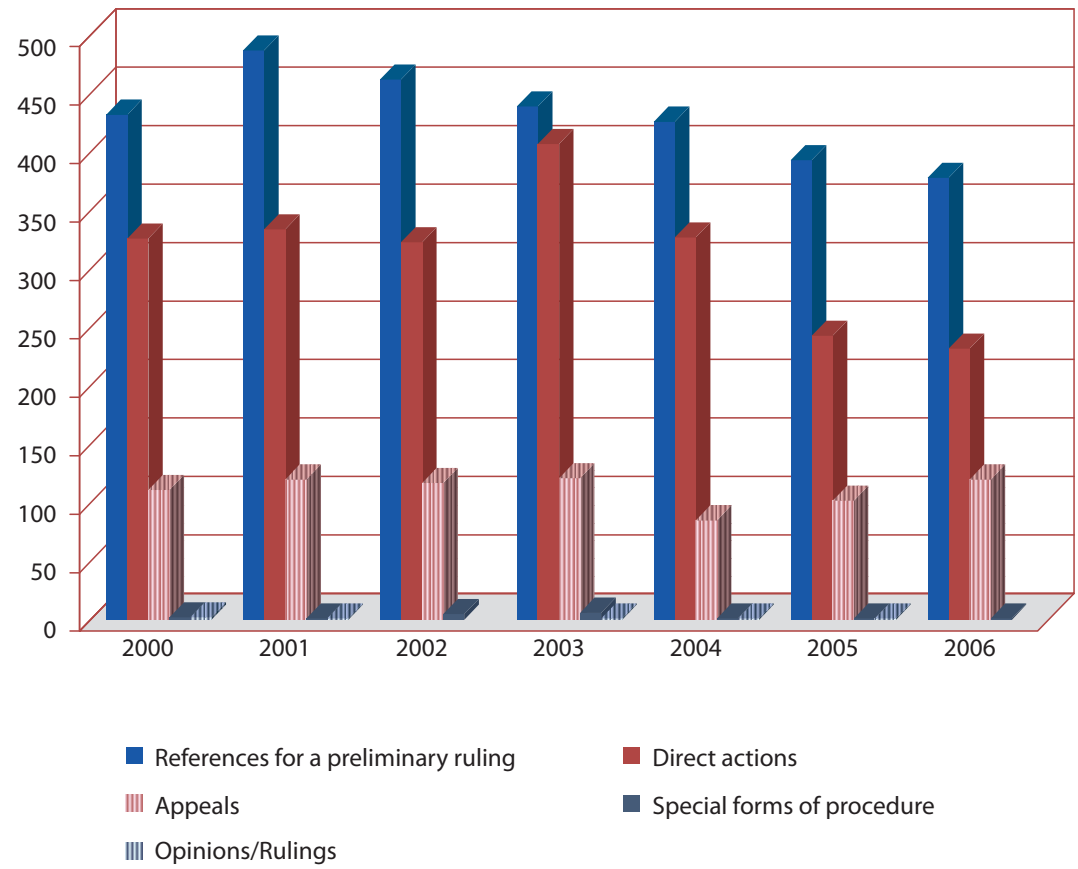
13. New cases — Expedited and accelerated procedures (2000–06)[1]

	2000		2001		2002		2003		2004		2005		2006		Total
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	
Direct actions						1		3	1	2					7
References for a preliminary ruling		1	1	5		1		3		10		5		5	31
Appeals				2			1	1							4
Opinions of the Court										1					1
Total		**1**	**1**	**7**		**2**	**1**	**7**	**1**	**13**		**5**		**5**	**43**

[1] A case before the Court of Justice may be dealt with under such a procedure pursuant to Articles 62a, 104a and 118 of the Rules of Procedure, as amended with effect from 1 July 2000.

Cases pending as at 31 December

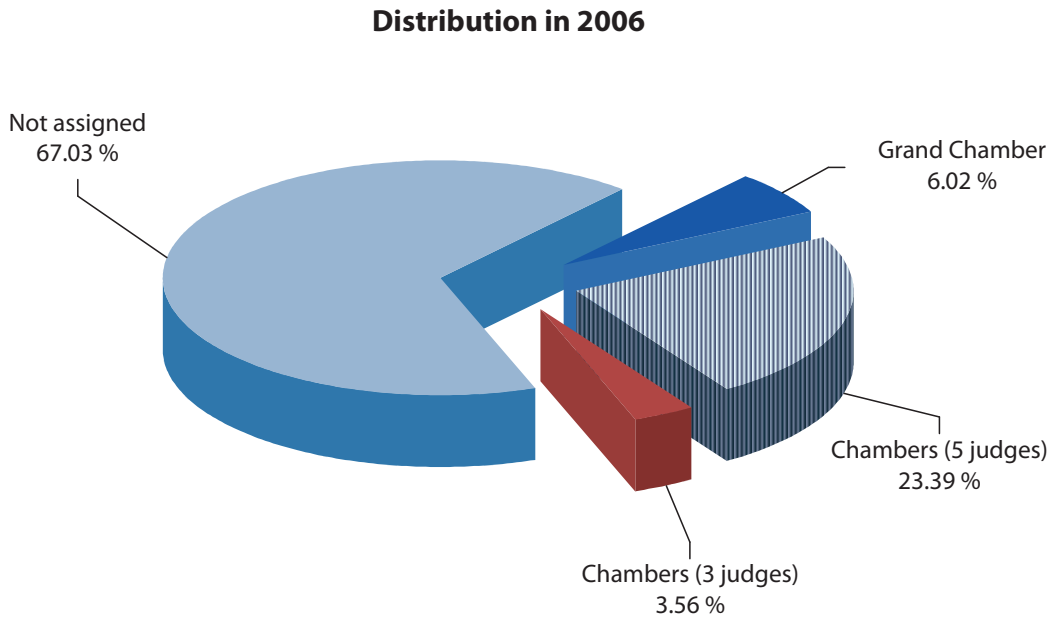
14. Nature of proceedings (2000–06)[1]



	2000	2001	2002	2003	2004	2005	2006
References for a preliminary ruling	432	487	462	439	426	393	378
Direct actions	326	334	323	407	327	243	232
Appeals	111	120	117	121	85	102	120
Special forms of procedure	2	1	5	6	1	1	1
Opinions/Rulings	2	1		1	1	1	
Total	**873**	**943**	**907**	**974**	**840**	**740**	**731**

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

15. Cases pending as at 31 December — Bench hearing action (2006)[1]



	2000	2001	2002	2003	2004	2005	2006
Not assigned	634	602	546	690	547	437	490
Full Court	34	31	47	21	2	2	
Small plenary	26	66	36	1			
Grand Chamber				24	56	60	44
Chambers (5 judges)	129	199	234	195	177	212	171
Chambers (3 judges)	42	42	42	42	57	29	26
President	8	3	2	1	1		
Total	**873**	**943**	**907**	**974**	**840**	**740**	**731**

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

General trend in the work of the Court (1952–2006)

16. New cases and judgments

Year	New cases[1]						Judgments[2]
	Direct actions[3]	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Applications for interim measures	
1953	4				4		
1954	10				10		2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43		10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37		24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79		64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	62	69			131	5	78
1976	52	75			127	6	88
1977	74	84			158	6	100
1978	147	123			270	7	97
1979	1 218	106			1 324	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	217	129			346	16	185
1983	199	98			297	11	151

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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	
1984	183	129			312	17	165
1985	294	139			433	23	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	193	179			372	17	238
1989	244	139			383	19	188
1990[4]	221	141	15	1	378	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	5	210
1993	265	204	17		486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	6	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
2004	220	249	52	6	527	3	375
2005	179	221	66	1	467	2	362
2006	201	251	80	3	535	1	351
Total	**7 908**	**5 765**	**761**	**61**	**14 495**	**342**	**7 178**

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

2 Net figures.

3 Including opinions of the Court.

4 The Court of First Instance began operating in 1989.

17. General trend in the work of the Court (1952–2006) —

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

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

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	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Benelux[2]	Total
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
2004	24		4	50		18	8	21	1	48				1	2		28	12		1			4	5	22		249
2005	21	1	4	51		11	10	17	2	18				2	3		36	15	1	2			4	11	12		221
2006	17	3	3	77		14	17	24	1	34			1	1	4		20	12	2	3		1	5	2	10		251
Total	**533**	**4**	**111**	**1 542**		**117**	**180**	**717**	**48**	**896**			**1**	**60**	**9**		**666**	**288**	**3**	**60**		**1**	**47**	**63**	**418**	**1**	**5 765**

[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.

18. General trend in the work of the Court (1952–2006) — New references for a preliminary ruling (by Member State and by court or tribunal)

			Total
Belgium	Cour de cassation	68	
	Cour d'arbitrage	5	
	Conseil d'État	38	
	Other courts or tribunals	422	533
Czech Republic	Nejvyššího soudu		
	Nejvyšší správní soud		
	Ústavní soud		
	Other courts or tribunals	4	4
Denmark	Højesteret	19	
	Other courts or tribunals	92	111
Germany	Bundesgerichtshof	102	
	Bundesverwaltungsgericht	73	
	Bundesfinanzhof	233	
	Bundesarbeitsgericht	17	
	Bundessozialgericht	72	
	Staatsgerichtshof des Landes Hessen	1	
	Other courts or tribunals	1 044	1 542
Estonia	Riigikohus		
	Other courts or tribunals		
Greece	Άρειος Πάγος	9	
	Συμβούλιο της Επικρατείας	26	
	Other courts or tribunals	82	117
Spain	Tribunal Supremo	17	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	155	180
France	Cour de cassation	74	
	Conseil d'État	34	
	Other courts or tribunals	609	717
Ireland	Supreme Court	15	
	High Court	15	
	Other courts or tribunals	18	48
Italy	Corte suprema di Cassazione	90	
	Consiglio di Stato	57	
	Other courts or tribunals	749	896

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			Total
Cyprus	Ανώτατο Δικαστήριο		
	Other courts or tribunals		
Latvia	Augstākā tiesa		
	Satversmes tiesa		
	Other courts or tribunals		
Lithuania	Konstitucinis Teismas		
	Lietuvos Aukščiausiasis Teismas		
	Lietuvos vyriausiasis administracinis Teismas	1	
	Other courts or tribunals		1
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	7	
	Other courts or tribunals	30	60
Hungary	Legfelsöbb Bíroság	1	
	Szegedi Ítélötáblá	1	
	Other courts or tribunals	7	9
Malta	Constitutional Court		
	Qorti ta' l-Appel		
	Other courts or tribunals		
Netherlands	Raad van State	51	
	Hoge Raad der Nederlanden	147	
	Centrale Raad van Beroep	44	
	College van Beroep voor het Bedrijfsleven	134	
	Tariefcommissie	34	
	Other courts or tribunals	256	666
Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	59	
	Oberster Patent- und Markensenat	1	
	Bundesvergabeamt	24	
	Verwaltungsgerichtshof	46	
	Vergabekontrollsenat	4	
	Other courts or tribunals	150	288

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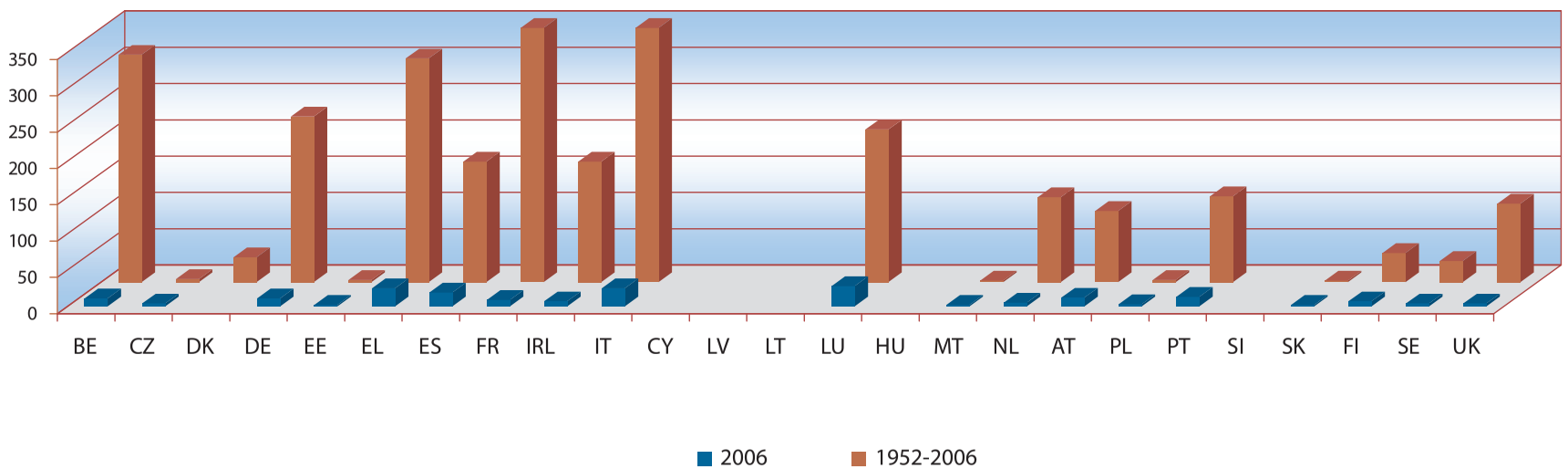
			Total
Poland	Sąd Najwyższy		
	Naczelny Sąd Administracyjny		
	Trybunał Konstytucyjny		
	Other courts or tribunals	3	3
Portugal	Supremo Tribunal de Justiça	1	
	Supremo Tribunal Administrativo	34	
	Other courts or tribunals	25	60
Slovenia	Vrhovno sodišče		
	Ustavno sodišče		
	Other courts or tribunals		
Slovakia	Ústavný Súd		
	Najvyšší súd		
	Other courts or tribunals	1	1
Finland	Korkein hallinto-oikeus	18	
	Korkein oikeus	7	
	Other courts or tribunals	22	47
Sweden	Högsta Domstolen	8	
	Marknadsdomstolen	3	
	Regeringsrätten	19	
	Other courts or tribunals	33	63
United Kingdom	House of Lords	35	
	Court of Appeal	38	
	Other courts or tribunals	345	418
Benelux	Cour de justice/Gerechtshof[1]	1	1
Total			**5 765**

[1] Case C–265/00 Campina Melkunie.

19. General trend in the work of the Court (1952–2006) — New actions for failure of a Member State to fulfil its obligations[1]



	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
2006	11	4		11	2	25	19	9	7	25				28		2	5	12	3	13		2	7	4	4	**193**
1952-2006	313	4	34	228	3	308	166	352	166	559				210		2	117	98	3	118		2	40	29	108	**2 860**

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

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

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

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

Chapter II

The Court of First Instance of the European Communities

A — Proceedings of the Court of First Instance in 2006

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

In 2006, for the second year in succession, the Court of First Instance disposed of more cases than were brought before it (436 cases disposed of compared with 432 lodged). Overall, the number of cases lodged has fallen (432 compared with 469 in 2005). However, this drop is merely apparent and is attributable to the fact that no staff cases were lodged with the Court of First Instance in 2006 as those cases now come within the jurisdiction of the Civil Service Tribunal [1]. In fact, leaving aside staff cases and special forms of procedure, the number of cases lodged showed a marked increase of 33 % (387 cases compared with 291 in 2005). The number of trade mark cases brought has risen by 46 % (143 in 2006 compared with 98 in 2005), while cases concerning matters other than intellectual property and staff cases increased by 26 % (244 compared with 193). The number of cases disposed of as such has fallen (436 compared with 610), but, here too, account must be taken of the fact that, in 2005, 117 cases were disposed of by transfer to the Civil Service Tribunal. If those cases are not taken into account, the drop in the number of cases disposed of is still real but less marked (436 compared with 493).

In short, the number of cases pending was similar to that in the previous year, that is to say slightly over 1 000 (1 029 compared with 1 033 in 2005). It is interesting in this connection that, as at 1 January 2007, intellectual property cases represented nearly 25 % of the total number of cases pending. Accordingly, although 82 staff cases are still pending before the Court of First Instance and the first appeals against judgments of the Civil Service Tribunal have been brought before it (10 of them as at 31 December 2006), the litigation before the Court of First Instance is gradually changing character and becoming more focused on commercial litigation.

The average duration of proceedings increased slightly this year, in that, leaving aside staff cases and intellectual property cases, it went from 25.6 months in 2005 to 27.8 months in 2006. However, in 2006, use of the expedited procedure provided for by Article 76a of the Rules of Procedure of the Court of First Instance was allowed by the Court in four of the 10 cases in which it was applied for.

Ms Pernilla Lindh, appointed to the Court of Justice as a Judge, and Mr Paolo Mengozzi and Ms Verica Trstenjak, appointed to the Court of Justice as Advocates General, left the Court of First Instance on 6 October. On the same day they were replaced by Mr Nils Wahl, Mr Enzo Moavero Milanesi and Mr Miro Prek respectively.

It is impossible, in the framework of this report, to give an exhaustive account of the richness of the case-law of the Court of First Instance in 2006. Mention will be made only of the most significant developments of the year, the selection of which is necessarily subjective to some extent [2]. They relate to proceedings concerning the legality of measures (I), actions for damages (II) and, finally, applications for interim relief (III).

1 However, in 2006, the Civil Service Tribunal referred a case to the Court of First Instance.

2 For example, no mention is made of antidumping law, although it gave rise to some interesting developments, in particular in the judgment of 24 October 2006 in Case T-274/02 *Ritek and Prodisc Technology* v *Council*, not yet published in the ECR, and staff case-law.

I. *Proceedings concerning the legality of measures*

A. Admissibility of actions brought under Articles 230 and 232 EC

In 2006, the most significant developments on this question concern the definition of a challengeable act and, to a lesser extent, that of standing to bring proceedings.

1. Measures against which an action may be brought

According to settled case-law, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment [3]. In 2006, the current relevance of this issue was illustrated by no less than seven cases.

To begin with, three judgments defined the limits of actions for annulment of measures adopted by the European Anti-Fraud Office (OLAF) [4]. First, in its judgment in *Camós Grau* v *Commission*, the Court of First Instance held that a report of an investigation carried out by OLAF implicating the applicant did not significantly alter his legal position, given that, inter alia, it imposes no obligation, even of a procedural nature, on the authorities to which it is addressed. Secondly, following the same approach, the Court of First Instance made clear in its judgment in *Tillack* v *Commission* that the forwarding by OLAF of information to the national judicial authorities was not an act against which an action for annulment could be brought either. The forwarding of information by OLAF, although it had to be dealt with seriously by the national authorities, had no binding legal effect on them, as they remained free to decide what action should be taken following the OLAF investigation. Thirdly, and finally, in its order in *Strack* v *Commission*, the Court of First Instance held that an official who informs OLAF of possible irregularities may not challenge by means of an action for annulment the decision closing the investigation opened in the light of that information.

Secondly, two judgments delivered in 2006 in the case known as 'Austrian Banks — "Club Lombard"' held that actions brought against decisions taken by the Commission's hearing officer were admissible [5]. First, in its judgment in *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, two credit institutions sought the annulment of decisions to transmit to a political party non-confidential versions of the statements of objections relating to the fixing of bank charges. In its judgment the Court of First Instance

3 Judgments of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 23.

4 See judgments of 6 April 2006 in Case T-309/03 *Camós Grau* v *Commission* and of 4 October 2006 in Case T-193/04 *Tillack* v *Commission*, and order of 22 March 2006 in Case T-4/05 *Strack* v *Commission* (under appeal, Case C-237/06 P), none yet published in the ECR.

5 Judgments of 30 May 2006 in Case T-198/03 *Bank Austria Creditanstalt* v *Commission* and of 7 June 2006 in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, not yet published in the ECR. Commission Decision of 11 June 2002 in Case COMP/36.571/D-1 — Austrian Banks ('Lombard Club') (OJ L 56, 24.2.2004, p. 1).

held that the Commission's decision notifying an undertaking involved in infringement proceedings that the information transmitted by that undertaking does not qualify for the confidential treatment guaranteed by Community law (and may therefore be communicated to another complainant) has legal effect in relation to the undertaking in question, bringing about a distinct change in its legal position. It therefore constitutes a challengeable act. Second, in *Bank Austria Creditanstalt* v *Commission*, Bank Austria Creditanstalt sought the annulment of a decision of a hearing officer rejecting its objection to the publication in the Official Journal of the non-confidential version of the Commission's decision. In its judgment, the Court of First Instance held that a decision taken by the hearing officer under the third paragraph of Article 9 of Decision 2001/462/EC, ECSC [6] has legal effects inasmuch as it determines whether a text for publication contains business secrets or other information enjoying similar protection or other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy. Such a decision therefore also constitutes a challengeable act.

Thirdly, in its judgment in *Deutsche Bahn* v *Commission* [7], the Court of First Instance defined the scope of the notion of challengeable act as regards decisions which the Commission adopts in the area of State aid on the basis of Article 4(2) of Regulation (EC) No 659/1999 [8]. In this case the Member of the Commission responsible for transport had informed the applicant in writing that his complaint seeking the opening of the procedure provided for by Article 88(2) EC would not be upheld. The letter included a clear and detailed statement of the reasons why the national measure should not be considered to be aid within the meaning of Article 87(1) EC. However, the Commission maintained that it was merely a letter providing information and not a decision within the meaning of Article 4(2) of Regulation (EC) No 659/1999 and that, consequently, it was not a challengeable act insofar as it did not have legal effects.

The Court of First Instance nonetheless held that a letter sent to a complainant undertaking by the Commission falls within the scope of Article 230 EC, where the Commission, having received information regarding alleged unlawful aid and thus being obliged to examine it without delay pursuant to Article 10(1) of Regulation (EC) No 659/1999, does not merely inform the complainant, as Article 20 of that regulation allows it to, that there are insufficient grounds for taking a view on the case, but takes a clear and definitive position, giving reasons and indicating that the measure in question does not constitute aid. In so doing, the Commission must be considered to have adopted a decision under Article 4(2) of that regulation. The Commission is therefore not entitled to exclude that decision from review by the Community court by declaring that it did not take such a decision, attempting to withdraw it or deciding not to send the decision to the Member State concerned, in breach of Article 25 of Regulation (EC) No 659/1999. In that connection it is irrelevant that the

6 Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21).

7 Judgment of 5 April 2006 in Case T 351/02 *Deutsche Bahn* v *Commission*, not yet published in the ECR.

8 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ L 83, 27.3.1999, p. 1).

letter at issue does not stem from the adoption of a definitive decision on the complaint by the college of Commissioners or that such a decision was not published.

Finally, and fourthly, in its order in *Schneider Electric* v *Commission* [9], the Court of First Instance ruled, for the first time, on the admissibility of an action against a Commission decision to open the detailed examination phase of a concentration. In this case, the Commission had adopted such a decision in the course of the administrative procedure re-opened following two judgments annulling the decision declaring the concentration between Schneider Electric and Legrand, two producers of low voltage electrical equipment, to be incompatible with the common market, and annulling the decision splitting the two entities [10]. The applicant challenged the Commission decisions to open a detailed examination procedure and to formally close the procedure.

In its order, the Court of First Instance concluded, on the basis of the facts of the case, that an undertaking which, having secured the annulment by the Court of First Instance of a Commission decision prohibiting it from implementing a concentration, transfers the undertaking it had acquired within the time limit available to the Commission for the adoption of a new decision, cannot claim that it is adversely affected either by a Commission decision, taken after the decision to make that transfer, to re-open the procedure for detailed examination of the operation, or by a Commission decision, subsequent to the transfer, to formally close that procedure which has thus become devoid of purpose. The Court of First Instance also ruled *obiter* that the decision to open the formal examination procedure was simply a preparatory step. While it is true that the disputed measure involves extending the suspension of the transaction, as well as the obligation to cooperate with the Commission during the detailed examination phase, those consequences, which flow directly from the regulation and are naturally induced by the prior control of the compatibility of the transaction, amount to no more than the ordinary effects of any procedural step and do not therefore affect the legal position of Schneider Electric. In that connection the Court of First Instance rejected the analogy with the Community State aid regime suggested by that undertaking. Unlike a decision taken under Article 88(2) EC, which, according to the case-law of the Court of Justice, is liable in certain cases to have independent legal effects [11], the decision to open the detailed examination procedure does not, in itself, impose any obligation which does not already follow from the notification of the concentration to the Commission on the initiative of the undertakings concerned.

2. Standing to bring proceedings

(a) *Individual concern*

According to settled case-law, natural and legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects

9 Order of 31 January 2006 in Case T-48/03 *Schneider Electric* v *Commission* (under appeal, Case C-188/06 P), not yet published in the ECR.

10 Judgments of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071 and in Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201.

11 Judgment of the Court of Justice in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 21 to 23.

them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed [12].

In 2006, the Court of First Instance applied those principles, inter alia in the case resulting in the judgment in *Boyle and Others* v *Commission* [13]. That case concerned a Commission decision addressed to Ireland rejecting a request to increase the objectives of the Multiannual guidance programme for the Irish fishing fleet ('MAGP IV'). The Court of First Instance held that although the applicants, who were owners of vessels belonging to the Irish fishing fleet, were not the addressees of the decision, they were nonetheless concerned by it. The request for an increase made by Ireland was made up of all of the individual requests of owners of vessels, including the applicants' requests. Although the decision was addressed to Ireland, it applied to a series of identified vessels and had therefore to be considered to be a series of individual decisions, each affecting the legal situation of the owners of those vessels. The number and identity of the vessel-owners in question were fixed and ascertainable even before the date of the contested decision and the Commission was in a position to know that its decision affected solely the interests and positions of those owners. The contested decision thus concerned a closed group of identified persons at the time of its adoption, whose rights the Commission intended to regulate. The factual situation thus created therefore characterised the applicants by reference to all other persons and distinguished them individually in the same way as an addressee of the decision.

(b) *Standing to bring proceedings in litigation on State aid*

In its judgment in *Commission* v *Aktiongemeinschaft Recht und Eigentum*, delivered in 2005, the Court of Justice held, first, that an action for the annulment of a decision taken on conclusion of the preliminary phase of examination of aid under Article 88(3) EC brought by a person who is concerned within the meaning of Article 88(2) EC, where he seeks to safeguard the procedural rights available to him under the latter provision, is admissible and, second, that where an applicant calls in question the merits of the decision appraising the aid as such or a decision taken at the end of the formal investigation procedure, an action for annulment of such a decision is admissible only if he succeeds in establishing that he has a particular status within the meaning of the judgment in *Plaumann* v *Commission* [14].

12 Judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107.

13 Judgments of 13 June 2006 in Joined Cases T-218/03 to T-240/03 *Boyle and Others* v *Commission* (under appeal, Case C-373/06 P), not yet published in the ECR; see also the judgment of 13 June 2006 in Case T-192/03 *Atlantean* v *Commission*, not published in the ECR.

14 Judgment of the Court of Justice in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737.

Two judgments delivered in 2006 enabled the Court of First Instance to clarify the application of that distinction where the Commission took a decision without initiating the formal review procedure [15].

First, in *Air One* v *Commission* [16], the applicant, an Italian airline company, complained to the Commission alleging that the Italian authorities granted unlawful aid to the air carrier Ryanair in the form of reduced prices for the use of airport and groundhandling services. The applicant also called upon the Commission to order the Italian Republic to suspend those aid payments. Insofar as this was an action for failure to act, which represents one and the same means of redress as an action for annulment, the Court of First Instance needed to establish the admissibility of an action brought by the applicant for annulment of at least one of the measures which the Commission could have adopted on conclusion of the preliminary procedure for examination of aid. To that end the Court of First Instance applied the case-law of the Court of Justice and, in that connection, it clarified the definition of 'sufficient relationship of competition' for an undertaking to be considered a competitor of the recipients of aid and, therefore, concerned within the meaning of Article 88(2) EC. In this case, the Court of First Instance held, in ruling the action admissible, that it was sufficient to establish that the applicant and the recipient of aid jointly operate, directly or indirectly, an international airline and that the applicant aims to develop scheduled passenger transport services from or to Italian airports, inter alia regional airports, in relation to which it may be in competition with the recipient.

Second, in *British Aggregates* v *Commission* [17], the Commission had decided, without initiating the formal review procedure, not to raise objections to the levy under examination. The Court of First Instance recalled that if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The applicant must then demonstrate that it has a particular status within the meaning of the judgment in *Plaumann* v *Commission*. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates. The Court found, in this case, that the applicant, which is an association of undertakings, does not merely seek to challenge the Commission's refusal to initiate the formal investigation procedure, but also calls into question the merits of the contested decision. In considering whether it has explained why the measure under investigation is liable to have a significant effect on the position of one or more of its members on the relevant market, the Court of First Instance found that the measure was intended to modify generally the allocation of the market between virgin aggregates, which were subject to it, and alternative products, which were exempt. Moreover, that levy is liable to lead to a genuine change in the competitive position of some of the applicant's members since

15 As regards standing to bring proceedings in the area of State aid, see also the judgment of 27 September 2006 in Case T-117/04 *Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission*, not yet published in the ECR, in which the Court of First Instance held that an association and its members had no standing to bring proceedings to contest a decision adopted on conclusion of the formal examination procedure provided for by Article 88(2) EC.

16 Judgment of 10 May 2006 in Case T-395/04 *Air One* v *Commission*, not yet published in the ECR.

17 Judgment of 13 September 2006 in Case T-210/02 *British Aggregates* v *Commission* (under appeal, Case C-487/06 P), not yet published in the ECR.

they were in direct competition with the producers of exempted materials, which had become competitive as a result of the introduction of the environmental tax at issue. As the measure was likely substantially to affect the competitive situation of certain members of the applicants, its action was admissible.

(c) *Direct concern*

In order for an applicant to be considered to be directly concerned within the meaning of the fourth paragraph of Article 230 EC, two conditions must be met. First, the measure at issue must directly affect the legal situation of the person concerned. Second, that measure must leave no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules [18]. The second condition is satisfied where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt [19].

Applying those principles in *Boyle and Others* v *Commission*, the Court of First Instance held that a decision rejecting a request to increase the objectives of the Multiannual guidance programme for the Irish fishing fleet ('MAGP IV') directly concerned the owners of the vessels in question. In the contested decision, the Commission, as the only authority with competence in the matter, ruled definitively on the eligibility for an increase in capacity of certain particular vessels by reference to the conditions of the application of the applicable legislation. In finding that the applicants' vessels were not eligible, the contested decision had the direct and definitive effect of precluding them from the possibility of benefiting from a measure of Community law. The national authorities had no discretion as regards their obligation to implement that decision. In that regard the Court of First Instance dismissed the argument that Ireland might in theory decide to grant the additional capacity to the applicants' vessels up to the ceiling set under MAGP IV. According to the Court of First Instance, a national decision of that nature would not mean that the Commission's decision ceased to apply automatically as it would remain extraneous, legally speaking, to the application in Community law of the contested decision. The effect of that national decision would be to alter the applicants' situation once again, and that second alteration of their legal situation would be the consequence of the national decision alone and not of the implementation of the contested decision.

B. Competition rules applicable to undertakings

In 2006 the Court of First Instance delivered 26 judgments in proceedings concerning the substantive rules prohibiting anti-competitive agreements, of which no fewer than 18

[18] Judgment of the Court of Justice in Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and judgment of the Court of First Instance in Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4039, paragraph 24.

[19] *Dreyfus* v *Commission*, paragraph 44.

related to cartels [20]. Apart from cartels, the Court of First Instance delivered four judgments relating to the application of Articles 81 EC and 82 EC [21], and also four judgments determining substantive questions relating to the control of concentrations [22].

1. The concept of undertaking within the meaning of the competition rules

In *SELEX Sistemi Integrati* v *Commission*, the Court of First Instance determined an action challenging the Commission's rejection of a complaint by SELEX Sistemi Integrati SpA, a company active in the air traffic management systems sector. That complaint had concerned infringements of the competition rules by Eurocontrol in carrying out its standardisation tasks in relation to air traffic management ('ATM') equipment and systems. The complaint had been rejected on the ground that Eurocontrol's relevant activities were not of an economic nature.

In that judgment, the Court of First Instance referred, first of all, to the consistent case-law of the Court of Justice according to which the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. In that regard, any activity consisting in offering goods and services on a given market is an economic activity [23]. Then, applying those principles, the Court of First Instance held that Eurocontrol's standardisation activities, in relation to both the production and the adoption of standards, and also the acquisition of prototypes of ATM systems and the management of intellectual property rights by Eurocontrol in this field cannot be described

20 Judgments of 15 March 2006 in Case T-26/02 *Daiichi Pharmaceutical* v *Commission*, and Case T-15/02 *BASF* v *Commission*, not yet published in the ECR; of 5 April 2006 in Case T-279/02 *Degussa* v *Commission* (on appeal, Case C-266/06 P), not yet published in the ECR; of 30 May 2006 in Case T-198/03 *Bank Austria Creditanstalt* v *Commission*, not yet published in the ECR; of 7 June 2006 in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, not yet published in the ECR; of 4 July 2006 in Case T-304/02 *Hoek Loos* v *Commission* not yet published in the ECR; of 27 September 2006 in Case T-153/04 *Ferriere Nord* v *Commission*, Case T-59/02 *Archer Daniels Midland* v *Commission* (citric acid), and Case T-329/01 *Archer Daniels Midland* v *Commission* (sodium gluconate), Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission*, Case T-43/02 *Jungbunzlauer* v *Commission*, T-330/01 *Akzo Nobel* v *Commission*, Case T-322/01 *Roquette Frères* v *Commission* and also Case T-314/01 *Avebe* v *Commission*, not yet published in the ECR; of 16 November 2006 in Case T-120/04 *Peróxidos Orgánicos* v *Commission*, not yet published in the ECR; of 5 December 2006 in Joined Cases T-217/03 and T-245/03 *Westfalen Gassen Nederland* v *Commission*, not yet published in the ECR; of 13 December 2006 in Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission*, not yet published in the ECR; and of 14 December 2006 in Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission*, not yet published in the ECR.

21 Judgments of 2 May 2006 in Case T-328/03 *O_2 (Germany)* v *Commission*, not yet published in the ECR; of 27 September 2006 in Case T-168/01 *GlaxoSmithKline Services* v *Commission* and Case T-204/03 *Haladjian Frères* v *Commission*, neither yet published in the ECR; and also of 12 December 2006 in Case T-155/04 *SELEX Sistemi Integrati* v *Commission*, not yet published in the ECR.

22 Judgments of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* (on appeal, Case C-202/06 P); of 4 July 2006 in Case T-177/04 *easyJet* v *Commission*; of 13 July 2006 in Case T-464/04 *Impala* v *Commission* (on appeal, Case C-413/06 P); and of 14 July 2006 in Case T-417/05 *Endesa* v *Commission*, none yet published in the ECR.

23 Judgments of the Court of Justice of 23 April 1991 in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and of 12 September 2000 in Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

as economic activities. On the other hand, it found that the consultancy activities which Eurocontrol carried out for the national administrations in the form of assistance in drafting the contract documents for calls for tender or the selection of undertakings participating in those calls for tender constitute an offer of services on a market on which private undertakings specialised in this area could also very well offer their services. The fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as an economic activity. Furthermore, while the fact that that activity of providing assistance is not remunerated and is carried out in pursuit of a public service objective is an indication that it is a non-economic activity, that does not preclude in all situations the existence of an economic activity. The Court of First Instance concluded that the Commission had therefore been wrong to take the view that the activities in issue could not be described as economic activities.

2. Application of competition law in the agricultural sector

By decision of 2 April 2003 [24], the Commission imposed fines amounting to EUR 16.68 million on the main French federations in the beef sector. Those federations, which represent farmers and slaughterers, were penalised for having taken part in a cartel contrary to Community law. The agreement in question continued orally beyond the end of November 2001, the date on which it was supposed to come to an end, in spite of a warning from the Commission, which drew the federations' attention to the unlawful nature of the agreement. The agreement had been concluded in an economic context marked by the serious crisis in the beef sector from 2000, following the discovery of new cases of bovine spongiform encephalopathy, known as 'mad cow disease'.

In *FNCBV and Others* v *Commission*, on an action against that decision, the Court of First Instance, after rejecting, in particular, the applicants' arguments that the Commission had infringed their freedom to form associations, considered that the agreement in question could not benefit from the exemption provided for in Regulation No 26 in favour of certain activities connected with the production and marketing of agricultural products [25]. Whereas such an exemption is applicable only where an agreement favours all the objectives of Article 33 EC and is also necessary for the attainment of those objectives, that was not the position in this case: although the agreement might well be considered to be necessary for the objective of ensuring a fair standard of living for the agricultural community, it could, on the other hand, be prejudicial to ensuring that supplies reach consumers at reasonable prices and did not concern the stabilisation of the markets.

24 Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef) (OJ L 209, 19.8.2003, p. 12).

25 Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959–62, p. 129).

3. Points raised on the scope of Article 81 EC

(a) *Application of Article 81(1) EC*

Article 81(1) EC provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are to be prohibited as incompatible with the common market.

Anti-competitive object or effect of agreements

The judgment in *GlaxoSmithKline Services* v *Commission*, which concerns the connections between the restriction of parallel trade and the protection of competition, contains some significant developments concerning the concept of an agreement having as its object the restriction of competition in the European pharmaceutical sector. Glaxo Wellcome, a Spanish subsidiary of the GlaxoSmithKline group, one of the main world producers of pharmaceutical products, had adopted new general sales conditions concerning wholesalers of pharmaceutical products, under which its medicines were to be sold to Spanish wholesalers at prices differentiated according to the national health insurance scheme which would reimburse them and the marketing of those medicines, depending on whether they would be marketed in Spain or in another Member State. In practice, medicines intended to be reimbursed in other Member States of the Community were to be sold at a higher price than those intended to be reimbursed in Spain, where the administration sets maximum prices. GlaxoSmithKline notified those general sales conditions to the Commission and, in response to a number of complaints, the Commission found that the sales conditions in question had the object and the effect of restricting competition.

In its judgment, the Court of First Instance nonetheless considered that an agreement intended to limit parallel trade must not be considered by its nature, that is to say, independently of any competitive analysis, to have as its object the restriction of competition. In effect, while it is accepted that parallel trade must be given a certain protection, it is not as such but insofar as it favours the development of trade, on the one hand, and the strengthening of competition, on the other hand, that is to say, in this second respect, insofar as it gives final consumers the advantages of effective competition in terms of supply or price. Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies insofar as the agreement may be presumed to deprive final consumers of those advantages. In this, in view of the legal and economic context in which GlaxoSmithKline's General Sales Conditions were applied, it could not be presumed that those conditions deprive the final consumers of medicines of such advantages. First, the wholesalers, whose function is to ensure that the retail trade receives supplies with the benefit of competition between producers, are economic agents operating at an intermediate stage of the value chain and may keep the advantage in terms of price which parallel trade may entail, in which case that advantage will not be passed on to the final consumers. Second, as the prices of the medicines concerned are to a large extent shielded

from the free play of supply and demand owing to the applicable regulations and are set or controlled by the public authorities, it cannot be taken for granted at the outset that parallel trade tends to reduce those prices and thus to increase the welfare of final consumers. In those circumstances, according to the Court of First Instance, it cannot be inferred merely from a reading of the terms of the agreement, even in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement.

The Court of First Instance therefore examined the effects of the agreement on competition and rejected certain of the analyses carried out by the Commission on that point in its decision, but nonetheless found that the agreement constituted an obstacle to the pressure which in its absence would have existed on the unit price of the medicines in question, to the detriment of the final consumer, taken to mean both the patient and the national sickness insurance scheme acting on behalf of claimants.

Degree of proof required

In *Dresdner Bank and Others* v *Commission* the Court of First Instance observed that, in the light of the principle of the presumption of innocence, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Commission must therefore show precise and consistent evidence in order to establish the existence of the infringement. Nonetheless, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement: it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement. In the present case, the five applicant banks maintained that no agreement had been concluded by them, at a meeting held on 15 October 1997, on the level and structure of exchange commissions on currencies constituting subdivisions of the euro during the transitional stage between the introduction of the scriptural euro and the introduction of the fiduciary euro. The Court of First Instance examined both the evidence relating to the context of the meeting of 15 October 1997 and the direct evidence concerning that meeting and held that the evidence did not have sufficient force for it to be considered, without any reasonable doubt remaining on that point, that the banks present concluded the impugned agreement.

Obligations borne by the Commission when it examines an agreement

In *O_2 (Germany)* v *Commission*, the Court of First Instance recalled that, in order to assess whether an agreement is compatible with the common market in the light of the prohibition laid down in Article 81(1) EC, it is necessary to examine the economic and legal context in which the agreement was concluded, its object, its effects, and its impact on intra-Community trade, taking into account in particular the economic context in which the undertakings operate, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functions. Furthermore, in a case such as this, where it is accepted that the agreement does not have an anti-competitive object, the effects of the agreement should be considered and in order for the agreement to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted

or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.

Such an approach is not, according to the Court of First Instance, tantamount to applying a 'rule of reason' to Article 81(1) EC, which would consist in carrying out an assessment of the pro- and anti-competitive effects of the agreement, but to taking account of the impact of the agreement on existing and potential competition and also the competitive situation in the absence of the agreement, those two factors being intrinsically linked. The Court of First Instance further stated that such an examination is particularly necessary in respect of markets undergoing liberalisation or emerging markets, as in the case of the third-generation mobile communications market here at issue, where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry.

In this case, the Court of First Instance considered that the contested decision was affected by a number of errors of analysis. First, it contained no objective discussion of what the competition situation would have been in the absence of the agreement, which distorted the assessment of the actual and potential effects of the agreement on competition. In order to be able to make a proper assessment of the extent to which the agreement was necessary for O_2 (Germany) to penetrate the third-generation mobile communications market, the Commission ought to have examined more closely whether, in the absence of the agreement, the applicant would have been present on that market. Second, the decision did not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming had restrictive effects on competition, but was confined, in this respect, to a *petitio principii* and to broad and general statements.

(b) *Application of Article 81(3) EC*

Article 81(3) EC provides that the provisions of Article 81(1) EC may be declared inapplicable to, in particular, any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford to such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In *GlaxoSmithKline Services* v *Commission*, to which reference has already been made, the applicant put forward, in particular, evidence intended to establish that parallel trade would lead to a loss in efficiency by reducing the applicant's capacity to innovate. It thus contended that the agreement in issue, by affecting parallel trade and improving the applicant's margins, would enable the applicant to increase its capacity for innovation. The Commission's examination of certain relevant evidence put forward by the applicant could not be accepted as sufficient to support the conclusions which the Commission had

reached. The Commission could not neglect to consider whether the agreement in issue could enable the applicant's capacity for innovation to be reinstated and could thus give rise to a gain in efficiency for interbrand competition insofar as in the medicines sector the effect of parallel trade on competition is ambiguous. In effect, the gain in efficiency to which the agreement is likely to give rise for interbrand competition, the role of which is limited by the applicable pharmaceutical regulatory framework, must be compared with the loss in efficiency to which the agreement is likely to give rise for interbrand competition. The Court of First Instance therefore annulled the Commission's decision on that point.

4. Points raised on the scope of Article 82 EC

In 2006 the Court of First Instance adjudicated on the conditions of Article 82 EC in only two judgments, both relating to the rejection of a complaint.

First, in *SELEX Sistemi Integrati* v *Commission*, to which reference has already been made in connection with the concept of 'undertaking', the Court of First Instance found that the applicant had not shown in its complaint that Eurocontrol's conduct, in the context of its activity of advising national administrations, satisfied the criteria for the application of Article 82 EC, and, moreover, no competitive relationship appeared to exist between Eurocontrol and the applicant or any other undertaking active in the sector concerned.

Second, in *Haladjian Frères* v *Commission*, the company Haladjian Frères had lodged a complaint with the Commission, claiming in particular that there had been a number of infringements of Article 82 EC which were alleged to result from the introduction of a system for the marketing of replacement parts by the United States company Caterpillar. The Court of First Instance held that the applicant's arguments did not call in question the appraisals of the elements of fact and of law carried out by the Commission and that the Commission had been correct to reject the applicant's complaint. The complaints alleging the imposition of unfair prices, the limiting of markets or the application of dissimilar conditions to equivalent transactions were rejected, regard being had in particular to the fact that the system in issue did not prohibit in fact or in law competition in the form of parts imported at prices lower than the European prices.

5. Procedure for penalising anti-competitive practices

(a) *Legitimate interest of third parties and conduct of the proceedings for the application of the competition rules*

In *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission* and also in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that a final customer purchasing goods or services, such as a political party which is a customer for Austrian banking services, has a legitimate interest which entitles it to access to the statement of objections. A final customer which shows that it has suffered harm or might suffer harm to his economic interests owing to a restriction of competition has a legitimate interest in lodging an application or a complaint in order to obtain a finding by

the Commission that there has been an infringement of Articles 81 EC and 82 EC. As the ultimate purpose of the rules which seek to ensure that competition is not distorted within the internal market is to increase the welfare of the consumer, the recognition that such customers have a legitimate interest in obtaining a finding by the Commission that there has been an infringement of Articles 81 EC and 82 EC contributes to the attainment of the objectives of competition law. In *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance further stated, first, that a concerned party may be admitted as complainant and receive the statement of objections at any stage of the administrative procedure and, second, that the right to receive the statement of objections cannot be restricted on the basis of mere suspicion that that document may be misused.

(b) *Right not to incriminate oneself*

The judgment in *Archer Daniels Midland* v *Commission (citric acid)* provided the Court of First Instance with the opportunity to define the conditions in which the Commission may use against an undertaking admissions obtained by an authority in a non-Member country without breaching the right not to contribute to one's own incrimination as recognised by Community law [26]. Bayer, one of the members of the cartel on which sanctions were imposed, had communicated to the Commission a report of the United States Federal Bureau of Investigation (FBI) concerning the hearing of a representative of the applicant before the United States authorities, which was subsequently used in support of the statement of objections and then of the decision penalising the undertaking. In its action against that decision, the applicant contended that it had not had the opportunity to rely on its right not to incriminate itself, as recognised by Community law. In its judgment, however, the Court of First Instance held that there is no provision prohibiting the Commission from relying, as evidence, on a document drawn up in a procedure other than that conducted by the Commission itself. Nonetheless, it held that where the Commission relies on a statement made in a different context from that of the procedure before it, and where that statement potentially contains information which the undertaking concerned would have been entitled to refuse to supply, the Commission is required to ensure that the undertakings concerned enjoys procedural rights equivalent to those conferred by Community law. Thus, the Commission is required to examine of its own motion whether, at first sight, there are serious doubts as to observance of the procedural rights of the parties concerned in the proceedings during which they supplied such statements. In the absence of such doubts, the procedural rights of the parties concerned must be considered to have been sufficiently guaranteed if, in the statement of objections, the Commission indicated clearly, annexing the documents concerned to the statement of objections where necessary, that it intended to rely on the statements in issue. In this case, none of those principles had been breached by the Commission, notably because it had annexed the report in issue to the statement of objections and Archer Daniels Midland had not criticised the use of that document.

[26] On the right not to incriminate oneself, see the judgment of the Court of Justice of 18 October 1989 in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

(c) *Public nature of measures and definition of professional secrecy*

In *Bank Austria Creditanstalt* v *Commission*, the applicant claimed, in substance, that it was unlawful to publish a decision imposing fines, as the publication of that decision was not in this case obligatory. In its judgment, however, the Court of First Instance rejected that plea, holding that the power of the institutions to make acts which they adopt public is the rule. Nonetheless, there are exceptions to that principle, insofar as Community law, notably by means of the provisions that guarantee compliance with professional secrecy, opposes the publication of those acts or of certain information which they contain. The Court of First Instance then defined the concept of professional secrecy, holding that, in order that information be of the kind to be covered by that protection, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires that the legitimate interests opposing disclosure of the information be weighed against the public interest that the activities of the Community institutions take place as openly as possible. In fact, the Community legislature has balanced the public interest in the transparency of Community action against interests liable to militate against such transparency in various acts of secondary legislation, inter alia in Regulations (EC) No 45/2001 and (EC) No 1049/2001 [27]. The Court of First Instance therefore established a relationship of correspondence between the concept of professional secrecy and those two regulations. Insofar as such provisions of secondary legislation prohibit the disclosure of information to the public or exclude public access to documents containing it, that information must be considered to be covered by the obligation of professional secrecy. Conversely, to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the obligation of professional secrecy.

6. Fines

In 2006, the Court of First Instance again delivered a large number of judgments dealing with the lawfulness of the appropriateness of fines imposed for infringement of Article 81 EC. The most significant developments this year concerned the principle that penalties must be in accordance with the law, the application of the Guidelines on the method of setting fines, the ceiling of 10 % of turnover and the Court of First Instance's unlimited jurisdiction in relation to fines.

[27] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1) and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

(a) *Principle that penalties must be provided for by law*

In *Jungbunzlauer* v *Commission* and *Degussa* v *Commission*, the Court of First Instance rejected an objection of illegality in respect of Article 15(2) of Regulation No 17 [28], whereby it was alleged that that provision was incompatible with the principle that penalties must be provided for by law. According to the applicants, which had been parties to the cartels covering the markets for citric acid and methionine, that provision unlawfully confers on the Commission the discretion to decide on the appropriateness and the amount of the fine.

The Court of First Instance nonetheless considered that the principle that penalties must be provided for by law, as interpreted by the case-law of the European Convention on Human Rights, on the assumption that Article 7(1) of the European Convention on Human Rights is applicable to fines imposed in respect of infringements of the competition rules, requires only that the terms of the provisions whereby penalties are imposed be sufficiently precise for the consequences that may arise from an infringement of those provisions to be foreseeable with absolute certainty. Furthermore, although the Commission's discretion in applying penalties is wide, it is not absolute, since it is limited by the ceiling of 10 % of turnover, by the appraisal of the gravity and the duration of infringements, by the principles of equal treatment and proportionality, by its previous administrative practice seen in the light of the principle of equal treatment and, last, by the self-restraint which the Commission has imposed on itself by adopting the Leniency Notice and the Guidelines on the method of setting fines. The Court of First Instance therefore rejected the objection of illegality raised.

(b) *Guidelines*

Although the Commission adopted new Guidelines on the method of setting fines on 1 September 2006, the judgments delivered, and, moreover, the newly lodged cases, in 2006 concerned only the Guidelines adopted in 1998 [29].

From a general point of view, it is now accepted that the Guidelines bind the Commission. However, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that the fact that the Commission had thus bound itself was not incompatible with its retention of a substantial discretion. The adoption of the Guidelines thus did not render irrelevant the previous case-law according to which the Commission has a discretion which allows it to take into consideration, or not to do so, certain elements when it fixes the amount of the fines which it proposes to impose, depending in particular on the circumstances of the case. Where the Commission has departed from the method set out

[28] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959–62, p. 87).

[29] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3). Those guidelines have now been replaced by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 5.9.2003, p. 2). The new guidelines are to apply in cases where a statement of objections is notified after 1 September 2006.

in the Guidelines, it is for the Court of First Instance to ascertain whether that departure is justified in law and whether the reasons for such departure have been stated to the requisite legal standard. However, the Court of First Instance also made clear that the Commission's discretion and the limits which it has placed on it are without prejudice to the exercise by the Community judicature of its unlimited jurisdiction.

Extending, in substance, the same principles to the particular case of attenuating circumstances, the Court of First Instance stated that, in the absence of any binding indication in the Guidelines as regards the attenuating circumstances that might be taken into account, it must be considered that the Commission has retained a certain discretion to make a global assessment of the size of any reduction in the amount of fines to reflect attenuating circumstances.

During 2006 the Court of First Instance also continued to shed further light on certain provisions of the Guidelines, for example on the concept of 'actual impact', in *Archer Daniels Midland (sodium gluconate)* and *Archer Daniels Midland (citric acid)*, on the aggravating circumstance associated with the role of leader, in *BASF* v *Commission* and *Archer Daniels Midland* v *Commission (citric acid)*, and also on the attenuating circumstance associated with termination of the infringement as soon as the Commission intervenes, in *Archer Daniels Midlands* v *Commission (citric acid)* and *Archer Daniels Midland* v *Commission (sodium gluconate)*.

(c) *10 % ceiling*

Regulation No 17 provided, as Article 23(2) of Regulation (EC) No 1/2003 now provides, that for each undertaking and association of undertakings participating in an infringement of Article 81 EC or Article 82 EC, the fine is not to exceed 10 % of its total turnover in the preceding business year.

In *FNCBV and Others* v *Commission*, to which reference has already been made in connection with the application of the competition rules to the agricultural sector, the contested decision was vitiated by a failure to state reasons owing to the fact that the Commission had not dedicated any passage in the decision to compliance with the 10 % limit and the turnover to be taken into account when calculating that limit. Nonetheless, the Court of First Instance further held that the possibility for the Commission to rely not on the federations' own turnover but on that of their members is not limited to the circumstance, already identified in the case-law, in which an association may render its members liable. It must be possible to apprehend the real economic power of an association. Other specific circumstances may therefore justify the turnovers of the members of an association being taken into account, such as, for example, that fact that the infringement committed by an association relates to the activities of its members and that the practices are implemented by the association directly for the benefit of its members and in cooperation with them, the association having no autonomous objective interests by reference to its members' interests. That was indeed the situation in this case. The penalised federations' essential task was to defend their members and to represent their members' interests. The agreement in issue concerned those members' activities and had been concluded directly for their benefit. Last, it had been implemented, in particular, by the conclusion of local agreements

between departmental federations and local agricultural trade associations which were members of the national federations penalised in this case.

(d) *Exercise of unlimited jurisdiction*

Under Article 17 of Regulation No 17, and also under Article 31 of Regulation (EC) No 1/2003, the Court of First Instance, when hearing an action against a decision imposing a fine, is to have unlimited jurisdiction, within the meaning of Article 229 EC, which allows it to reduce or increase fines imposed by the Commission. During 2006 the Court of First Instance exercised that jurisdiction on numerous occasions and in various ways.

Thus, in the vitamins cartels cases, the Court of First Instance exercised its unlimited jurisdiction solely in order to draw the consequences from defects affecting the legality of the decision. In *BASF* v *Commission*, the Court of First Instance considered that the finding of the illegality of the Commission's assessment in regard to the aggravating circumstances which had led to an increase in the fine by reference to its basic amount gave the opportunity for the Community judicature to exercise its unlimited jurisdiction in order to confirm, cancel or amend that increase in the fine in the light of all the relevant circumstances of the case. More generally, having been invited by BASF to exercise its unlimited jurisdiction independently of a finding of illegality, the Court of First Instance held that the review which it exercises in respect of a Commission decision finding an infringement of the competition rules and imposing fines is confined to a review of the legality of that decision, it being possible for the Court to exercise its unlimited jurisdiction only where it has made a finding of illegality affecting the decision, and in respect of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for the determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.

Conversely, in *Hoek Loos* v *Commission*, which concerned the industrial gases cartel, the Court of First Instance considered the applicant's argument from the aspect of the request to cancel or reduce its fine. In that context, it observed that the assessment of the proportionate nature of the fine by reference to the gravity and duration of the infringement fell within the unlimited jurisdiction conferred on the Court of First Instance [30]. Having finally rejected all of those complaints, the Court of First Instance concluded that 'since the final amount of the fine imposed on the applicant appear[ed] to be wholly appropriate, no points raised by the latter justif[ied] any reduction thereof'. Likewise, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that, in addition to reviewing the legality of a decision, it must appraise whether it is appropriate to exercise its unlimited jurisdiction in regard to the fine imposed on the various members of the cartel. Thus, on a number of occasions, the Court of First Instance, after rejecting a plea put forward by the applicants, has exercised its unlimited jurisdiction and confirmed that the fine imposed was appropriate.

[30] See also *Westfalen Gassen Nederland* v *Commission* and Case T-329/01 *Archer Daniels Midland* v *Commission*, paragraph 380.

Last, in *FNCBV and Others* v *Commission*, to which reference has already been made, the Court of First Instance noted that, by way of attenuating circumstances, the Commission had taken into account, first, the fact that this was the first time that it had imposed sanctions on a cartel concluded exclusively between trade federations, relating to a basic agricultural product and involving two links in the production chain, and, second, the specific economic context of the case, marked in particular by the serious crisis in the beef sector from 2000, following the discovery of new cases of mad cow disease. For that reason, the Commission had applied a reduction of 60 % to the amount of the fines imposed on the applicants. Exercising its unlimited jurisdiction, the Court of First Instance considered that that reduction, although considerable, did not take sufficient account of the exceptional nature of the circumstances of the case. Accordingly, it considered that it was appropriate to establish at 70 % the percentage of reduction of the fines to be granted to the applicants and therefore to apply an additional reduction of 10 % to the amount of the fine.

It will also be noted that in two cases the Court of First Instance considered the possibility of increasing the fine imposed by the Commission.

Thus, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Commission requested the Court of First Instance to increase the amount of the fine imposed on the applicant, on the ground that it had disputed for the first time, before the Court of First Instance, the existence of a part of the impugned agreements. The Court of First Instance held that it is important in that regard to know whether the applicant's conduct obliged the Commission, against any expectation that it might reasonably found on the applicant's cooperation during the administrative procedure, to prepare and present a defence before the Court of First Instance specifically aimed at the contestation of the unlawful acts which it had been entitled to consider were no longer called in question by the applicant. The Court of First Instance concluded in this case that an increase in the penalty was not appropriate owing to the relative unimportance of the points disputed both for the structure of the contested decision and for the preparation of the Commission's defence, which was scarcely rendered more difficult by the applicant's conduct.

In *Roquette Frères* v *Commission*, on the other hand, the Court of First Instance increased the contested fine after reducing it. It found, initially, that the fine imposed on the applicant did not correspond with its position on the sodium gluconate market. Even though no criticism could be levelled against the Commission, since it had calculated the amount of the fine on the basis of unclear and equivocal information originating with the applicant, the Court of First Instance nonetheless decided to correct that defect in the decision and therefore to reduce the fine. It then increased the fine by EUR 5 000 to take account of the fact that the applicant, which was aware that the Commission might be confused, had communicated its turnover incorrectly following a request for information. As Regulation No 17 provides that the Commission may impose a fine of between EUR 100 and EUR 5 000 if the undertaking supplies incorrect information in response to a request for information, the Court of First Instance decided to take the applicant's serious negligence into account and to increase the fine by the maximum amount provided for in that provision.

Last, the Court of First Instance commented in that judgment on the manner in which it may exercise its unlimited jurisdiction: under that power, the Court of First Instance may

take into consideration additional information which was not mentioned in the contested decision when assessing the amount of the fine in the light of the complaint raised by the applicant, an assessment which was confirmed in *Raiffeisen Zentralbank Österreich and Others* v *Commission*. However, the Court of First Instance made clear in *Roquette Frères* v *Commission* that, in the light of the principle of legal certainty, that possibility must in principle be limited to taking into account items of information preceding the contested decision and of which the Commission might have been aware at the time of adopting its decision. A different approach would lead the Court of First Instance to substitute itself for the administration in order to assess a question which the Commission has not yet been called upon to examine, which would be tantamount to interfering with the system of the allocation of functions and the institutional balance between the judiciary and the administration.

7. Points raised in connection with the control of concentrations

Three judgments concerning the application of Regulation (EEC) No 4064/89, now replaced by Regulation (EC) No 139/2004, were delivered during 2006, as was a fourth judgment concerning the application of the latter regulation [31].

(a) *The Commission's competence in relation to the control of concentrations*

Regulations (EEC) No 4064/89 and (EC) No 139/2004 apply solely to concentrations having a Community dimension, which is defined, inter alia, by reference to a number of turnover thresholds applicable to the parties to the transaction. Two judgments delivered in 2006 define the Commission's competence in that regard.

In the first place, *Endesa* v *Commission* set out the criteria on which the turnovers of two parties to a concentration must be calculated in order to ascertain whether the concentration has a Community dimension. In that case, Gas Natural, a Spanish company active in the energy sector, had notified the Spanish competition authority of its intention to launch a public bid to acquire the whole of the capital of Endesa, a Spanish company essentially active in the electricity sector. Taking the view that, according to Regulation (EEC) No 139/2004, the transaction had a Community dimension and therefore ought to have been notified to the Commission, Endesa had lodged a complaint with the Commission, which had nonetheless rejected it. Endesa challenged that decision before the Court of First Instance, maintaining, in particular, that the Commission had assessed its turnover incorrectly.

In its judgment, the Court of First Instance found, in particular, that the Merger Regulation does not expressly require that the Commission satisfy itself, of its own motion, that every concentration which is not notified to it is not of a Community dimension. However, on a

[31] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13), repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

complaint by an undertaking which considers that a concentration which has not been notified to the Commission is of a Community dimension, the Commission is required to take a decision on the principle of its competence. Consequently, it is in principle for the complainant to demonstrate the merits of its complaint, whereas it is for the Commission to carry out a diligent and impartial examination of the complaints submitted it and to provide a properly reasoned response to the arguments put forward by the complainant. Furthermore, the Commission cannot be required to satisfy itself of its own motion in each case that the audited accounts submitted to it faithfully reflect reality and to examine all the adjustments envisageable. It is only when its attention is drawn to specific problems that the Commission must examine those adjustments.

In this case, Endesa maintained, in particular, that the Commission's examination of its turnover ought to have been based on international accounting standards and not on the Spanish standards then in force. However, the Court of First Instance interpreted Regulation (EC) No 139/2004 as meaning that it requires that the Commission refer to the undertakings' accounts for the previous year, drawn up and audited in accordance with the applicable legislation. In this case, the rules applicable in Spain for accounts for the 2004 business year were the generally accepted national accounting principles and not international accounting principles, which, in accordance with the regulation on the application of international accounting standards, did not become applicable until the 2005 business year.

The Court of First Instance also rejected Endesa's arguments that the Commission ought to have carried out two adjustments, one relating to Endesa's distribution operations and the other in respect of gas exchanges. In that context, the Court of First Instance stated, in particular, that for reasons of legal security, the turnover to take into consideration for the purpose of determining the authority competent to examine a concentration must, in principle, be defined on the basis of the published annual accounts. It is only exceptionally, where particular circumstances so warrant, that it is necessary to make certain adjustments intended to better reflect the economic reality of the undertakings concerned. The Court of First Instance therefore finally dismissed Endesa's action.

In the second place, the judgment in *Cementbouw Handel & Industrie* v *Commission* is particularly informative as regards the Commission's assessment of the unitary nature of a concentration brought about by means of a number of legal transactions. The action was brought against a decision whereby the Commission had retroactively authorised the acquisition of the Netherlands joint undertaking CVK by the German group Haniel and by Cementbouw Handel & Industrie (both of which dealt in construction materials) following the commitment given by those two undertakings to put an end to their pre-existing joint undertaking. The case involved a complex transaction, based essentially on two separate legal transactions, one of which had been notified to and then approved by the Netherlands competition authority. In its action, Cementbouw Handel & Industrie contested, in particular, the possibility that the Commission could characterise a number of separate transactions as a single transaction.

The Court of First Instance, however, adopted a purposive interpretation of the concept of concentration, which must correspond to the economic logic followed by the parties. Thus, it held that a such a transaction, within the meaning of Regulation (EEC) No 4064/89,

may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions — the result of which is to confer on one or more undertakings direct or indirect economic control of the activity of one or more other undertakings — are interdependent, insofar as none of them would be carried out without the others. In this case, the Commission had not erred in taking the view that the transactions in issue were indeed interdependent.

Nor does the Commission misconstrue the allocation of powers between national and Community competition authorities effected by Regulation (EEC) No 4064/89 where it examines, together with a subsequent transaction from which it cannot be dissociated, another transaction which, taken on its own, does not fulfil the 'Community dimension' criteria and was approved by a national competition authority. In fact, in that case it is artificial to consider that the approved transaction is economically autonomous.

(b) *Commitments given in order to amend the initial proposed concentration*

Article 8(2) of Regulation (EEC) No 4064/89 provides, in substance, that the Commission is to approve a proposed concentration, following modification of the initial proposal by the undertakings concerned if necessary, provided that it is compatible with the common market. The Commission may therefore attach to its decision conditions intended to ensure that the undertakings comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible.

In *Cementbouw* v *Commission*, to which reference has just been made, the Court of First Instance examined the delicate interconnection between the principle of proportionality and the parties' freedom to propose commitments to resolve in full the competition problems identified by the Commission. During the procedure involving the examination of the concentration in question, the parties, including the applicant, had proposed in turn draft commitments, which had been refused by the Commission, and then final commitments, which had been accepted.

The Court of First Instance concluded, first, that the draft commitments did not enable the competition problem identified by the Commission to be resolved in full. As to the final commitments, since they went beyond the objective of restoring the competitive situation existing before the transaction, the Court of First Instance held that the Commission was required to take formal notice and to declare the transaction compatible with the common market. It could not therefore either declare the concentration incompatible with the common market or adopt a decision declaring the concentration compatible with the common market and imposing conditions aimed at strictly restoring the competitive situation existing before the concentration other than those proposed by the parties. In particular, Regulation (EEC) No 4064/89 makes no provision for the Commission to make its declaration that a concentration is compatible with the common market subject to conditions which it has imposed unilaterally, independently of the commitments given by the notifying parties. The applicant could not therefore plead failure by the Commission to respect the principle of proportionality, nor could it claim in this case to have proposed those commitments under the arbitrary constraint of the Commission.

(c) *Assessment of the creation of a collective dominant position*

According to the case-law [32], three conditions are necessary in order for a collective dominant position which significantly impedes effective competition in the common market or a substantial part thereof to be capable of being created following a concentration. First, the market must be sufficiently transparent, so that the undertakings which coordinate their conduct may be in a position to monitor to a sufficient extent whether the rules of coordination are being observed. Second, there must be a form of deterrent mechanism in the event of deviating conduct. Third, the reactions of undertakings which do not participate in the coordination, such as present or future competitors, and also the reactions of customers, must not be capable of jeopardising the results expected from coordination.

The judgment in *Impala* v *Commission* defines the obligations borne by the Commission, as regards the risk of the creation of a collective dominant position, when it declares a concentration compatible with the common market. In that case, Bertelsmann and Sony, two companies active in the media, had notified the Commission of a proposed concentration intended to combine their worldwide recorded music businesses under the name Sony BMG. The Commission had initially informed the parties that it had reached the provisional conclusion that the concentration was incompatible with the common market, since, in particular, it would reinforce a collective dominant position on the recorded music market. After hearing the parties, however, the Commission authorised the transaction. Impala, an international association of independent music production companies, then requested the Court of First Instance to annul that decision.

In its judgment, the Court of First Instance, relying on the case-law deriving from *Airtours* v *Commission*, recalled that, in the context of Regulation (EEC) No 4064/89, as regards the risk that a collective dominant position maybe created, the Commission is required to base its assessment on a prospective analysis of the reference market, which calls for a delicate prognosis as regards the probable development of the market and of the conditions of competition. Conversely, the finding not of a risk of a collective dominant position but of the existence of a collective dominant position is supported by a concrete analysis of the situation existing at the time of adoption of the decision. Accordingly, although the three conditions identified by the Court of First Instance in *Airtours* v *Commission* are indeed also necessary for the assessment of the existence of a collective dominant position, they may be established indirectly on the basis of a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position. In particular, close alignment of prices over a long period, especially if they are above the prices normally applied in a competitive situation, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, which may be presumed in such circumstances. Nonetheless, since the applicant had in this case relied solely on the conditions defined in *Airtours* v *Commission*, the Court of First Instance confined itself to ascertaining that those conditions had been observed.

[32] Judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 62.

In this case, as regards the reinforcement of a pre-existing collective dominant position on the recorded music market, the Court of First Instance found that, according to the decision, the absence of a collective dominant position on that market may be inferred from the heterogeneity of the relevant product, from the lack of market transparency and from the absence of retaliation between the five largest companies operating on the market. The Court of First Instance held, however, that the argument that the markets for recorded music are not sufficiently transparent to permit a collective dominant position was not supported by a statement of reasons of the requisite legal standard and was vitiated by a manifest error of assessment in that the elements on which it was based were incomplete and did not include all the relevant data that ought to have been taken into consideration by the Commission and were not capable of supporting the conclusions drawn from them. The Court of First Instance further observed that the Commission had relied on the absence of proof that retaliatory measures had been used in the past when, according to the case-law, the mere existence of effective deterrent mechanisms is sufficient. If the companies conform to the common policy, there is no need to resort to the exercise of sanctions. In that context, the Court of First Instance stated that credible and effective deterrent measures did appear to exist in the present case, in particular the possibility of sanctioning a deviating major record company by excluding it from compilations. Furthermore, even on the assumption that the appropriate test in that regard consists in whether such retaliatory means had been used in the past, the examination carried out by the Commission was insufficient.

In addition, as regards the possible creation after the merger of a collective dominant position on the markets for recorded music, the Court of First Instance criticised the Commission for having carried out an extremely brief examination and for having presented in the decision only a few superficial and formal observations on that point. The Court of First Instance further considered that the Commission could not, without making an error, rely on the fact that there was no market transparency and no evidence that retaliatory measures had been used in the past to conclude that the concentration was not likely to give rise to the creation of a collective dominant position. In effect, examination of the creation of a collective dominant position rests on a prospective assessment which ought to have induced the Commission not to rely solely on the existing situation. The Court of First Instance therefore annulled the contested decision.

C. State aid

1. Basic rules

Article 87(1) EC provides that, save as otherwise provided in the Treaty, any aid granted through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is to be incompatible with the common market.

As the Court of First Instance confirmed in *Le Levant 001 and Others* v *Commission* [33], classification as aid, in the sense of State aid incompatible with the common market,

[33] Judgment of 22 February 2006 in Case T-34/02 *Le Levant 001 and Others* v *Commission*, not yet published in the ECR.

requires that all the conditions set out in that provision are fulfilled, while the Commission's obligation to state reasons must also be satisfied in respect of each of those conditions. The aid in question in that case related to tax deduction measures for certain overseas investments, introduced initially by the French Law of 11 July 1986, in respect of which the Commission had raised no objections under Article 87 EC. The operation in question consisted in ensuring the financing and operation of the cruise vessel *Le Levant*, for a period of approximately seven years, by investors who were natural persons, through one-person limited liability undertakings (EURLs), constituted solely for that purpose and brought together in a maritime co-ownership.

In its judgment, the Court of First Instance found that the contested decision did not explain how the aid in question met three of the four conditions laid down in Article 87(1) EC. First, as regards the effect on trade between Member States, the Court of First Instance observed that the Commission did not state how the aid in question might affect such trade, when the vessel was to be used at Saint-Pierre-et-Miquelon, which is not part of the territory of the Community. Second, as regards the advantage conferred on the beneficiary of the aid and the selective nature of that advantage, the Court of First Instance considered that the contested decision did not explain how the private investors had been placed in an advantageous position by the aid in question. Third, as regards the effects of the aid on competition, the Court observed that there was nothing in the contested decision explaining how, and on what market competition was affected or likely to be affected by the aid. On the ground, in particular, of that defective reasoning, the Court of First Instance annulled the Commission's decision.

It may be noted in that regard that the Court of First Instance also found insufficient or lack of reasoning leading to the annulment in whole or in part of the contested decision in *Ufex and Others* v *Commission*, *Lucchini* v *Commission* and *Italie and Wam* v *Commission* [34].

Although the Court of First Instance adjudicated in 2006 on many other points of the State aid system, mention will be made only of *British Aggregates* v *Commission*, in which the Court of First Instance examined the capacity of the national measure to confer a selective advantage to the exclusive benefit of certain undertakings or of certain business sectors [35].

In that case, the United Kingdom of Great Britain and Northern Ireland had introduced an environmental levy which is, in principle, a burden on the commercial exploitation of virgin aggregates, that is to say granular material on first extraction used in the construction sector, and intended in principle to maximise the use of recycled aggregates and other alternative materials to virgin aggregate, to promote its efficient use and to ensure the

34 Judgments of 7 June 2006 in Case T-613/97 *Ufex and Others* v *Commission*, not yet published in the ECR; of 19 September 2006 in Case T-166/01 *Lucchini* v *Commission*, not yet published in the ECR; and of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and Wam* v *Commission*, on appeal, not published in the ECR.

35 Judgment of 13 September 2006 in Case T-210/02 *British Aggregates* v *Commission* (on appeal, Case C-487/06 P). Also concerned with the question of the selectivity of aid is the judgment of 26 January 2006 in Case T-92/02 *Stadtwerke Schwäbisch Hall and Others* v *Commission* (on appeal, Case C-176/06 P), not published in the ECR.

internalisation of environmental costs of the extraction of the aggregates to which the tax applied, in accordance with the 'polluter-pays' principle. Faced with such a tax measure, the Court of First Instance found it necessary to determine whether the Commission had been right to consider that the differentiation introduced by the measure in question had arisen from the nature or the general system of the overall scheme which applied. Where it was apparent that a differentiation was based on objectives other than those pursued by the overall scheme, the measure in question would, in principle, be regarded as satisfying the condition of selectivity laid down under Article 87(1) EC.

According to the Court of First Instance, an environmental levy is an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base. It seeks to tax certain goods or services so that the environmental costs may be included in their price and/or so that recycled products are rendered more competitive and producers and consumers are oriented towards activities which better respect the environment. It is open to the Member States, which are competent in matters relating to environmental policy, to introduce sectoral environmental levies in order to attain certain environmental objectives. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or services, and cannot be seen as part of an overall system of taxation which applies to all similar activities which have a comparable impact on the environment, does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage. In this case, the Commission had not exceeded the limits on its power of assessment in taking the view that scope of the levy in question could be justified by the pursuit of the desired environmental objectives and, accordingly, that the levy did not constitute State aid.

2. Procedural matters

(a) *Right of interested parties to submit observations*

In two judgments delivered in 2006, the Court of First Instance emphasised the detail which a decision to initiate the procedure must contain, in order to allow third parties to submit their comments.

First, in *Le Levant 001 and Others* v *Commission*, to which reference has already been made, the Court of First Instance defined the Commission's obligations under Article 88(2) EC as regards respect for the procedural guarantees of persons concerned by a decision which declares a national measure incompatible with Article 87(1) EC. The Court of First Instance held that the identification of the beneficiary of the aid is necessarily one of the 'relevant issues of fact and law' which must be contained in the decision to open the procedure if that is possible at that stage of the procedure, since it is on the basis of that identification that the Commission will be able to adopt the recovery decision. In this case, the Court of First Instance found that the decision to open the procedure had made no reference to the investors as potential beneficiaries of the alleged aid but, on the contrary, had given the

impression that that beneficiary was the manager of the co-ownership, which was referred to as the operator and ultimate owner of the vessel. The Court of First Instance concluded that, by not giving the private investors the opportunity to submit comments, the Commission had infringed Article 88(2) EC and also the general principle of Community law which requires that any person against whom an adverse decision may be taken must be given the opportunity to make his views known effectively regarding the facts held against him by the Commission as a basis for the disputed decision.

Second, in *Kuwait Petroleum (Nederland)* v *Commission* [36], the Court of First Instance stated that the Commission cannot be required to present a complete analysis on the aid in question in its notice of intention to initiate that procedure. It must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments. In this case, the fundamental concept, namely that the oil companies could be the actual recipients of the aid in the light of the exclusive supply agreements, had been contained in the notice, so that the Commission, with the means it had at its disposal, had correctly performed its task of putting the interested parties on formal notice duly to submit their comments during the formal investigation procedure on the aid.

(b) *Reliance before the Court of First Instance on facts not mentioned during the administrative phase before the Commission*

In two judgments delivered in 2006, the Court of First Instance supplemented its case-law limiting the right for an applicant to rely before the Court on evidence not available to the Commission during the administrative phase [37].

Thus, in *Schmitz-Gotha Fahrzeugwerke* v *Commission* [38], the Court of First Instance held that as the applicant had not participated in the administrative procedure, it could not rely on elements of which the Commission had not been aware during that phase, although the applicant had been mentioned by name as being the beneficiary of the aid in question and although the Commission had requested the German authorities and any interested parties to produce evidence of certain elements. Once the Commission has given the interested parties the opportunity to submit their comments, it cannot be criticised for having failed to take account of any elements of fact which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it.

36 Judgment of 31 May 2006 in Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission*, not yet published in the ECR.

37 Judgments of 14 January 2004 in Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 50 and 51, and of 11 May 2005 in Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and Zemag* v *Commission*, paragraphs 67 to 70, not yet published in the ECR.

38 Judgment of 6 April 2006 in Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission,* not yet published in the ECR.

The Court of First Instance likewise found in *Ter Lembeek* v *Commission* [39] that, notwithstanding that the applicant had been perfectly aware of the initiation of a formal investigation procedure and of the need and importance for it to supply certain information, it had decided not to participate in that procedure and had not even claimed that the reasons given in the decision to initiate the formal investigation procedure were insufficient to allow it properly to exercise its rights. In those circumstances, the applicant could neither rely for the first time before the Court on information which had been unknown to the Commission at the time when it had adopted the contested decision nor rely on a plea supported only by information which had been unknown to the Commission when it had adopted the contested decision, such a plea being inadmissible.

(c) *Reasonable time*

In *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [40], the preliminary stage provided for in Article 88(3) EC had lasted almost 28 months. The Court of First Instance held that, as the reasonableness of the duration of an initial investigation procedure within the meaning of Article 88(3) EC must be determined in relation to the particular circumstances of each case, in the present case neither the volume of documents submitted to the Commission by the applicants nor the other circumstances of the case justified the duration of the initial investigation conducted by the Commission. However, in the absence of other circumstances the existence of which had not been established by the applicants, the mere adoption of a decision after the expiry of a reasonable period was not regarded by the Court of First Instance as in itself sufficient to render unlawful a decision taken by the Commission. The Court of First Instance therefore dismissed the action for annulment.

D. Community trade mark

In 2006 a great many decisions again concerned Regulation (EC) No 40/94 [41]. The 90 trade mark cases completed thus account for 20 % of the cases disposed of by the Court in 2006.

1. Absolute grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in two of the total of eight judgments which disposed of substantive issues in cases concerning absolute grounds for refusal of registration [42]. In 2006 the case-law dealt essentially with the absolute grounds for refusal

39 Judgment of 23 November 2006 in Case T-217/02 *Ter Lembeek* v *Commission*, not yet published in the ECR.

40 Judgment of 12 December 2006 in Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, not yet published in the ECR.

41 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

42 Judgments of 4 October 2006 in Case T-188/04 *Freixenet* v *OHIM (Shape of a frosted matt black bottle)* and Case T-190/04 *Freixenet* v *OHIM (Shape of a frosted white bottle)*, neither published in the ECR.

based on lack of any distinctive character of the sign and the fact that it is descriptive (Article 7(1)(b) and (c) of Regulation (EC) No 40/94). For example, the following were held to be descriptive or lacking any distinctive character: the shape of a plastic bottle for drinks, condiments and liquid foodstuffs; the WEISSE SEITEN sign, inter alia for certain data carriers and paper-based goods, and an oblong shape calling to mind a skein or a twist for certain food products [43].

2. Relative grounds for refusal of registration

There was once again a great deal of case-law in 2006 in relation to this point. Mention can for example be made of the clarifications to the relationship between distinctive character and reputation set out in the judgment in *Vitakraft-Werke Wührmann* v *OHIM — Johnson's Veterinary Products (VITACOAT)*, or the temporal assessment of the conflict between two marks in *MIP Metro* v *OHIM — Tesco Stores (METRO)* [44]. However, **only** the new developments in relation to the concept of a 'family of marks' and the scope of the protection conferred by genuine use of a mark will be discussed here.

(a) *Concept of a 'family of marks'*

In *Ponte Finanziaria* v *OHIM — Marine Enterprise Projects (BAINBRIDGE)*, the Court explained the relevance of the concept of a 'family of marks' for the assessment of the likelihood of confusion [45]. In that case the applicant submitted that the earlier trade marks, all characterised by the presence of the same word component, 'bridge', constituted a 'family of marks' or 'marks in a series'. In its view, such a circumstance was liable to give rise to an objective likelihood of confusion. For the Court, although the concept of 'marks in a series' is not referred to by Regulation (EC) No 40/94, the likelihood of confusion must nonetheless be assessed globally, taking into account all factors relevant in the circumstances. The Court added that the fact that an opposition to a Community trade mark application is based on several earlier marks and that those marks display characteristics which give grounds for regarding them as forming part of a single 'series' or 'family' constitutes such a relevant factor for the purpose of assessing whether there is a likelihood of confusion. That may be the case, inter alia, either when those marks reproduce in full a single distinctive element with the addition of a figurative or word element differentiating them from one another, or when they are characterised by the repetition of a single prefix or suffix taken from an original mark. In those circumstances, a likelihood of confusion may be created by the possibility of association between the trade mark applied for and the earlier marks

43 Judgments of 15 March 2006 in Case T-129/04 *Develey* v *OHIM (Shape of a plastic bottle)* (under appeal, Case C-238/06 P); of 16 March 2006 in Case T-322/03 *Telefon & Buch* v *OHIM — Herold Business Data (Weisse Seiten)*, neither yet published in the ECR; and of 31 May 2006 in Case T-15/05 *De Waele* v *OHIM (Shape of a sausage)*, not yet published in the ECR.

44 See, respectively, judgments of 12 July 2006 in Case T-277/04 *Vitakraft-Werke Wührmann* v *OHIM — Johnson's Veterinary Products (VITACOAT)* and of 13 September 2006 in Case T-191/04 *MIP Metro* v *OHIM — Tesco Stores (METRO)* (under appeal, Case C-493/06 P), neither yet published in the ECR.

45 Judgment of 23 February 2006 in Case T-194/03 *Ponte Finanziaria* v *OHIM — Marine Enterprise Projects (BAINBRIDGE)* (under appeal, Case C-234/06 P), not yet published in the ECR.

forming part of the series where the trade mark applied for displays such similarities to those marks as might lead the consumer to believe that it forms part of that same series and therefore that the goods covered by it have the same commercial origin as those covered by the earlier marks, or a related origin.

The Court however limited that solution to cases in which two conditions are cumulatively satisfied. First, the proprietor of a series of earlier registrations must furnish proof of use of all the marks belonging to the series or, at the very least, of a number of marks capable of constituting a 'series'. Second, in addition to its similarity to the marks belonging to the series, the trade mark applied for must also display characteristics capable of associating it with the series. The Court stated that that could not be the case where, for example, the element common to the earlier marks in a series is used in the trade mark applied for either in a different position from that in which it usually appears in the marks belonging to the series or with a different semantic content. In this instance the Court held that, at the very least, the first of those two conditions was not satisfied since the applicant had proved the presence on the market only of two earlier marks in the series relied on.

(b) *Scope of the protection conferred by genuine use of the trade mark*

Article 15(1) of Regulation (EC) No 40/94 states that if, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark is to be subject to the sanctions provided for in that regulation, unless there are proper reasons for non-use. Article 15(2) provides that use of the Community trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered also constitutes genuine use.

Furthermore, according to Article 43(2) of Regulation (EC) No 40/94, if the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition must furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. Article 43(2) also provides that if the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it is, for the purposes of the examination of the opposition, to be deemed to be registered in respect only of that part of the goods or services. Article 43(3) of Regulation (EC) No 40/94 extends the application of those principles to the case of earlier national trade marks.

In *Ponte Finanziaria* v *OHIM*, the Court ruled on an argument of the applicant based on the concept of a 'defensive mark'. That concept makes it possible, in Italian law, to bring about an exception to the rule that a trade mark must be revoked for non-use where the proprietor of the unused trade mark is, at the same time, the proprietor of another, similar trade mark

or several other, similar trade marks still in force, at least one of which is used to identify the same goods or services.

The Court held, however, that there was no concept of a 'defensive trade mark' in the system of protection of the Community trade mark, which imposes, as an essential condition for the recognition of the rights attached to marks, actual use of a sign in trade in connection with the goods or services in question. The Court stated in this regard that defensive registrations did not fall within the 'proper reasons' for non-use referred to in Article 43(2) of Regulation (EC) No 40/94. That concept refers to the existence of obstacles to use of the trade mark or to situations in which its commercial exploitation proves, in the light of all the relevant circumstances of the case, to be excessively onerous. That could for example be the case where national rules impose restrictions on the marketing of the goods covered by the trade mark. Conversely, that is not the case in respect of a national provision which allows the registration as trade marks of signs not intended to be used in trade on account of their purely defensive function in relation to another sign which is being commercially exploited.

Nor is the concept of a 'defensive mark' covered by the possibility, for the proprietor of a mark, to demonstrate genuine use by furnishing proof of use in trade in a form slightly different from that in which registration was effected. According to the Court, the purpose of Article 15(2)(a) of Regulation (EC) No 40/94 is to allow the proprietor of a mark, on the occasion of its commercial exploitation, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned. The material scope of that provision must be regarded as limited to situations in which the sign actually used by the proprietor of a trade mark constitutes the form in which that same mark is commercially exploited. However, that provision does not allow the proprietor of a registered trade mark to avoid his obligation to use that mark by relying in his favour on the use of a similar mark covered by a separate registration.

3. Formal and procedural issues

It follows from the principle of continuity in terms of functions as between the adjudicating bodies of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) that, within the scope of application of Article 74(1) of Regulation (EC) No 40/94 (which restricts, in proceedings relating to relative grounds for refusal of registration, the examination to the facts, evidence and arguments provided by the parties and the relief sought), the Board of Appeal is required to base its decision on all the matters of fact and of law which the party concerned introduced either in the proceedings before the body which heard the application at first instance or in the appeal, subject only to Article 74(2) of Regulation (EC) No 40/94 (the fact that OHIM disregards facts or evidence which are not submitted in due time by the parties concerned) [46].

[46] Judgment in Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 32.

The Court continued in 2006 to define the scope of its case-law by clarifying the purpose of the examination which the Board of Appeal must carry out, both from a factual and a legal point of view.

First, as regards the factual examination of the Board of Appeal, in *La Baronia de Turis* v *OHIM — Baron Philippe de Rothschild (LA BARONNIE)* and *Caviar Anzali* v *OHIM — Novomarket (Asetra)*, the Court held that the Board of Appeal has the same powers as the department which was responsible for the decision appealed and that its examination concerns the dispute as a whole as it stands on the date of its ruling [47]. Consequently, the review exercised by the Boards of Appeal is not limited to the lawfulness of the contested decision, but, by virtue of the devolutive effect of the appeal proceedings, it requires a reappraisal of the dispute as a whole, since the Boards of Appeal must re-examine in full the initial application and take into account evidence produced in due time before them. The Court therefore held that, although Article 74(2) of Regulation (EC) No 40/94 gives OHIM the option to disregard evidence which is not submitted 'in due time' by the parties, that concept must be interpreted in proceedings before a Board of Appeal as referring to the time limit applicable to the lodging of an appeal and to the time limits granted in the course of those proceedings. Since this notion applies in each of the proceedings pending before OHIM, the expiry of the time limits granted by the department hearing the application at first instance for producing evidence therefore has no bearing on the question whether the evidence has been produced 'in due time' before the Board of Appeal. The Board of Appeal is therefore required to take into consideration the evidence produced before it, irrespective of whether or not it has been produced before the Opposition Division. In this instance, since the documents in question had been annexed to the statement before the Board of Appeal within the four-month time limit laid down in Article 59 of Regulation (EC) No 40/94, the production of those documents could not be regarded as late for the purposes of Article 74(2) of Regulation (EC) No 40/94.

The Court nonetheless held that it was necessary to examine the consequences that had to be derived from that error in law, since a procedural irregularity entails the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the contested decision might have been substantively different. In this instance, the Court, whilst observing that it was not for it to replace OHIM in assessing the matters at issue, held that it could not be ruled out that the evidence which the Board of Appeal wrongly refused to take into consideration might be such as to modify the substance of the contested decision. It therefore annulled the contested decision [48].

Second, as regards the legal examination which the Board of Appeal must conduct, the Court stated, in *DEF-TEC Defense Technology* v *OHIM — Defense Technology (FIRST DEFENSE AEROSOL PEPPER PROJECTOR)*, that that examination is not, in principle, determined

47 Judgments of 10 July 2006 in Case T-323/03 *La Baronia de Turis* v *OHIM — Baron Philippe de Rothschild (LA BARONNIE)* and of 11 July 2006 in Case T-252/04 *Caviar Anzali* v *OHIM — Novomarket (Asetra)*, neither yet published in the ECR.

48 See, for a substantially similar analysis, the judgment in *Torre Muga*.

exclusively by the grounds relied on by the party who has brought the appeal [49]. Accordingly, even if the party who brought the appeal has not raised a specific ground of appeal, the Board of Appeal is nonetheless bound to examine whether or not, in the light of all the relevant matters of fact and of law, the decision under appeal could be lawfully adopted. In the present case, the applicant contended before the Court that the decision of the Opposition Division was void because it does not have signatures. The Court held that although that plea was not put forward before the Board of Appeal, and assuming that an infringement of the formal rules applicable were proven, the Board of Appeal should have raised it of its own motion.

Also from a procedural point of view, the Court dealt again in 2006 with the question of the factors which could be relied on before it against a decision of the Board of Appeal.

In *Vitakraft-Werke Wührmann* v *OHIM*, the Court thus relied on its earlier case-law in holding that facts which are pleaded before it without having previously been brought before the departments of OHIM can affect the legality of a decision of the Board of Appeal only if OHIM should have taken them into account of its own motion. Since Article 74(1) of Regulation (EC) No 40/94 provides that, in proceedings relating to relative grounds for refusal of registration, OHIM is to be restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, it is not required to take into account of its own motion facts which have not been put forward by the parties. Therefore, such facts cannot affect the legality of a decision of the Board of Appeal.

By contrast, in *Armacell* v *OHIM — nmc (ARMAFOAM)*, the Court held that the fact that a party agreed in the proceedings before the Opposition Division that the goods covered by the marks in question might potentially be identical, then stated before the Board of Appeal that the question whether the goods were similar could be left undecided on account of the alleged differences between the conflicting signs, did not in any way divest OHIM of the power to adjudicate on whether the goods covered by those marks were similar or identical [50]. Consequently, such a fact does not deprive that party of the right to challenge before the Court, in the factual and legal context of the dispute before the Board of Appeal, the findings of that body on this point.

E. Access to documents

Only two judgments were delivered in 2006 in relation to a refusal of access to documents in the light of Regulation (EC) No 1049/2001 [51]. Those judgments nonetheless enabled the

49 Judgment of 6 September 2006 in Case T-6/05 *DEF-TEC Defense Technology* v *OHIM — Defense Technology* (*FIRST DEFENSE AEROSOL PEPPER PROJECTOR*), not yet published in the ECR.

50 Judgment of 10 October 2006 in Case T-172/05 *Armacell* v *OHIM — nmc (ARMAFOAM)*, not yet published in the ECR.

51 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43). Judgments of 6 July 2006 in Joined Cases T-391/03 and T-70/04 *Franchet and Byk*; and of 14 December 2006 in Case T-237/02 *Technische Glaswerke Ilmenau* v *Commission*, neither yet published in the ECR.

Court to define the scope of the exceptions based on the protection of the purpose of inspections and investigations and on the protection of court proceedings.

First, in *Technische Glaswerke Ilmenau* v *Commission*, which concerned a refusal of a request for access to documents relating to State aid proceedings, the Court held that the mere fact for the Commission to claim that access could compromise the necessary dialogue between the Commission, the Member State and the undertakings concerned in the context of investigations in progress did not demonstrate that there were special circumstances justifying not undertaking a concrete, individual examination of the documents to which access was requested.

Second, in the judgment in *Franchet and Byk* v *Commission*, the Court dealt with a refusal of access to various documents of OLAF and the internal audit service of the Commission. Those documents had been sent to the French and Luxembourg judicial authorities in the context of an investigation into alleged irregularities at Eurostat. The applicants' liability had been an issue in the context of that case.

Having observed that the exceptions to the principle of access to documents of the institutions must be construed and applied restrictively, the Court examined the Commission's application of those exceptions, more specifically those based on the protection of court proceedings and of the purpose of inspections, investigations and audits.

As regards the first exception, the Court held that, in the circumstances of this case, the Commission was not entitled to find that the various documents sent by OLAF had been drawn up solely for the purposes of court proceedings. The action taken by the national competent authorities or the institutions in response to the reports and information forwarded by OLAF is within their sole and entire responsibility and it is possible that a communication from OLAF to the national authorities or to an institution would not lead to the opening of judicial proceedings at national level or disciplinary or administrative proceedings at Community level. Compliance with national procedural rules is sufficiently safeguarded if the institution ensures that disclosure of the documents does not constitute an infringement of national law. Therefore, in the event of doubt, OLAF should have consulted the national court and should have refused access only if that court objected to disclosure of the documents.

As regards the second exception, based on the protection of the purpose of inspections, investigations and audits, the Court held that that provision applies only if disclosure of the documents in question may endanger the completion of the inspections, investigations or audits in question. That makes it necessary to ascertain whether, at the time of the adoption of the contested decisions, inspections and investigations were still in progress which could therefore have been jeopardised and whether these activities were carried out within a reasonable period. In this instance, the Commission made no error of law or of assessment in taking the view that, at the time of the adoption of the first contested decision, access to the documents sent to the French and Luxembourg authorities had to be refused on the ground that disclosure of these documents would undermine the protection of the purpose of inspections, investigations and audits. It is apparent however from certain communications from OLAF to the Commission, that OLAF made a decision

in abstracto without showing to the requisite legal standard that disclosure of these documents would actually prejudice the protection of the purpose of inspections, investigations and audits and that the exception invoked actually applied to all the information contained in those documents. The decision to refuse access was therefore annulled insofar as it concerned those documents.

Finally, mention should be made of the application, in *Kallianos* v *Commission*, of the principles deriving from Regulation (EC) No 1049/2001 in order to rule, in an action brought by an official against a decision withholding part of his remuneration, on a plea alleging inter alia a lack of transparency [52]. In that case, the applicant had requested access to the opinions of the Commission's legal service concerning his personal circumstances. Although the applicant had not lodged a request on the basis of Regulation (EC) No 1049/2001, it is in the light of the case-law concerning that legislation that it was held that the Commission had partially infringed the applicant's right of access to the file. The Court did not however annul the Commission's decision, since the refusal to disclose the legal opinions in question had not harmed the applicant's defence.

F. Common foreign and security policy (CFSP) — Combating terrorism

In 2006, the Court delivered three judgments concerning the fight against terrorism [53]. The first two supplement the principles laid down in *Yusuf and Al Barakaat International Foundation* v *Council and Commission* and in *Kadi* v *Council and Commission* [54], whilst the third judgment was given in an unprecedented legal context.

After the terrorist attacks of 11 September 2001, the Security Council of the United Nations adopted several resolutions calling on all the Member States of the United Nations (UN) to freeze the funds and other financial resources of the persons and entities associated with the Taliban, Osama bin Laden and the Al-Qaeda network. A Sanctions Committee was tasked by the Security Council with identifying the subjects and maintaining an updated list of them. Those resolutions were implemented in the Community by Council regulations ordering the freezing of the funds of the persons and entities concerned. Those persons and entities are included in a list which is regularly revised by the Commission on the basis of updates carried out by the Sanctions Committee. Derogations to the freezing of funds may be granted by States for humanitarian reasons, subject to the approval of the Sanctions Committee. Requests to be removed from the list can be submitted to the Sanctions Committee through the State in which the person concerned resides or of which he is a national, in accordance with a specific procedure.

52 Judgment of 17 May 2006 in Case T-93/04 *Kallianos* v *Commission* (under appeal, Case C-323/06 P), not yet published in the ECR.

53 Judgments of 12 July 2006 in Case T-253/02 *Ayadi* v *Council* (under appeal, Case C-403/06 P), not yet published in the ECR, and in Case T-49/04 *Hassan* v *Council and Commission* (under appeal, Case C-399/06 P), not published in the ECR; and judgment of 12 December 2006 in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council*, not yet published in the ECR.

54 Judgment in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* (under appeal, Case C-45/05 P) [2005] ECR II-3533, and Case T-315/01 *Kadi* v *Council and Commission* (under appeal, C-402/05 P) [2005] ECR II-3649.

Chafiq Ayadi, a Tunisian national residing in Dublin (Ireland), and Faraj Hassan, a Libyan national held in Brixton prison (United Kingdom), were included in the Community list in question. Those two persons requested that the Court annul that measure and, in the two resulting judgments, the Court clarified a number of points in relation to the procedure for freezing funds.

In *Ayadi* v *Council*, the Court, having observed that the freezing of funds provided for by the contested regulation does not infringe the universally recognised fundamental rights of the human person (*jus cogens*), acknowledged that such a measure is particularly drastic. However, it went on to state that the importance of the aims pursued by the legislation in question is such as to justify those negative consequences and that the freezing of the funds did not prevent the individuals concerned from leading satisfactory personal, family and social lives, given the circumstances. In particular, they were not prevented from carrying on professional activities even if, however, the receipt of income from those activities was regulated.

As regards, next, the procedure for removal from the list, the Court found that the Sanctions Committee's guidelines and the contested Council regulation provide for the right for an individual to submit his case to the Sanctions Committee for re-examination through the government of the country in which he resides or of which he is a national. That right is therefore also safeguarded by the Community legal order. In examining such a request, the Member States are bound to respect the fundamental rights of the persons involved given that the respect of those rights is not capable of preventing the proper performance of their obligations under the Charter of the United Nations. In particular, the Member States must ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities. The Member States are not entitled to refuse to initiate the review procedure solely because the individual concerned cannot provide precise and relevant information owing to his having been unable to ascertain the precise reasons for which he was included in the list in question, on account of the confidential nature of those reasons. Member States are also required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Sanctions Committee if that appears to be objectively justified in the light of the relevant information supplied.

Finally, it is open to the persons concerned to bring an action before the national courts against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination. The need to ensure the full effectiveness of Community law may lead a national court to refrain from applying, if need be, a national rule preventing the exercise of that right, such as a rule excluding from judicial review a refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals. In the present cases, the Court found that it was for Mr Ayadi and Mr Hassan to avail themselves of the opportunities for judicial remedy offered by national law if they intended to challenge the alleged failure of the Irish and British authorities to cooperate in good faith with them.

The judgment in *Organisation des Modjahedines du peuple d'Iran* v *Council* also concerned the fight against terrorism, but was given in another legal context which gives rise to the establishment of different principles. On 28 September 2001, the United Nations Security

Council adopted a resolution calling on all the Member States of the UN to combat terrorism and the financing thereof by all means, inter alia by freezing the funds of persons and entities who commit, or attempt to commit, terrorist acts. That resolution can be distinguished from those at issue in *Yusuf and Al Barakaat International Foundation* v *Council and Commission*, *Kadi* v *Council and Commission*, *Ayadi* v *Council* and *Hassan* v *Council and Commission* in that the identification of the persons whose funds must be frozen is left to the discretion of the States. That resolution was implemented in the Community inter alia by two common positions and a Council regulation, adopted on 27 December 2001, which order the freezing of funds of the persons and entities included in a list drawn up and regularly updated by the Council [55]. By a common position and by a decision of 2 May 2002, the Council updated the list of persons and entities concerned, including in it inter alia l'Organisation des Modjahedines du peuple d'Iran (OMPI) [56]. Since then, the Council has adopted a number of common positions and decisions updating the list in question, OMPI still appearing in that list. OMPI brought an action before the Court seeking the annulment of those common positions and decisions to the extent that those measures concerned it.

In its judgment, the Court found that certain rights and fundamental safeguards, in particular the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection are, as a matter of principle, fully applicable in the context of the adoption of a Community decision to freeze funds under the regulation in question. As regards the right to a fair hearing, the Court drew a distinction between this case and *Yusuf and Al Barakaat International Foundation* v *Council and Commission* and *Kadi* v *Council and Commission*. Since, in the system in question in the present case, the specific identification of the persons and entities whose funds must be frozen is left to the assessment of the members of the UN, that identification involves the exercise of the Community's own powers, entailing, by the Community, a discretionary appreciation from the point of view of UN law. In those circumstances, the Council is in principle fully bound to observe the right to a fair hearing of the parties concerned.

Determining next the extent of those rights and safeguards, and the restrictions to which they may be subject in the context of the adoption of a Community measure to freeze funds, the Court held, first, that the general principle of observance of the right to a fair hearing does not require that the parties concerned be heard by the Council when an initial decision freezing their funds is adopted, since that decision must be able to benefit from a surprise effect. By contrast, that principle requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence which gives rise to a decision to freeze funds be notified, insofar as reasonably possible, either concomitantly with or as soon as possible after the adoption of such a decision. Subject to the same reservations,

55 Common Position 2001/930/CFSP on combating terrorism (OJ L 344, 28.12.2001, p. 90), Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ L 344, 28.12.2001, p. 93), and Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344, 28.12.2001, p. 70).

56 Common Position 2002/340/CFSP updating Common Position 2001/931 (OJ L 116, 3.5.2002, p. 75), and Decision 2002/334/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927/EC (OJ L 116, 3.5.2002, p. 33).

the parties concerned must be afforded the opportunity effectively to make known their views before any subsequent decision to maintain a freeze of funds.

Similarly, subject also to the same reservation, the statement of reasons for an initial or subsequent decision to freeze funds must at least make actual and specific reference to the factors which give rise to the freezing of the funds, including in particular the specific information or material in the file indicating that a decision has been taken in respect of the parties concerned by a competent authority of a Member State. That statement must also indicate the reasons why the Council considers, in the exercise of its discretion, that the parties concerned must be the subject of such a measure.

Lastly, the right to effective judicial protection is ensured by the right the parties concerned have to bring an action before the Court against any decision ordering the freeze of their funds or the maintenance thereof. However, given the broad discretion that the Council enjoys in this area, the review carried out by the Court of the lawfulness of such decisions must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.

In applying those principles to this case, the Court observed that the relevant legislation does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent decisions to maintain the freeze of funds, with a view to having them removed from the list. Next, the Court found that at no time before the action was brought was the evidence which gave rise to the freezing of the funds notified to OMPI. Neither the initial decision to freeze its funds, nor the subsequent decisions to maintain that freeze mentioned even the specific information or material in the file which indicated that a decision justifying its inclusion in the disputed list had been taken by a competent national authority. The Court concluded from this that the Council had infringed its obligation to state reasons. Consequently the Court annulled the contested decision insofar as it concerned OMPI.

II. *Actions for damages*

A. Conditions for admissibility of an action for damages

The action for damages provided for in the second paragraph of Article 288 EC is an independent form of action which differs from an action for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution. The specific nature of the action for damages means that it must be declared inadmissible where it is actually aimed at securing withdrawal of a measure which has become definitive and would, if upheld, nullify the legal effects of that measure. According to the case-law, that is particularly the case where the action for damages seeks the payment of an amount precisely equal to the duty paid by the applicant pursuant to the measure which has become definitive [57].

[57] Judgment of the Court of Justice in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 30, 32 and 33.

In *Danzer* v *Council* [58], the applicants brought an action aimed at obtaining compensation for the loss allegedly suffered because of the penalties imposed on them by the competent Austrian authorities on the basis of national law implementing two directives coordinating company law provisions [59]. They did not allege any other loss which might be regarded as being distinct from the effects arising immediately and solely from the implementation of those decisions on penalties. The Court of First Instance concluded that the applicants were seeking to obtain, through their action for damages, the result that would be obtained if the decisions taken by the competent national authorities were annulled, and that their action was therefore admissible.

The Court of First Instance attached to that conclusion several riders concerning the system of Community remedies. It held that, even if the disputed provisions could be regarded as being directly behind those national penalties decisions and even if the applicants thus had an interest in having the disputed provisions declared unlawful, their action for damages was not the appropriate means to achieve that end. In the system of legal remedies provided for by the Treaty, the appropriate legal remedy would have been to request, from the national court before which the action to have those decisions annulled was brought, a reference for a preliminary ruling on the validity of the disputed provisions from the Court of Justice. The Court of First Instance found it to be entirely irrelevant that the national courts seised had rejected their requests for a reference to be made. The Court stated, without prejudice to the possible liability of the Member State concerned [60], that the case-law of the Court of Justice does not recognise an absolute obligation to refer a question for a preliminary ruling [61]. The Court of First Instance held that it was not for it to assess, in the context of an action for damages, the appropriateness of the refusal of the Austrian courts to refer a question for a preliminary ruling on the validity of the disputed provisions of those directives. In the view of the Court of First Instance, to allow the action for damages as admissible would enable the applicants to circumvent both the rejection of their applications for annulment of the national decisions imposing penalties by the national courts, which alone are competent to do so, and the refusal by those courts to grant their request for a reference to the Court of Justice for a preliminary ruling, which would undermine the very principle of judicial cooperation underlying the preliminary reference procedure.

58 Judgment of 21 June 2006 in Case T-47/02 *Danzer* v *Council*, not yet published in the ECR.

59 First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article [48 EC], with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition, 1968 (I), p. 41); Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g) EC] on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

60 Judgment of the Court of Justice in Case C-224/01 *Köbler* [2003] ECR I-10239.

61 Judgments of the Court of Justice in Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 21, and in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 14.

B. Admissibility of claims seeking an injunction

In *Galileo* v *Commission* [62], the Court of First Instance ruled on the admissibility of claims seeking the cessation of alleged unlawful conduct by the Commission in an action for damages. In this case, the applicants were the proprietors of several Community trade marks containing the sign Galileo who contested the use by the Commission of the word in connection with the Community project relating to a global satellite radio navigation system and asked the Court of First Instance, inter alia, to prohibit the Commission from using the term. The Commission pleaded the inadmissibility of that claim contending that the EC Treaty did not confer such a power on the Community courts even in actions for damages.

The Court of First Instance nonetheless held that the Community courts have the power under the second paragraph of Article 288 EC and Article 235 EC to impose on the Community any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something. In relation to trade marks, Directive 89/104/EEC [63] approximates laws so that the proprietor of a mark is entitled 'to prevent all third parties' from using it. The Court of First Instance concluded that the uniform protection of the proprietor of a trade mark falls within the general principles common to the laws of the Member States, so that the Community cannot, on principle, be excluded from a corresponding procedural measure on the part of the Community courts, particularly as the Community institutions are obliged to comply with the entire body of Community law, which includes secondary law.

C. Causal link

The non-contractual liability of the Community, whether for unlawful conduct, or in the absence of such conduct, depends on the existence of a causal connection between the operative event and the damage caused [64]. In its judgments in *Abad Pérez and Others* v *Council and Commission* and *É.R. and Others* v *Council and Commission* [65], the Court of First Instance defined the notion of a causal link in actions brought respectively by Spanish cattle breeders, by indirect victims and by the next of kin of five people who died in France,

62 Judgment of 10 May 2006 in Case T-279/03 *Galileo International Technology and Others* v *Commission* (under appeal, Case C-325/06 P), not yet published in the ECR.

63 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1).

64 See, inter alia, as regards liability for unlawful conduct, the judgment of the Court of Justice in Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and, as regards liability in the absence of such conduct, the judgment of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* (under appeal, Case C-120/06 P), paragraph 160, not yet published in the ECR.

65 Judgments of 13 December 2006 in Case T-304/01 *Abad Pérez and Others* v *Council and Commission* and in Case T-138/03 *É.R. and Others* v *Council and Commission*, not yet published in the ECR.

who sought reparation of the harm allegedly suffered as a result of acts and omissions on the part of the Council and the Commission in relation to the spread in Europe of mad cow disease and new variant Creutzfeldt-Jakob disease.

In that context, the Court of First Instance stated, inter alia, that in an area such as that of animal and human health, the existence of a causal link between conduct and damage must be established from an analysis of the conduct required of the institutions according to the state of scientific knowledge at the time. Furthermore, where the conduct which allegedly caused the damage in question consists in refraining from taking action, it is particularly necessary to be certain that such damage was actually caused by the inaction complained of and could not have been caused by different conduct from that alleged against the defendant institutions. Relying, inter alia, on those principles, the Court of First Instance held in the end that it had not been established that the allegedly unlawful actions and omissions on the part of the Council and the Commission could be regarded as a certain and direct cause of the damage alleged. It is thus not shown in the circumstances of this case that if those institutions had adopted — or had adopted earlier — the measures which the applicants criticise them for not adopting, the damage in question would not have occurred.

D. Liability for unlawful conduct

According to established case-law in relation to the liability of the Community for damage caused to an individual by a breach of Community law for which a Community institution or organ is responsible, a right to reparation is conferred where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties [66]. In two cases, the Court of First Instance defined what was to be understood by a rule of law which is intended to confer rights on individuals.

First, in its judgment in *Camós Grau* v *Commission*, the Court of First Instance held that the requirement of impartiality, to which the institutions are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with [67]. It must therefore be considered to be intended to confer rights on individuals. In this case, the breach of that rule by OLAF was serious and manifest. Moreover, there was a direct causal link between the breach of that obligation and the damage sustained by the applicant, which took the form of impairment of his honour and professional reputation and difficulties in his living conditions. The Court of First Instance therefore awarded Mr Camós Grau damages of EUR 10 000.

66 See, inter alia, the judgment in *Brasserie du pêcheur and Factortame*, paragraph 51.

67 Judgment of 6 April 2006 in Case T-309/03 *Camós Grau* v *Commission*, not yet published in the ECR.

Second, in its judgment in *Tillack* v *Commission*, the Court of First Instance recalled that it had already held that the principle of sound administration does not, in itself, confer rights upon individuals [68]. However, the Court of First Instance made clear that the same does not apply where that principle constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union [69].

E. Liability in the absence of unlawful conduct

As the Grand Chamber of the Court of First Instance ruled in 2005, the second paragraph of Article 288 EC allows individuals to obtain compensation in the Community court even in the absence of unlawful action by the perpetrator of the damage [70]. In 2006, the Court of First Instance had occasion to rule on this regime of liability several times. Two examples will illustrate this.

First, in *Galileo* v *Commission*, the Court of First Instance recalled that Community liability in the absence of unlawful conduct can only arise if there is unusual and special damage. Damage is held to be unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned. In his case it held that the damage caused by the use by a Community institution of a term to designate a project cannot be regarded as exceeding the limits of the risks inherent in the use by the applicants of the same term in respect of their trade marks, given that, by reason of the characteristics of the term chosen, inspired by the first name of the renowned Italian mathematician, physicist and astronomer, the proprietor of the trade mark voluntarily exposed himself to the risk that someone else could legally, that is to say without infringing their trade mark rights, give the same name to one of its projects.

Second, in its judgment in *Masdar* v *Commission* [71], the Court of First Instance recognised the possibility an applicant had of relying on unjust enrichment and *negotiorum gestio* to establish the non-contractual liability of the institutions, even in the absence of unlawful conduct on their part. This case arose over a sub-contract concluded by the applicant with a Commission contractor. As that company never paid the applicant, the applicant pursued the Commission which refused to pay it directly. The applicant then brought an action for damages claiming that the Commission had breached certain principles of non-contractual liability recognised in many of the Member States.

It cited inter alia the civil law action based on the principle of the prohibition of unjust enrichment (*de in rem verso*) and the civil law action based on *negotiorum gestio*.

68 Judgment of 4 October 2006 in Case T-193/04 *Tillack* v *Commission*, citing the judgment in Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 43.

69 Charter of fundamental rights of the European Union proclaimed on 7 December 2000 in Nice (OJ C 364, 4.12.2000, p. 1).

70 Judgment in *FIAMM and FIAMM Technologies* v *Council and Commission*, paragraphs 158 to 160.

71 Judgment of 16 November 2006 in Case T-333/03 *Masdar* v *Commission*, not yet published in the ECR.

After first observing that the liability of the Community could arise even in the absence of unlawful conduct, the Court of First Instance found that actions based on unjust enrichment or *negotiorum gestio* are designed, in specific civil law circumstances, to constitute a source of non-contractual obligation on the part of persons in the position of the enriched party or the principal involving, in general, either refund of sums paid in error or indemnification of the manager respectively. Accordingly, pleas regarding unjust enrichment and *negotiorum gestio* cannot be dismissed solely on the ground that the condition relating to the unlawfulness of the conduct of the institution is not satisfied. Further observing that the Community courts have already had the opportunity to apply certain principles in respect of recovery of undue payments, including in relation to unjust enrichment, the prohibition of which is a general principle of Community law, the Court of First Instance concluded that it had to be examined whether the conditions governing the action *de in rem verso* or the action based on *negotiorum gestio* are satisfied in the case at hand.

In that regard, the Court of First Instance outlined the detailed rules governing such actions according to the general principles common to the laws of the Member States, namely that those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation, and that it is generally possible to plead such actions only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed. It concluded that in this case the pleas of the applicant were unfounded.

III. *Applications for interim relief*

This year 25 applications for interim relief were made to the President of the Court of First Instance, which represents a slight increase compared with the number of applications (21) made the previous year. In 2006, the President decided 24 cases and twice ordered interim measures, in his orders in *Globe* v *Commission* and *Romana Tabacchi* v *Commission* [72].

The order in *Globe* v *Commission* forms part of a process begun by the order made in 2005 in *Deloitte* v *Commission* [73], but, unlike the decision in that case, it ordered interim measures. In this case the applicant was seeking suspension of the operation of a Commission decision rejecting its bid made in a tendering procedure for the supply of goods destined for certain countries in central Asia.

First, as regards to the condition relating to the existence of a prima facie case, the President held that one of the pleas put forward by the applicant gave rise to serious doubts about the lawfulness of the contract. Thus, when going on to examine whether the suspension of operation sought should be ordered as a matter of urgency, the President found that it was not for him to prejudice measures which might be taken by the Commission in order

72 Orders of the President of the Court of First Instance of 20 July 2006 in Case T-114/06 R *Globe* v *Commission* and of 13 July 2006 in Case T-11/06 R *Romana Tabacchi* v *Commission*, not yet published in the ECR.

73 Order of the President of the Court of First Instance of 20 September 2005 in Case T-195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II-3485.

to comply with any annulling decision. It added that nevertheless, the general principle of Community law which gives individuals a right to complete and effective judicial protection required that interim protection be available to individuals, if it was necessary for the full effectiveness of the definitive future decision, in order to ensure that there was no lacuna in the legal protection provided by the Community courts. It should therefore be examined whether, following an annulling judgment, the possibility of the Commission organising a new tendering procedure would allow such damage to be repaired and, if that is not the case, it should be assessed whether the applicant could be compensated accordingly.

In this case it was very unlikely that, following an annulling judgment, which would probably be delivered after the contract had been performed, a fresh tendering procedure would be organised by the Commission. The President therefore examined whether Globe could be compensated for the loss of a chance of being awarded the contract which was the subject of the Community tendering procedure. Although that chance was a very serious one, it was very difficult, or even impossible, to quantify it and, therefore, to assess as precisely as required the damage resulting from its loss. As the damage could not be quantified sufficiently precisely, it had to be considered to be very difficult to remedy. The President of the Court of First Instance also took the view that the damage was serious, having regard to the particular circumstances of the case and the characteristics of the market on which the applicant and the undertaking awarded the contract were operating.

Finally, having weighed up the interests involved, the President recalled that there were serious reasons for thinking that the Commission had acted unlawfully. Moreover, in view of the compensation which the party awarded the contract could claim from the Commission before the competent courts, the balance of interests could not be allowed to favour the party awarded the contract at the expense of the applicant. Further, the Commission could not plead any interest liable to affect that assessment, with the result that the President ordered the suspension of operation of the contract.

In the order in *Romana Tabacchi* v *Commission*, the President of the Court of First Instance ruled on an application made by an undertaking which sought a waiver of the obligation to set up a bank guarantee as a condition for the fine imposed on it not being recovered immediately. The President found that there were exceptional circumstances in the case which justified a partial suspension of the obligation on the applicant to set up a bank guarantee. The applicant succeeded in establishing not only the existence of a prima facie case but also that its precarious financial situation and that of its shareholders were the reasons for the refusal by certain banks to grant the guarantee required. Having weighed up the interests in the matter, the President also took the view that the financial interests of the Commission would not be better safeguarded by immediate enforcement of the decision because it was unlikely that it would be able to obtain the amount of the fine. In this case, too, interim measures were ordered.

Finally, mention should be made of the fact that, in *Endesa* v *Commission* [74], already cited in connection with the control of concentrations, the applicant made an application for

[74] Judgment of 14 July 2006 in Case T-417/05 *Endesa* v *Commission*, not yet published in the ECR.

interim measures, seeking, inter alia, an order suspending the operation of a Commission decision rejecting the complaint by Endesa [75]. In his order, the President recalled that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. Such damage must, in particular, be likely to be caused to the interests of the party seeking the interim measure. In that regard, Endesa relied, inter alia, on the risk that, without interim measures, Gas Natural might take control of it and proceed to dismantle it, and such damage would, according to the applicant, also affect its shareholders. According to the President, to establish urgency Endesa cannot rely on damage which would be caused to its shareholders, as they have a legal personality separate from Endesa's. As regards the damage alleged to have been caused to Endesa as such, the President of the Court of First Instance found that it was hypothetical, because it depended on the launching and success of the take-over bid, the success of which was not proven at that stage. Finally, the President took the view that, in any event, it had not been established that the remedies provided by Spanish law would not enable Endesa to avoid the serious and irreparable damage which it alleged. The President of the Court of First Instance therefore dismissed the application for interim relief.

75 Order of the President of the Court of First Instance of 1 February 2006 in Case T-417/05 R *Endesa* v *Commission*, not published in the ECR.

B — Composition of the Court of First Instance

(Order of precedence as at 6 October 2006)

First row, from left to right:

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

Second row, from left to right:

I. Wiszniewska-Białecka, Judge; E. Cremona, Judge; E. Martins Ribeiro, Judge; A. W. H. Meij, Judge; N. J. Forwood, Judge; F. Dehousse, Judge; O. Czúcz, Judge; I. Pelikánová, Judge.

Third row, from left to right:

N. Wahl, Judge; S. Papasavvas, Judge; K. Jürimäe, Judge; D. Šváby, Judge; V. Vadapalas, Judge; I. Labucka, Judge; E. Moavero Milanesi, Judge; M. Prek, Judge; E. Coulon, Registrar.

1. Members of the Court of First Instance

(in order of their entry into office)

Bo Vesterdorf

Born 1945; Lawyer-linguist at the Court of Justice; Administrator in the Ministry of Justice; Examining Magistrate; Legal Attaché in the Permanent Representation of Denmark to the European Communities; Temporary Judge at the Østre Landsret (Court of Appeal); Head of the Constitutional and Administrative Law Division in the Ministry of Justice; Director of a department in the Ministry of Justice; University Lecturer; Member of the Steering Committee on Human Rights at the Council of Europe (CDDH), and subsequently Member of the Bureau of the CDDH; in 2004 Member of the 'Ad-hoc committee on judicial training' at the Academy of European Law, Trier (Germany); Judge at the Court of First Instance since 25 September 1989; President of the Court of First Instance since 4 March 1998.

Rafael García-Valdecasas y Fernández

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

Virpi Tiili

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

Pernilla Lindh

Born 1945; Law graduate of the University of Lund; Judge (assessor), Court of Appeal, Stockholm; Legal adviser and Director-General at the Legal Service of the Trade Department at the Ministry of Foreign Affairs; Judge at the Court of First Instance from 18 January 1995 to 6 October 2006; Judge at the Court of Justice from 7 October 2006.

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 Cooperation of the Council of Europe (CDCJ); Representative *ad litem* before the Verfassungsgerichtshof (Constitutional Court) in proceedings for review of the constitutionality of federal laws; Coordinator responsible for the adaptation of Austrian federal law to Community law; Judge at the Court of First Instance since 18 January 1995.

John D. Cooke

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

Marc Jaeger

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

Jörg Pirrung

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

Paolo Mengozzi

Born 1938; Professor of International Law and holder of the Jean Monnet Chair of European Community law at the University of Bologna; Doctor *honoris causa* of the Carlos III University, Madrid; visiting professor at the Johns Hopkins University (Bologna Center), the Universities of St Johns (New York), Georgetown, Paris-II and Georgia (Athens) and the Institut universitaire international (Luxembourg); coordinator 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 research centre of The Hague Academy of International Law, devoted to the WTO; Judge at the Court of First Instance from 4 March 1998 to 3 May 2006; Advocate General at the Court of Justice since 4 May 2006.

Arjen W. H. Meij

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

Mihalis Vilaras

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

Nicholas James Forwood

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

Hubert Legal

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

Maria Eugénia Martins de Nazaré Ribeiro

Born 1956; studied in Lisbon, Brussels and Strasbourg; Member of the Bar in Portugal and Brussels; independent researcher at the Institut d'études européennes de l'université libre de Bruxelles (Institute of European Studies, Free University of Brussels); Legal Secretary to the Portuguese Judge at the Court of Justice, Mr Moitinho de Almeida (1986–2000), then to the President of the Court of First Instance, Mr Vesterdorf (2000–03); Judge at the Court of First Instance since 31 March 2003.

Franklin Dehousse

Born 1959; Law degree (University of Liege, 1981); research fellow (Fonds national de la recherche scientifique, 1985–89); legal adviser to the Chamber of Representatives (1981–90); Doctor in Laws (University of Strasbourg, 1990); Professor (Universities of Liege and Strasbourg; College of Europe; Institut royal supérieur de Défense; Université 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 (1995–99); Director of European Studies of the Royal Institute of International Relations (1998–2003); assesseur at the Council of State (2001–03); consultant to the European Commission (1990–2003); member of the Internet Observatory (2001–03); Judge at the Court of First Instance since 7 October 2003.

Ena Cremona

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

Ottó Czúcz

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

Irena Wiszniewska-Białecka

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

Irena Pelikánová

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

Daniel Šváby

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

Vilenas Vadapalas

Born 1954; Doctor of Laws (University of Moscow); Doctor habil. in law (University of Warsaw); Taught, at the University of Vilnius, international law (from 1981), human rights law (from 1991) and Community law (from 2000); Adviser to the Lithuanian Government on foreign relations (1991–93); Director General of the Government's European Law Department (1997–2004); Member of the coordinating group of the delegation negotiating accession to the European Union (2002–04); Professor of European law at the University of Vilnius, holder of the Jean Monnet Chair; President of the Lithuanian European Union Studies Association; Rapporteur of the parliamentary working group on constitutional reform relating to Lithuanian accession; Member of the International Commission of Jurists (April 2003); Judge at the Court of First Instance since 12 May 2004.

Küllike Jürimäe

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

Ingrida Labucka

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

Savvas S. Papasavvas

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

Verica Trstenjak

Born 1962; Judicial service examination (1987); Doctor of Laws of the University of Ljubljana (1995); professor (since 1996) of theory of law and State (jurisprudence) and of private law; researcher; postgraduate study at the University of Zurich, the Institute of Comparative Law of the University of Vienna, the Max Planck Institute for private international law in Hamburg, the Free University of Amsterdam; visiting professor at the Universities of Vienna and Freiburg (Germany) and at the Bucerius School of Law in Hamburg; head of the legal service (1994–96) and State Secretary in the Ministry of Science and Technology (1996–2000); Secretary-General of the Government (2000); Member of the Study Group on a European Civil Code since 2003; responsible for a Humboldt research project (Humboldt Foundation); publication of more than 100 legal articles and several books on European and private law; Prize of the Association of Slovene Lawyers 'Lawyer of the Year 2003'; Member of the editorial board of a number of legal periodicals; Secretary-General of the Association of Slovene Lawyers and member of a number of lawyers' associations, including the Gesellschaft für Rechtsvergleichung; Judge at the Court of First Instance from 7 July 2004 to 6 October 2006; Advocate General at the Court of Justice since 7 October 2006.

Enzo Moavero Milanesi

Born 1954; Doctor of Laws (La Sapienza University, Rome); studies in Community law (College of Europe, Bruges); Member of the Bar, legal practice (1978–83); lecturer in Community law at the Universities of La Sapienza (Rome) (1993–96), Luiss (Rome) (1993–96 and 2002–06) and Bocconi (Milan) (1996–2000); advisor on Community matters to the Italian Prime Minister (1993–95); official at the European Commission: legal adviser and subsequently Head of Cabinet of the Vice-President (1989–92), Head of Cabinet of the Commissioner responsible for the internal market (1995–99) and Competition (1999), Director, Directorate-General for Competition (2000–02), Deputy Secretary-General of the European Commission (2002–05), Director-General of the Bureau of European Policy Advisers (2006); Judge at the Court of First Instance since 3 May 2006.

Nils Wahl

Born 1961; Master of Laws, University of Stockholm (1987); Doctor of Laws, University of Stockholm (1995); Associate Professor (docent) and holder of the Jean Monet Chair of European Law (1995); Professor of European Law, University of Stockholm (2001); Assistant lawyer in private practice (1987–89); Managing Director for an educational foundation (1993–2004); Chairman of the Swedish Network for European Legal Research (Nätverket för europarättslig forskning) (2000–06); Member of the Council for Competition Law Matters (Rådet för konkurrensfrågor) (2001–06); Assigned judge at the Court of Appeal for Skåne and Blekinge (Hovrätten över Skåne och Blekinge) (2005); Judge at the Court of First Instance since 7 October 2006.

Miro Prek

Born 1965; Degree in law (1989); Called to the Bar (1994); performed various tasks and functions in the public administration, principally in the Government Office for Legislation (Under-Secretary of State and Deputy Director, Head of the Department for European and Comparative Law) and in the Office for European Affairs (Under-Secretary of State); Member of the negotiating team for the association agreement (1994–96) and for accession to the European Union (1998–2003), responsible for legal affairs; lawyer; responsible for projects regarding adaptation to European legislation, and to achieve European integration, principally in the western Balkans; Head of Division at the Court of Justice of the European Communities (2004–06); Judge at the Court of First Instance since 7 October 2006.

Emmanuel Coulon

Born 1968; law studies (Université Panthéon-Assas, Paris); management studies (Université Paris Dauphine); College of Europe (1992); entrance examination for the Centre regional de formation à la profession d'avocat (Regional training centre for the Bar), Paris; certificate of admission to the Brussels Bar; practice as an avocat in Brussels; successful candidate in an open competition for the Commission of the European Communities; Legal Secretary at the Court of First Instance of the European Communities (Chambers of the Presidents, Mr Saggio (1996–98) and Mr Vesterdorf (1998–2002)); Head of Chambers of the President of the Court of First Instance (2003–05); Registrar of the Court of First Instance since 6 October 2005.

2. Changes in the composition of the Court of First Instance in 2006

Formal sitting on 3 May 2006

By decision of the representatives of the Governments of the Member States of the European Communities of 6 April 2006, Mr Enzo Moavero Milanesi was appointed as a Judge of the Court of First Instance of the European Communities until 31 August 2007. Mr Enzo Moavero Milanesi replaced Mr Paolo Mengozzi.

Formal sitting on 6 October 2006

Upon the renewal of the mandates of certain members of the Court of Justice and the appointment of two Judges of the Court of First Instance as members of the Court of Justice, Mr Nils Wahl and Mr Miro Prek were appointed as Judges of the Court of First Instance of the European Communities, replacing Ms Pernilla Lindh and Ms Verica Trstenjak respectively.

3. Order of precedence

from 1 January to 3 May 2006

B. VESTERDORF, President of the Court of First Instance
M. JAEGER, President of Chamber
J. PIRRUNG, President of Chamber
M. VILARAS, President of Chamber
H. LEGAL, President of Chamber
R. GARCÍA-VALDECASAS, President of Chamber
V. TIILI, Judge
P. LINDH, Judge
J. AZIZI, Judge
J. D. COOKE, Judge
P. MENGOZZI, Judge
A. W. H. MEIJ, Judge
N. J. FORWOOD, Judge
M. E. MARTINS RIBEIRO, Judge
F. DEHOUSSE, Judge
E. CREMONA, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
D. ŠVÁBY, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
V. TRSTENJAK, Judge

E. COULON, Registrar

from 4 May to 30 September 2006

B. VESTERDORF, President of the Court of First Instance
M. JAEGER, President of Chamber
J. PIRRUNG, President of Chamber
M. VILARAS, President of Chamber
H. LEGAL, President of Chamber
R. GARCÍA-VALDECASAS, President of Chamber
V. TIILI, Judge
P. LINDH, Judge
J. AZIZI, Judge
J. D. COOKE, Judge
A. W. H. MEIJ, Judge
N. J. FORWOOD, Judge
M. E. MARTINS RIBEIRO, Judge
F. DEHOUSSE, Judge
E. CREMONA, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
D. ŠVÁBY, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
V. TRSTENJAK, Judge
E. MOAVERO MILANESI, Judge

E. COULON, Registrar

from 1 October to 5 October 2006

B. VESTERDORF, President of the Court of First Instance
M. JAEGER, President of Chamber
J. PIRRUNG, President of Chamber
M. VILARAS, President of Chamber
H. LEGAL, President of Chamber
J. D. COOKE, President of Chamber
R. GARCÍA-VALDECASAS, Judge
V. TIILI, Judge
P. LINDH, Judge
J. AZIZI, Judge
A. W. H. MEIJ, Judge
N. J. FORWOOD, Judge
M. E. MARTINS RIBEIRO, Judge
F. DEHOUSSE, Judge
E. CREMONA, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
D. ŠVÁBY, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
V. TRSTENJAK, Judge
E. MOAVERO MILANESI, Judge

E. COULON, Registrar

from 6 October to 31 December 2006

B. VESTERDORF, President of the Court of First Instance
M. JAEGER, President of Chamber
J. PIRRUNG, President of Chamber
M. VILARAS, President of Chamber
H. LEGAL, President of Chamber
J. D. COOKE, President of Chamber
R. GARCÍA-VALDECASAS, Judge
V. TIILI, Judge
J. AZIZI, Judge
A. W. H. MEIJ, Judge
N. J. FORWOOD, Judge
M. E. MARTINS RIBEIRO, Judge
F. DEHOUSSE, Judge
E. CREMONA, Judge
O. CZÚCZ, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
I. PELIKÁNOVÁ, Judge
D. ŠVÁBY, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
E. MOAVERO MILANESI, Judge
N. WAHL, Judge
M. PREK, Judge

E. COULON, Registrar

4. Former Members of the Court of First Instance

José Luis da Cruz Vilaça (1989–95), President from 1989 to 1995
Donal Patrick Michael Barrington (1989–96)
Antonio Saggio (1989–98), President from 1995 to 1998
David Alexander Ogilvy Edward (1989–92)
Heinrich Kirschner (1989–97)
Christos Yeraris (1989–92)
Romain Alphonse Schintgen (1989–96)
Cornelis Paulus Briët (1989–98)
Jacques Biancarelli (1989–95)
Koen Lenaerts (1989–2003)
Christopher William Bellamy (1992–99)
Andreas Kalogeropoulos (1992–98)
André Potocki (1995–2001)
Rui Manuel Gens de Moura Ramos (1995–2003)

Presidents

José Luis da Cruz Vilaça (1989–95)
Antonio Saggio (1995–98)

Registrar

Hans Jung (1989–2005)

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

General activity of the Court of First Instance

1. New cases, completed cases, cases pending (2000–06)

New cases

2. Nature of proceedings (2000–06)
3. Type of action (2000–06)
4. Subject-matter of the action (2000–06)

Completed cases

5. Nature of proceedings (2000–06)
6. Subject-matter of the action (2006)
7. Subject-matter of the action (2000–06) (judgments and orders)
8. Bench hearing action (2000–06)
9. Duration of proceedings in months (2000–06) (judgments and orders)

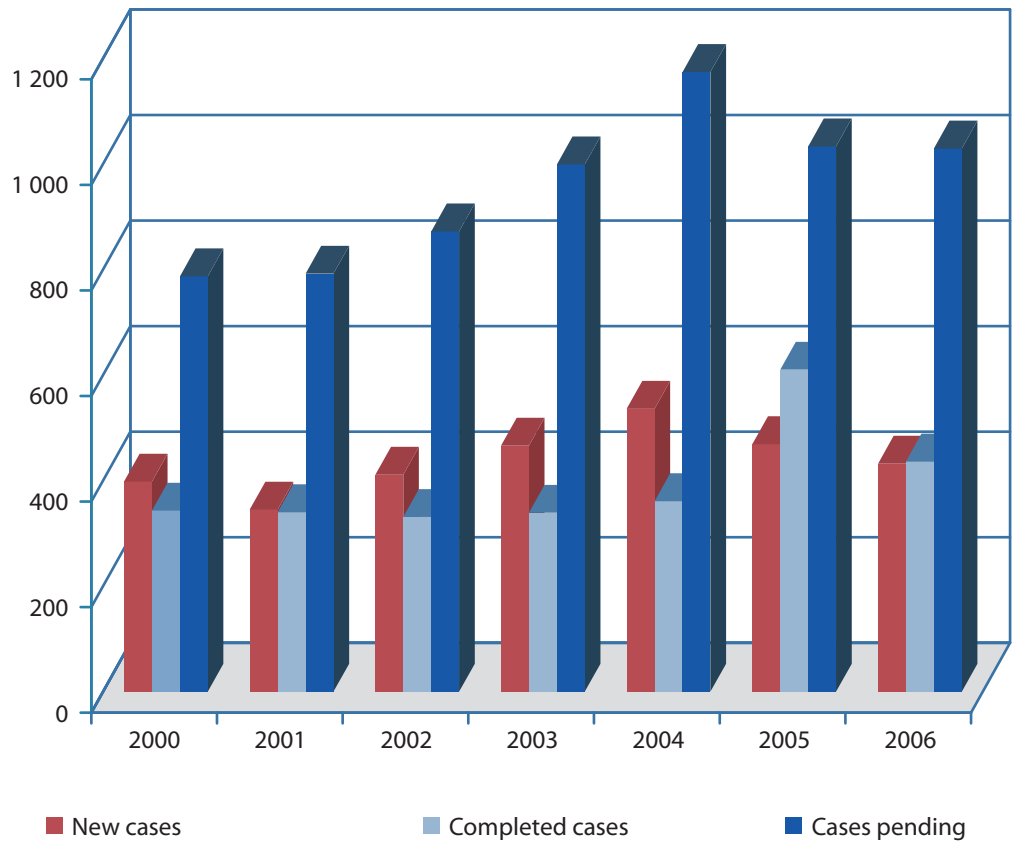
Cases pending as at 31 December

10. Nature of proceedings (2000–06)
11. Subject-matter of the action (2000–06)
12. Bench hearing action (2000–06)

Miscellaneous

13. Proceedings for interim measures (2000–06)
14. Expedited procedures (2001–06)
15. Appeals against decisions of the Court of First Instance (1989–2006)
16. Distribution of appeals according to the nature of the proceedings (1989–2006)
17. Results of appeals (2006) (judgments and orders)
18. General trend (1989–2006)
    New cases, completed cases, cases pending

1. *General activity of the Court of First Instance —* New cases, completed cases, cases pending (2000–06)[1]

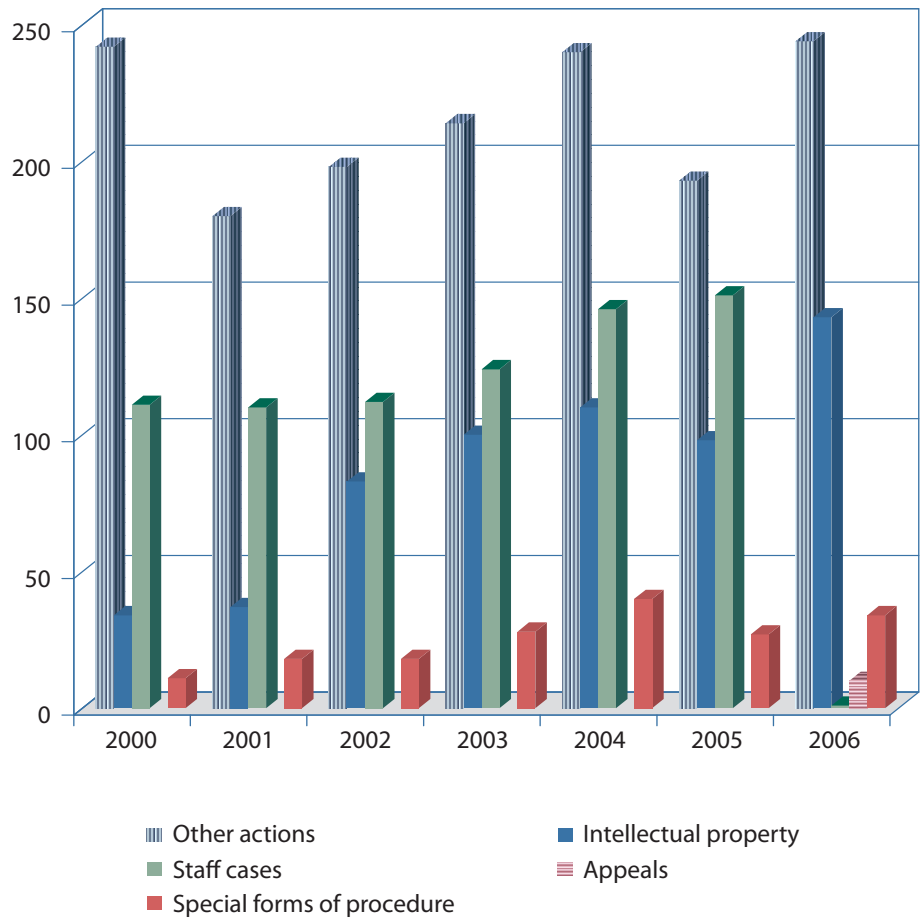


	2000	2001	2002	2003	2004	2005	2006
New cases	398	345	411	466	536	469	432
Completed cases	343	340	331	339	361	610	436
Cases pending	787	792	872	999	1 174	1 033	1 029

[1] Unless otherwise indicated, this table and the following tables take account of special forms of procedure.

The following are considered to be 'special forms of procedure': application to set a judgment aside (Article 41 of the Statute of the Court of Justice; Article 122 of the Rules of Procedure of the Court of First Instance); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 123 of the Rules of Procedure); revision of a judgment (Article 44 of the Statute of the Court of Justice; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 43 of the Statute of the Court of Justice; Article 129 of the Rules of Procedure); taxation of costs (Article 92 of the Rules of Procedure); legal aid (Article 96 of the Rules of Procedure), and rectification of a judgment (Article 84 of the Rules of Procedure).

2. *New cases* — Nature of proceedings (2000–06)[1]

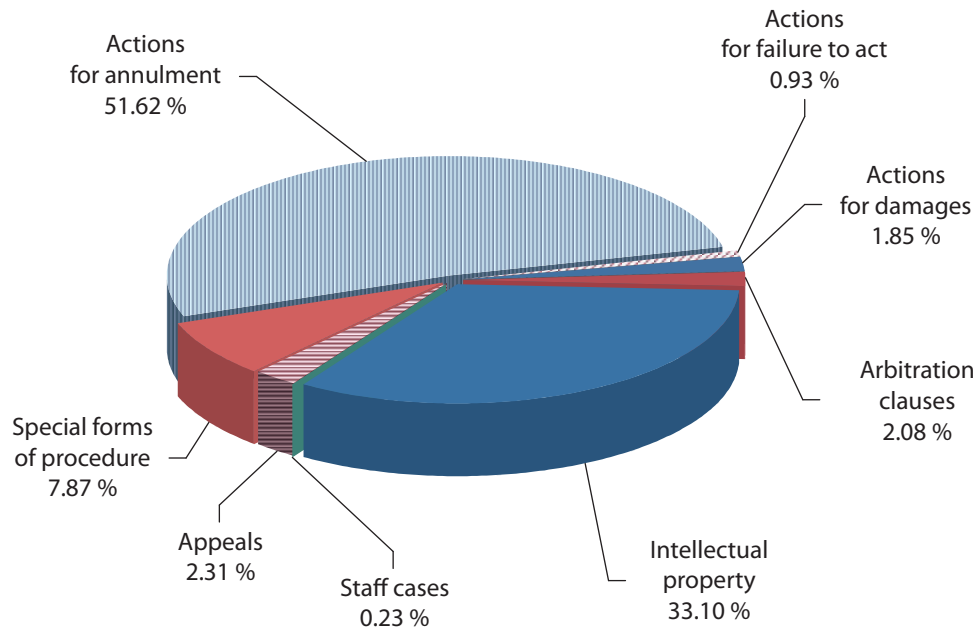


	2000	2001	2002	2003	2004	2005	2006
Other actions	242	180	198	214	240	193	244
Intellectual property	34	37	83	100	110	98	143
Staff cases	111	110	112	124	146	151	1
Appeals							10
Special forms of procedure	11	18	18	28	40	27	34
Total	**398**	**345**	**411**	**466**	**536**	**469**	**432**

[1] The entry 'other actions' in this and the following tables refers to all direct actions other than actions brought by officials of the European Communities and intellectual property cases.

3. *New cases* — Type of action (2000–06)

Distribution in 2006

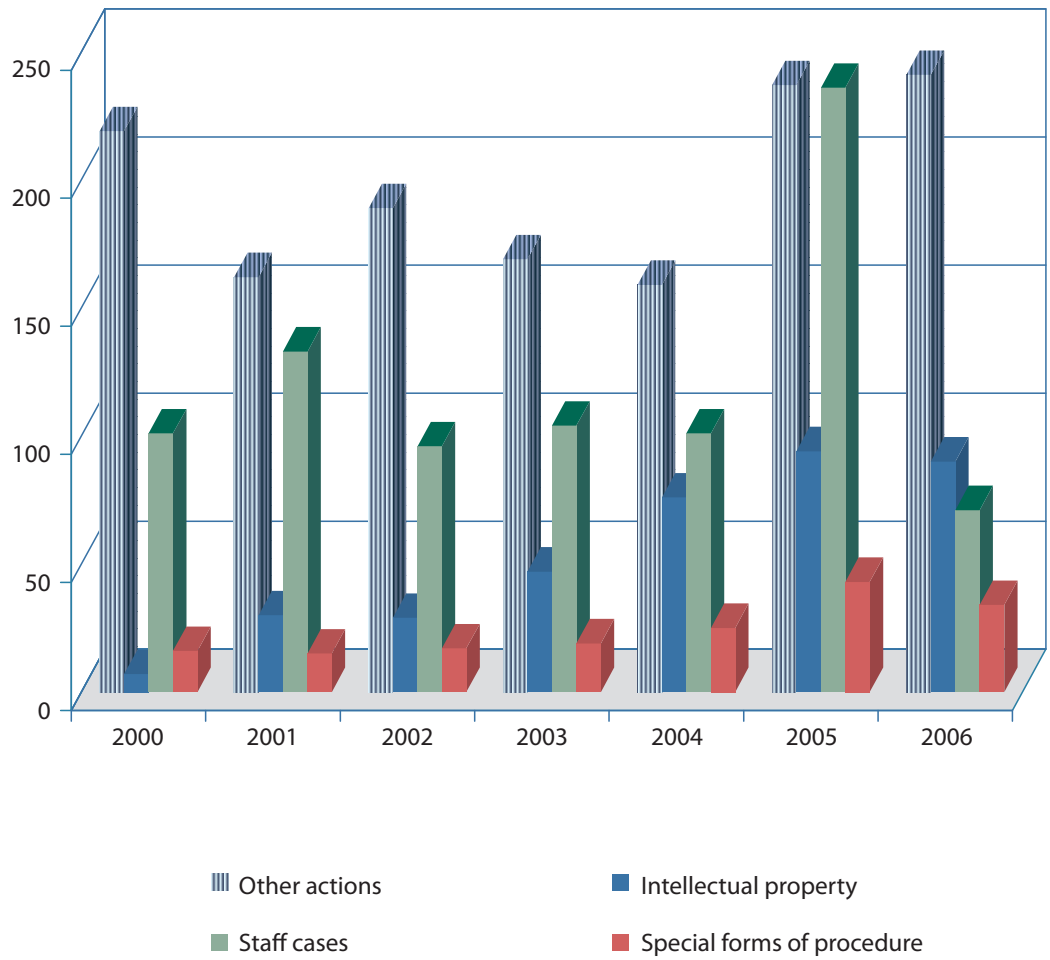


	2000	2001	2002	2003	2004	2005	2006
Actions for annulment	219	134	172	174	199	160	223
Actions for failure to act	6	17	12	13	15	9	4
Actions for damages	17	21	12	24	18	16	8
Arbitration clauses		8	2	3	8	8	9
Intellectual property	34	37	83	100	110	98	143
Staff cases	111	110	112	124	146	151	1
Appeals							10
Special forms of procedure	11	18	18	28	40	27	34
Total	**398**	**345**	**411**	**466**	**536**	**469**	**432**

4. *New cases* — Subject-matter of the action (2000–06)

	2000	2001	2002	2003	2004	2005	2006
Accession of new States				1	1		
Agriculture	18	17	9	11	25	21	18
Approximation of laws		2	1	3	1		
Arbitration clause		2	1			2	3
Association of the Overseas Countries and Territories	6	6		1			
Commercial policy	8	4	5	6	12	5	18
Common Customs Tariff	1	2			1		2
Common foreign and security policy	1	3	6	2	4		5
Community own resources						2	
Company law	4	6	3	3	6	12	11
Competition	36	36	61	43	36	40	81
Culture	2	1					3
Customs union	14	2	6	5	11	2	
Economic and monetary policy						1	2
Energy		2		2			1
Environment and consumers	14	2	8	14	30	18	21
European citizenship	2						
External relations	8	14	8	10	3	2	2
Fisheries policy	5	6	3	25	3	2	
Free movement of goods	2	1			1		
Freedom of establishment	7	1			1		
Freedom of movement for persons	1	3	2	7	1	2	4
Freedom to provide services							1
Intellectual property	34	37	83	101	110	98	145
Justice and home affairs		1	1			1	
Law governing the institutions	24	16	17	26	33	28	15
Regional policy		1	6	7	10	12	16
Research, information, education and statistics	1	3	1	3	6	9	5
Social policy	7	1	3	2	5	9	3
State aid	80	42	51	25	46	25	28
Taxation			1	5			1
Transport		2	1	1	3		1
Total EC Treaty	**275**	**213**	**277**	**303**	**349**	**291**	**386**
Total CS Treaty	**1**	**4**	**2**	**11**			
Total EA Treaty			**2**		**1**		**1**
Staff Regulations	111	110	112	124	146	151	11
Special forms of procedure	11	18	18	28	40	27	34
OVERALL TOTAL	**398**	**345**	**411**	**466**	**536**	**469**	**432**

5. *Completed cases* — Nature of proceedings (2000–06)



	2000	2001	2002	2003	2004	2005	2006
Other actions	219	162	189	169	159	237	241
Intellectual property	7	30	29	47	76	94	90
Staff cases	101	133	96	104	101	236	71
Special forms of procedure	16	15	17	19	25	43	34
Total	**343**	**340**	**331**	**339**	**361**	**610**	**436**

6. *Completed cases* — Subject-matter of the action (2006)

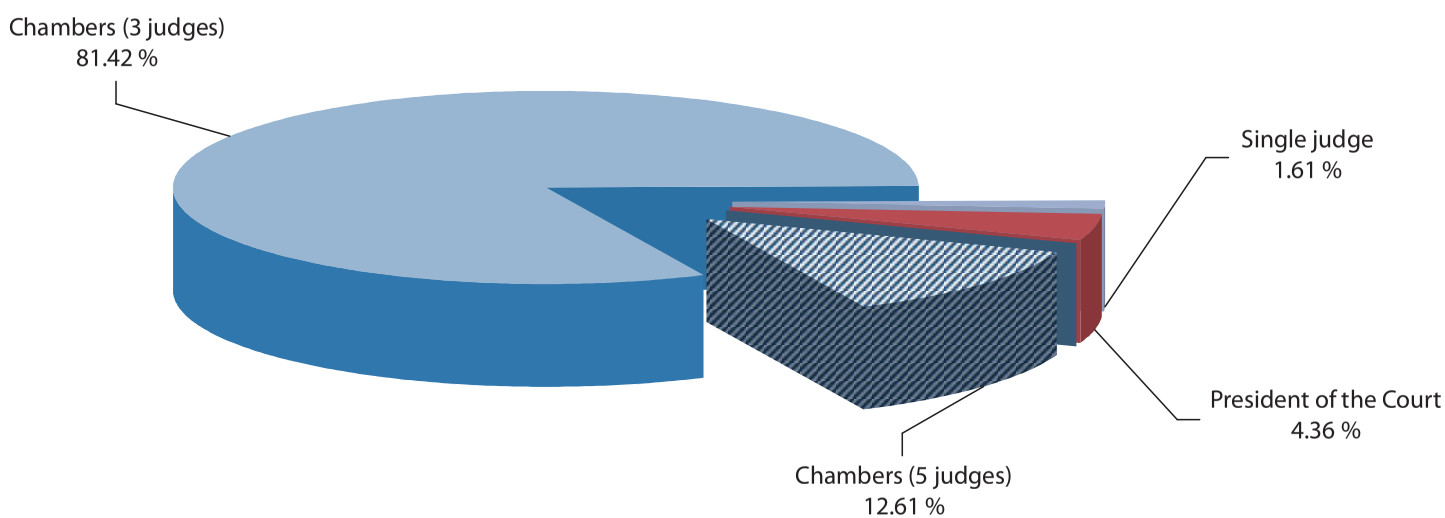
	Judgments	Orders	Total
Accession of new States		1	1
Agriculture	11	14	25
Association of the Overseas Countries and Territories		2	2
Commercial policy	5	8	13
Common foreign and security policy	3	1	4
Community own resources		2	2
Company law	3	3	6
Competition	33	9	42
Customs union	2		2
Economic and monetary policy		1	1
Energy		3	3
Environment and consumers	3	16	19
External relations	3	2	5
Fisheries policy	24		24
Freedom of movement for persons		4	4
Intellectual property	50	41	91
Law governing the institutions	4	10	14
Regional policy	3	4	7
Research, information, education and statistics	1	2	3
Social policy	1	4	5
State aid	14	40	54
Taxation		1	1
Transport		2	2
Total EC Treaty	**160**	**170**	**330**
Total CS Treaty	**1**		**1**
Staff Regulations	61	10	71
Special forms of procedure	5	29	34
OVERALL TOTAL	**227**	**209**	**436**

7. *Completed cases* — Subject-matter of the action (2000–06)
(judgments and orders)

	2000	2001	2002	2003	2004	2005	2006
Accession of new States				1			1
Agriculture	14	47	28	21	15	34	25
Approximation of laws			2	1	3		
Arbitration clause	2			1	2	1	
Association of the Overseas Countries and Territories	1	2	6	4		4	2
Commercial policy	17	5	6	6	1	7	13
Common Customs Tariff		3		2			
Common foreign and security policy		3			2	5	4
Community own resources							2
Company law	4	4	4	2	2	6	6
Competition	61	21	40	38	26	35	42
Culture			2	1			
Customs union	5	15	18	3	3	7	2
Economic and monetary policy							1
Energy							3
Environment and consumers	7		12	9	4	19	19
European citizenship	1	1					
External relations	6	2	6	11	7	11	5
Fisheries policy	1	7	2	2	6	2	24
Free movement of goods			2		1	1	
Freedom of establishment	3	4	2			1	
Freedom of movement for persons	1	2		8	2	1	4
Freedom to provide services	1						
Intellectual property	7	30	29	47	76	94	91
Justice and home affairs			1	1		1	
Law governing the institutions	31	19	15	20	16	35	14
Regional policy	5		1		4	4	7
Research, information, education and statistics	1		2	4		1	3
Social policy	18	2	2	1	4	6	5
State aid	35	12	31	26	54	53	54
Taxation				5	1		1
Transport	2		2	2	1	1	2
Total EC Treaty	**223**	**179**	**213**	**216**	**230**	**329**	**330**
Total CS Treaty	**3**	**10**	**4**		**5**	**1**	**1**
Total EA Treaty		**1**	**1**			**1**	
Staff Regulations	101	135	96	104	101	236	71
Special forms of procedure	16	15	17	19	25	43	34
OVERALL TOTAL	**343**	**340**	**331**	**339**	**361**	**610**	**436**

8. *Completed cases* — Bench hearing action (2000–06)

Distribution in 2006



	2000			2001			2002			2003			2004			2005			2006		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Grand Chamber																6		6			
Chambers (5 judges)	84	28	112	17	25	42	48	16	64	18	21	39	18	46	64	28	34	62	22	33	55
Chambers (3 judges)	96	117	213	135	145	280	144	113	257	146	131	277	141	135	276	181	329	510	198	157	355
Single judge	11	4	15	10	2	12	5	1	6	14	1	15	13	1	14	7		7	7		7
President of the Court		3	3		6	6		4	4		8	8		7	7		25	25		19	19
Total	**191**	**152**	**343**	**162**	**178**	**340**	**197**	**134**	**331**	**178**	**161**	**339**	**172**	**189**	**361**	**222**	**388**	**610**	**227**	**209**	**436**

9. *Completed cases* — Duration of proceedings in months (2000–06)[1]

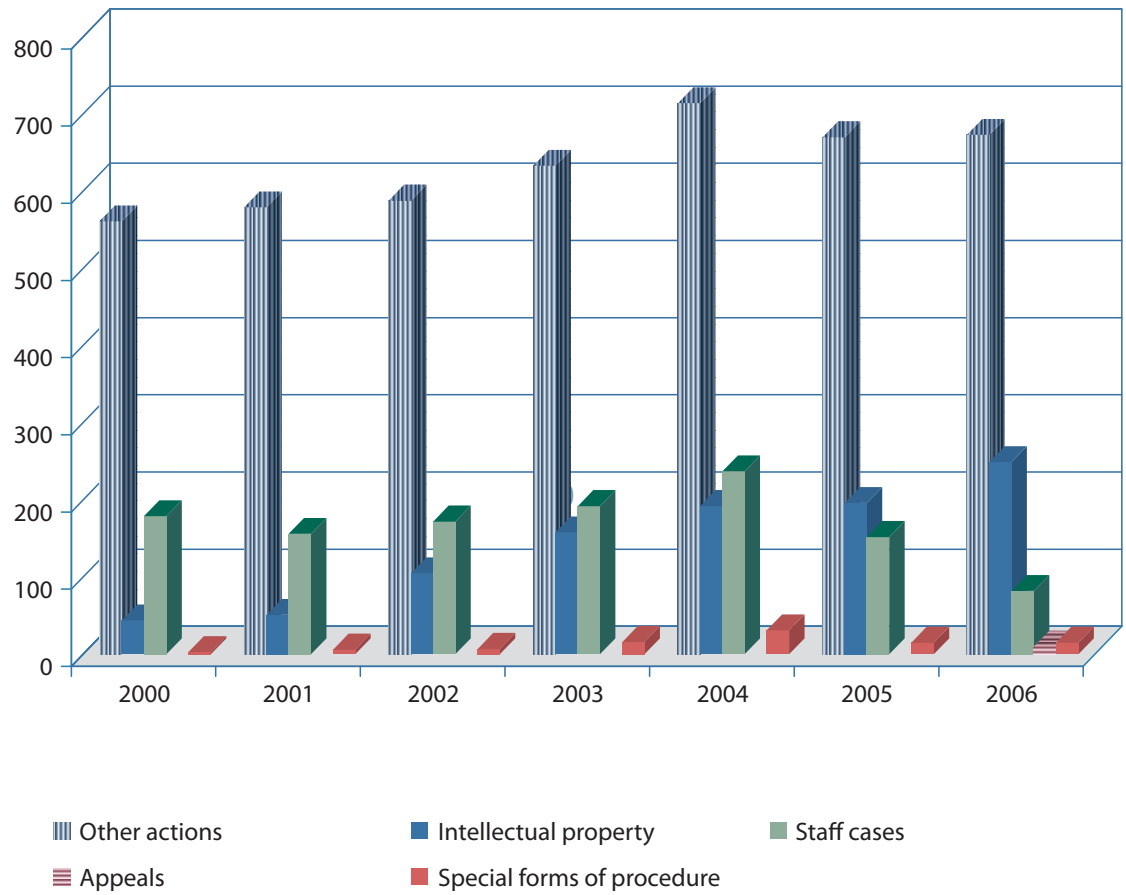
(judgments and orders)

	2000	2001	2002	2003	2004	2005	2006
Other actions	27.5	20.7	21.3	21.6	22.6	25.6	27.8
Intellectual property	9.1	16.4	19.5	15.8	17.3	21.1	21.8
Staff cases	15.6	18.7	17.2	17.9	19.2	19.2	24.8

[1] The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; cases referred by the Court of Justice following the amendment of the division of jurisdiction between it and the Court of First Instance; cases referred by the Court of First Instance after the Civil Service Tribunal began operating.

The duration of proceedings is expressed in months and tenths of months.

10. *Cases pending as at 31 December* — Nature of proceedings (2000–06)



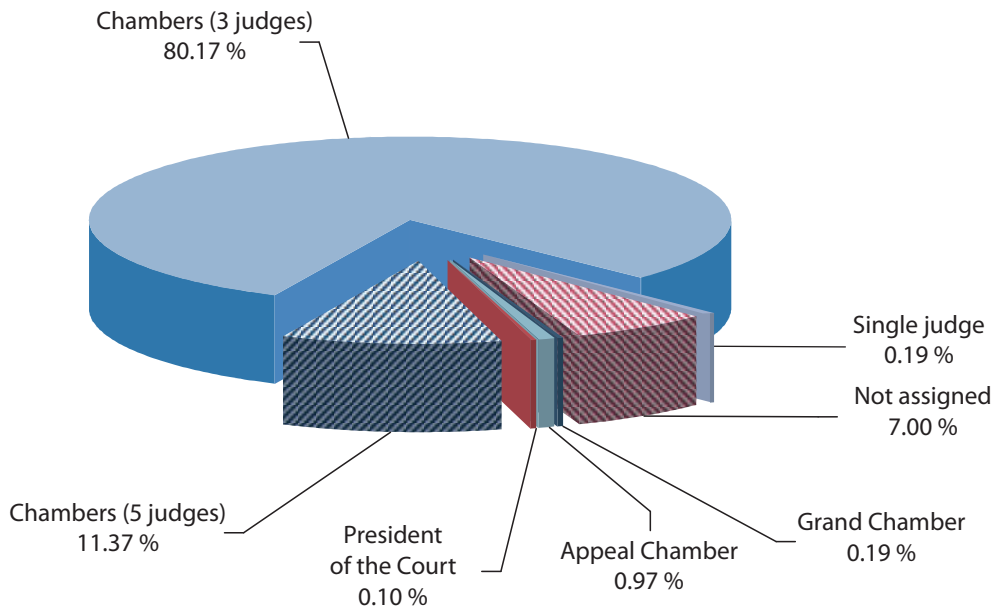
	2000	2001	2002	2003	2004	2005	2006
Other actions	561	579	588	633	714	670	673
Intellectual property	44	51	105	158	192	196	249
Staff cases	179	156	172	192	237	152	82
Appeals							10
Special forms of procedure	3	6	7	16	31	15	15
Total	**787**	**792**	**872**	**999**	**1 174**	**1 033**	**1 029**

11. *Cases pending as at 31 December* — Subject-matter of the action (2000–06)

	2000	2001	2002	2003	2004	2005	2006
Accession of new States					1	1	
Agriculture	144	114	95	85	95	82	74
Approximation of laws		2	1	3	1	1	1
Arbitration clause		2	3	2		1	3
Association of the Overseas Countries and Territories	11	15	9	6	6	2	
Commercial policy	16	15	14	14	25	23	28
Common Customs Tariff	3	2	2		1	1	3
Common foreign and security policy	3	3	9	11	13	8	9
Community own resources						2	
Company law	4	6	5	6	10	16	23
Competition	78	93	114	119	129	134	173
Culture	2	3	1				3
Customs union	33	20	8	10	18	13	11
Economic and monetary policy						1	2
Energy		2	2	4	4	4	2
Environment and consumers	15	17	13	18	44	43	44
European citizenship	1						
External relations	9	21	23	22	18	9	6
Fisheries policy	8	7	8	31	28	28	4
Free movement of goods	2	3	1	1	1		
Freedom of establishment	5	2			1		
Freedom of movement for persons		1	3	2	1	2	3
Freedom to provide services							1
Intellectual property	44	51	105	159	193	197	251
Justice and home affairs		1	1				
Law governing the institutions	27	24	26	32	49	42	43
Regional policy		1	6	13	19	27	36
Research, information, education and statistics	1	4	3	2	8	16	18
Social policy	4	3	4	5	6	9	7
State aid	177	207	227	226	218	190	164
Taxation			1	1			
Transport	1	3	2	1	3	2	1
Total EC Treaty	**588**	**622**	**686**	**773**	**892**	**854**	**910**
Total CS Treaty	**14**	**8**	**6**	**17**	**12**	**11**	**10**
Total EA Treaty	**1**		**1**	**1**	**2**	**1**	**2**
Staff Regulations	181	156	172	192	237	152	92
Special forms of procedure	3	6	7	16	31	15	15
OVERALL TOTAL	**787**	**792**	**872**	**999**	**1 174**	**1 033**	**1 029**

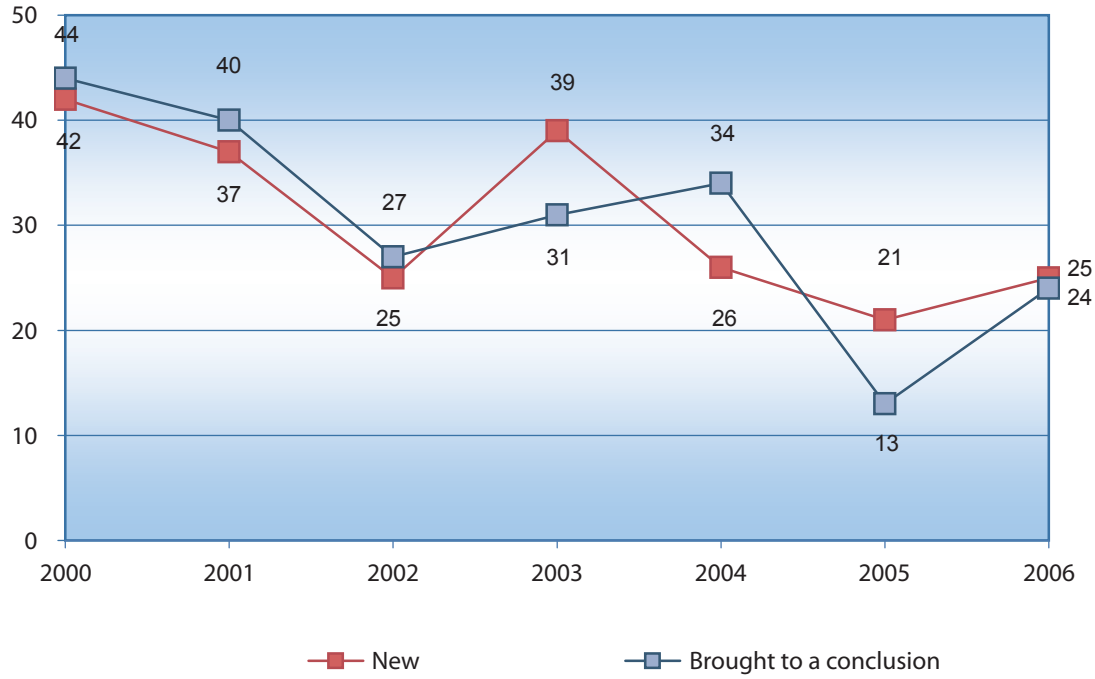
12. *Cases pending as at 31 December* — Bench hearing action (2000–06)

Distribution in 2006



	2000	2001	2002	2003	2004	2005	2006
Grand Chamber					6	1	2
Appeal Chamber							10
President of the Court							1
Chambers (5 judges)	247	264	276	251	187	146	117
Chambers (3 judges)	512	479	532	691	914	846	825
Single judge	5	3	8	6	1	4	2
Not assigned	23	46	56	51	66	36	72
Total	**787**	**792**	**872**	**999**	**1 174**	**1 033**	**1 029**

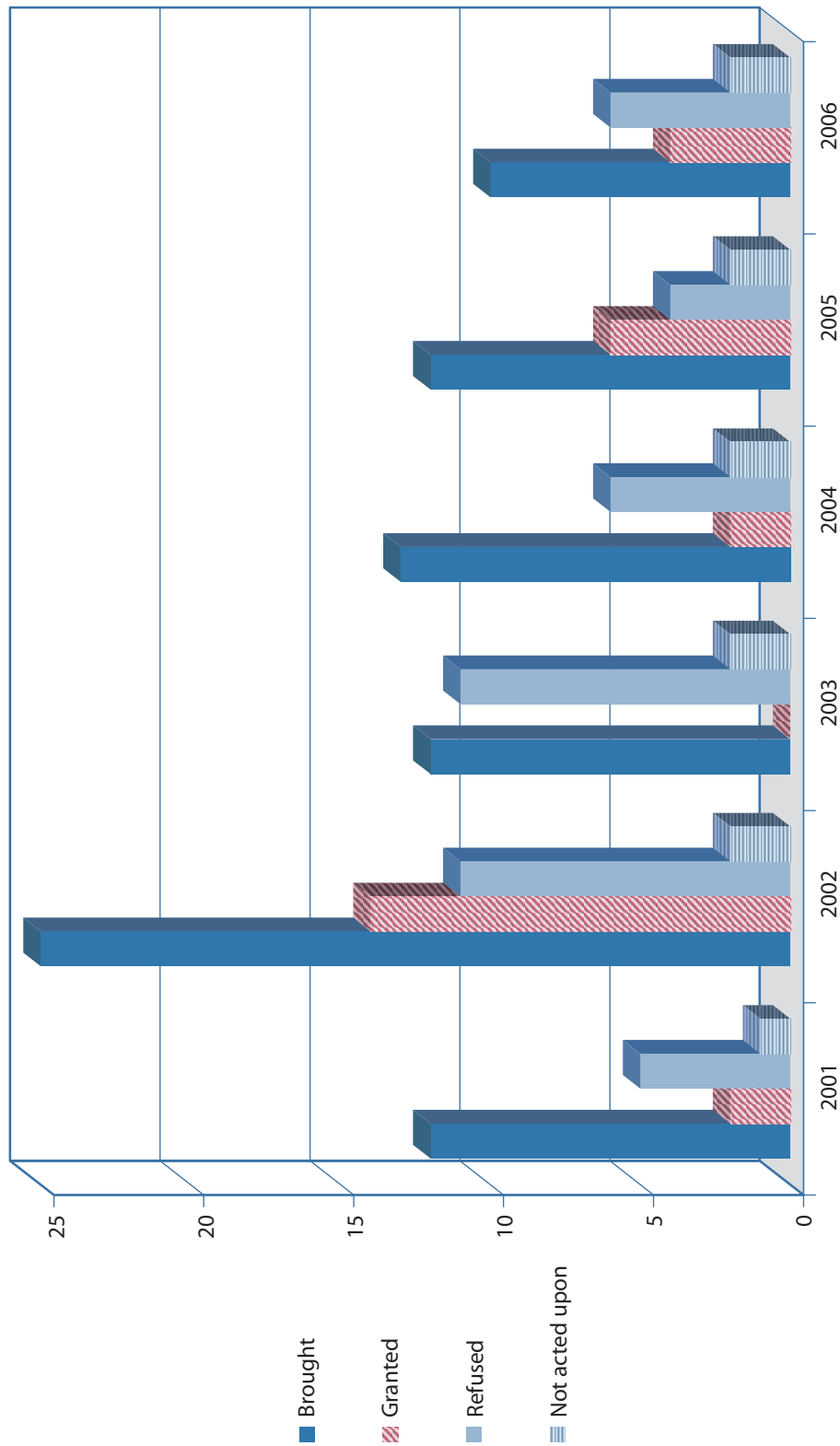
13. *Miscellaneous* — Proceedings for interim measures (2000–06)



Distribution in 2006

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Dismissed	Granted	Removal from the register/ no need to adjudicate
Agriculture	5	1	1		
Commercial policy	1	1	1		
Company law	2	5	1	1	3
Competition	1	3	2	1	
Environment and consumers	7	6	5		1
Law governing the institutions	2	1	1		
Research, information, education and statistics	1				
Social policy	1				
State aid	4	4	4		
Transport	1	1	1		
Total EC Treaty	**25**	**22**	**16**	**2**	**4**
Staff Regulations		2	1		1
OVERALL TOTAL	**25**	**24**	**17**	**2**	**5**

14. *Miscellaneous* — Expedited procedures (2001–06)

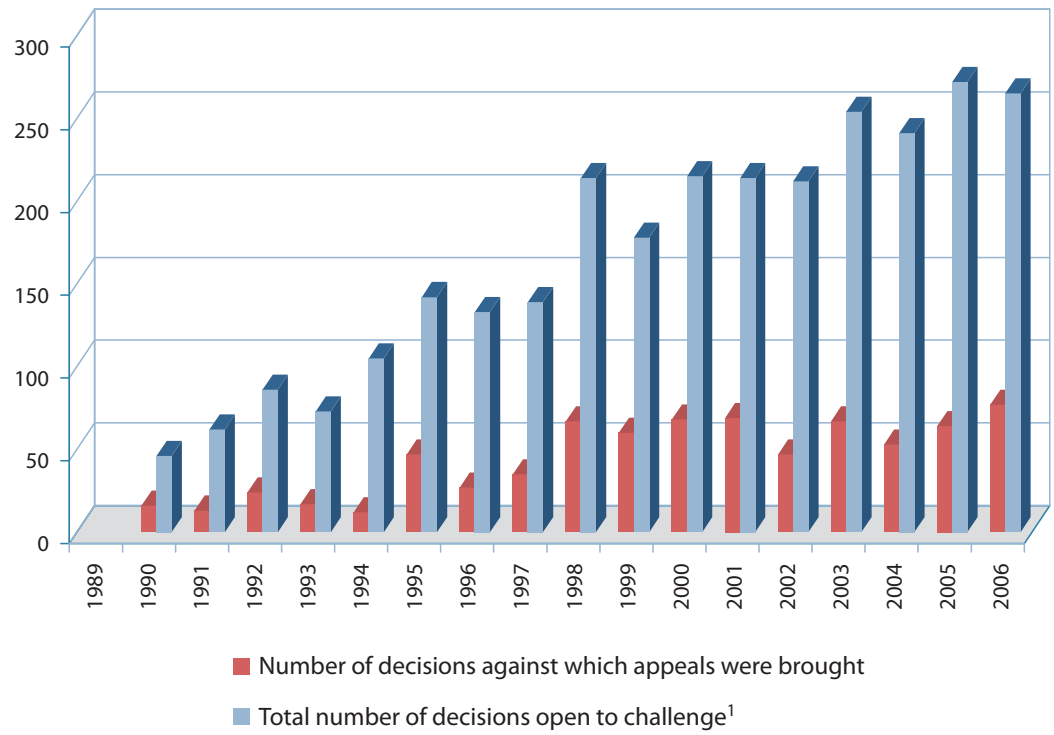


	2001				2002				2003				2004				2005				2006			
		Outcome				Outcome				Outcome				Outcome				Outcome				Outcome		
	Brought	Granted	Refused	Not acted upon	**Brought**	Granted	Refused	Not acted upon	**Brought**	Granted	Refused	Not acted upon	**Brought**	Granted	Refused	Not acted upon	**Brought**	Granted	Refused	Not acted upon	**Brought**	Granted	Refused	Not acted upon
Agriculture					1				1		2						2				2	1	3	
Commercial policy	1		1		1		1																	
Common foreign and security policy	1						1																	
Community own resources																	2							2
Company law													4	1	2		3	2	1	1				
Competition	1				15	13	2	1	1		1		3				2	3	2		4	2	2	
Environment and consumers									1		1		1		1		2	1		1	3	1	1	
External relations					1	1			1		1													
Fisheries policy													1	1										
Freedom of movement for persons													1			1								
Law governing the institutions	3		1	1	2		3		5		4		1		2		1		1					
Research, information, education and statistics					1							1												
Staff Regulations	3		3		2		1	1					1		1									
State aid	3	2			2		3		3		2	1									1			
Transport													1			1								
Total	**12**	2	5	1	**25**	14	11	2	**12**	0	11	2	**13**	2	6	2	**12**	6	4	2	**10**	4	6	2

The Court of First Instance may decide pursuant to Article 76a of the Rules of Procedure to deal with a case before it under an expedited procedure. That provision has been applicable since 1 February 2001.

The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

15. *Miscellaneous* — Appeals against decisions of the Court of First Instance (1989–2006)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge[1]	Percentage of decisions against which appeals were brought
1989			
1990	16	46	35 %
1991	13	62	21 %
1992	24	86	28 %
1993	17	73	23 %
1994	12	105	11 %
1995	47	142	33 %
1996	27	133	20 %
1997	35	139	25 %
1998	67	214	31 %
1999	60	178	34 %
2000	68	215	32 %
2001	69	214	32 %
2002	47	212	22 %
2003	67	254	26 %
2004	53	241	22 %
2005	64	272	24 %
2006	77	265	29 %

[1] Total number of decisions open to challenge – judgments, and orders relating to admissibility, concerning interim measures, declaring that there was 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.

16. *Miscellaneous* — Distribution of appeals according to the nature of the proceedings (1989–2006)

	1989			1990			1991			1992			1993			1994			1995			1996			1997		
	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage
Other actions				2	8	25 %	5	16	31 %	15	31	48 %	6	17	35 %	7	44	16 %	38	91	42 %	15	59	25 %	22	86	26 %
Intellectual property																											
Staff cases				14	38	37 %	8	46	17 %	8	54	15 %	10	55	18 %	5	61	8 %	9	51	18 %	12	74	16 %	13	53	25 %
Sub-total				16	46	35 %	13	62	21 %	23	85	27 %	16	72	22 %	12	105	11 %	47	142	33 %	27	133	20 %	35	139	25 %
Special forms of procedure										1	1	100 %	1	1	100 %												
Total				16	46	35 %	13	62	21 %	24	86	28 %	17	73	23 %	12	105	11 %	47	142	33 %	27	133	20 %	35	139	25 %

	1998			1999			2000			2001			2002			2003			2004			2005			2006		
	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage	Appeals	Decisions open to challenge	Appeals as a percentage
Other actions	48	120	40 %	45	118	38 %	58	132	44 %	40	115	35 %	32	134	24 %	51	134	38 %	41	114	36 %	37	120	31 %	46	146	32 %
Intellectual property				1	1	100 %	1	7	14 %	13	25	52 %	6	20	30 %	7	33	21 %	7	45	16 %	16	71	23 %	18	59	31 %
Staff cases	18	93	19 %	14	59	24 %	8	75	11 %	15	73	21 %	9	58	16 %	9	87	10 %	5	82	6 %	11	81	14 %	13	60	22 %
Sub-total	66	213	31 %	60	178	34 %	67	214	31 %	68	213	32 %	47	212	22 %	67	254	26 %	53	241	22 %	64	272	24 %	77	265	29 %
Special forms of procedure	1	1	100 %				1	1	100 %	1	1	100 %															
Total	67	214	31 %	60	178	34 %	68	215	32 %	69	214	32 %	47	212	22 %	67	254	26 %	53	241	22 %	64	272	24 %	77	265	29 %

17. *Miscellaneous* — Results of appeals (2006)
(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	3		1		4
Approximation of laws	1				1
Competition	10	5		1	16
Customs union	1				1
Environment and consumers	1				1
External relations	1				1
Freedom of movement for persons	1				1
Freedom to provide services	1				1
Intellectual property	12			2	14
Justice and home affairs	1				1
Law governing the institutions	5				5
Procedure				1	1
Regional policy	1				1
Social policy	4				4
Staff Regulations	6	3		1	10
State aid	3				3
Total	**51**	**8**	**1**	**5**	**65**

18. *Miscellaneous* — General trend (1989–2006)

New cases, completed cases, cases pending

	New cases[1]	Completed cases[2]	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	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
Total	**6 256**	**5 227**	

[1] 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance.

1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.

1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance.

2004–05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance.

[2] 2005–06: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

Chapter III

The European Union Civil Service Tribunal

A — Proceedings of the Civil Service Tribunal in 2006

By Mr Paul J. Mahoney, President of the Civil Service Tribunal

The year 2006 was the first full year of operation of the Civil Service Tribunal of the European Union.

During the year the Tribunal devoted a significant part of its time to the continuation of work on its draft Rules of Procedure, which began in the first months of its existence in 2005. The draft which resulted from the studies and consultation [1] conducted by the Tribunal was submitted, following a phase of collaboration with the Court of First Instance of the European Communities and by agreement with the Court of Justice of the European Communities, for approval to the Council of the European Union on 19 December 2006. Thus, the Tribunal should probably have its own Rules of Procedure available by the second half of 2007.

As regards the work of the Tribunal as a judicial body, it appears from the statistics that 148 actions were brought before it, which represents a slight decrease in volume compared with the number of actions brought in staff cases in 2005, when 164 actions were brought (151 before the Court of First Instance and 13 before the Tribunal between 12 and 31 December 2005). Since its creation, the Tribunal has had 161 cases brought directly before it, to which the 118 cases transferred from the Court of First Instance must be added. The Tribunal has thus had 279 cases brought before it since its creation.

Fifty-three cases were brought to a close in 2006, including two delivered by the full Tribunal. There was a fairly clear increase in the pace of adoption of decisions closing cases in the second half of the year as the written procedure was concluded in the cases transferred from the Court of First Instance. There was also a proportionately fairly high number of annulments, in that 10 judgments to that effect were delivered. Appeals against 10 decisions of the Tribunal were lodged before the Court of First Instance.

It should be pointed out that proceedings were stayed in a significant number of cases by orders adopted pursuant to the first subparagraph of Article 8(3) of Annex I to the Statute of the Court of Justice, inter alia, pending the delivery of the decisions of the Court of First Instance in Case T-58/05 *Centeno Mediavilla and Others* v *Commission* and Case T-47/05 *Angé Serrano and Others* v *Commission* concerning classification/reclassification in grade following the entry into force of the new Staff Regulations of Officials of the European Communities. Thus, 68 orders staying proceedings were delivered by the Tribunal in 2006.

The first year of judicial activity of the Tribunal was also marked by its endeavours to comply with the Council's wish, expressed in the seventh recital in the preamble to its Decision 2004/752/EC, Euratom and repeated in Article 7(4) of Annex I to the Statute of the

[1] In the course of this preparatory work the Tribunal undertook consultations, in particular of representatives of the institutions, staff committees and unions. A meeting with the heads of administration was held for that purpose on 26 January 2006. It was followed, on 8 February 2006, by a meeting with the unions and professional organisations and their lawyers.

Court of Justice, that it should facilitate the amicable settlement of disputes at all stages of the procedure. For instance, in several cases, the judge-rapporteur put proposals for amicable settlement before the parties for consideration. Four disputes were brought to a close by orders striking the cases from the register and recording that the parties had reached an agreement, following an amicable settlement at the instigation of the Tribunal.

It would clearly be premature, at this stage, to attempt to assess the success of the practice of amicable settlement or to define the Tribunal's own decision-making practice. The account given below will be confined to a brief outline of the main decisions made by the Tribunal, looking in turn at certain general aspects of procedure (I), proceedings concerning the legality of measures (II), applications for interim relief (III) and, finally, applications for legal aid (IV).

I. *Procedural aspects*

In its first judgment, in *Falcione* v *Commission* [2], delivered by the full Tribunal on 26 April 2006, the Tribunal held that the costs regime applicable until the entry into force of its own Rules of Procedure would be that of the Court of First Instance, in order to guarantee for those subject to the law sufficient predictability in the application of the rules concerning the costs of proceedings, on the basis of the principle of the sound administration of justice.

Two decisions delivered on the basis of Article 8 of Annex I to the Statute of the Court of Justice should be highlighted. In *Marcuccio* v *Commission* [3], the Tribunal declined jurisdiction, pursuant to the second subparagraph of Article 8(3) of Annex I to the Statute of the Court of Justice, taking the view that the case had the same subject-matter as two cases before the Court of First Instance. By order in *Gualtieri* v *Commission* [4], the Tribunal held that a dispute between the Commission of the European Communities and a national expert on secondment does not constitute a dispute between the Community and its servants within the meaning of Article 236 EC. Accordingly, the Tribunal took the view that it did not have jurisdiction to hear the action and referred it to the Court of First Instance on the basis of Article 8(2) of Annex I to the Statute of the Court of Justice.

2 Judgment of the Tribunal of 26 April 2006 in Case F-16/05 *Falcione* v *Commission*, not yet published in the ECR.

3 Order of the Tribunal of 25 April 2006 in Case F-109/05 *Marcuccio* v *Commission*, not yet published in the ECR.

4 Order of the Tribunal of 9 October 2006 in Case F-53/06 *Gualtieri* v *Commission* (under appeal, Case T-413/06 P), not yet published in the ECR.

II. *Proceedings concerning the legality of measures*

A. Admissibility of actions brought under Articles 236 EC and 152 EA

1. Measures against which an action may be brought

In its order in *Lebedef and Others* v *Commission* [5], the Tribunal made clear that the detailed arrangements for using the data-processing tools of the administration as regards the language of the operating system and the software in personal computers are internal organisational measures of a service and cannot adversely affect an official within the meaning of Articles 90(2) and 91(1) of the Staff Regulations.

2. Time limit for bringing an action

In its judgment in *Grünheid* v *Commission* [6], the Tribunal, in declaring admissible an action against a decision of final classification in grade, rejected a plea of inadmissibility alleging that the complaint made under Article 90(2) of the Staff Regulations was lodged more than three months after the existence of the decision came to the knowledge of the applicant through a monthly salary slip. In that connection, the Tribunal held that, although notification of the monthly salary statement has the effect of setting time running for the purpose of the time limit for proceedings against an administrative decision where the scope of such a decision is clearly apparent from the statement, the same is not true of a decision by which the appointing authority makes the definitive classification of a newly recruited official, the scope of which exceeds by far the establishment of strictly pecuniary rights which it is the purpose of a salary statement to specify for a given period. In the absence of written notification, giving reasons, of the definitive decision regarding classification, in accordance with Article 25 of the Staff Regulations, requiring the official concerned to lodge a complaint at the latest within three months of receipt of the first salary statement in which that classification was apparent would deprive of all meaning the second paragaph of Article 25 and the second and third paragraphs of Article 26 of the Staff Regulations, the purpose of which is precisely to allow officials to take effective cognisance of decisions concerning, inter alia, their administrative position and to assert the rights guaranteed by those regulations.

By its judgment in *Combescot* v *Commission* [7], the Tribunal held that an explicit decision rejecting a complaint, adopted within the time limit of four months of the lodging of the complaint, but not notified before expiry of the time limit for bringing an action, cannot preclude, under the second subparagraph of Article 90(2) of the Staff Regulations, an

5 Order of the Tribunal of 14 June 2006 in Case F-34/05 *Lebedef and Others* v *Commission*, not yet published in the ECR.

6 Judgment of the Tribunal of 28 June 2006 in Case F-101/05 *Grünheid* v *Commission*, not yet published in the ECR.

7 Judgment of the Tribunal of 19 October 2006 in Case F-114/05 *Combescot* v *Commission* (under appeal, Case T-414/06 P), not yet published in the ECR.

implied decision rejecting the complaint. If it were the case that the adoption of an explicit decision rejecting a complaint within the time limit of four months of the lodging of the complaint precluded an implied decision even where it was not notified to the official concerned within that time limit, that official could not bring an action for annulment under the first sentence of the second indent of Article 91(3) of the Staff Regulations. Such a result would run counter to the purpose of that provision, which is intended to guarantee the judicial protection of officials in the event of inertia or silence on the part of the administration. Thus a decision rejecting a complaint which is adopted but not notified cannot constitute a 'reply' within the meaning of the second subparagraph of Article 90(2) of the Staff Regulations.

In its order in *Schmit* v *Commission* [8], having first outlined the case-law according to which, for the purposes of calculating the time limit for lodging a complaint against an act adversely affecting an official, Article 90 of the Staff Regulations must be interpreted as meaning that the complaint is 'lodged' when it is received by the institution, the Tribunal pointed out that, although the fact that an administration places a stamp on a document sent to it to register it does not amount to recording a definite date of lodging of the document, it is none the less a means, consistent with good administrative practice, of establishing a presumption, subject to proof to the contrary, that that document arrived on the date indicated. In the event of a dispute, it is for the official to adduce any evidence, such as an acknowledgement of receipt or advice of delivery of a letter sent by recorded delivery, liable to rebut the presumption created by the registration stamp, and thus establish that the complaint was actually lodged on a different date.

B. Merits

By way of introduction, attention should be drawn to the variety of questions which were brought before the Tribunal. For instance, it has considered, inter alia, the consequences of the transition to the euro on the pension rights of officials where they transferred rights acquired in a national pension scheme to the Community scheme [9], the conditions under which certain officials may, under Article 9(2) of Annex VIII to the Staff Regulations, take early retirement with no reduction of their pension [10], a case of compulsory sick leave for psychiatric reasons for a Commission official [11], several cases concerning the recognition of the occupational nature of a disease [12] and the financial provisions of the convention

8 Order of the Tribunal of 15 May 2006 in Case F-3/05 *Schmit* v *Commission*, not yet published in the ECR.

9 Judgment of the Tribunal of 14 November 2006 in Case F-100/05 *Chatziioannidou* v *Commission*, not yet published in the ECR.

10 Judgment of the Tribunal of 12 September 2006 in Case F-86/05 *De Soeten* v *Council*, not yet published in the ECR.

11 Judgment of the Tribunal of 13 December 2006 in Case F-17/05 *De Brito Sequeira Carvalho* v *Commission*, not yet published in the ECR.

12 See, inter alia, judgment of the Tribunal of 12 July 2006 in Case F-18/05 *D* v *Commission* (under appeal, Case T-262/06 P), not yet published in the ECR.

establishing the working conditions and financial rules for conference interpeter staff [13]. It is also worthy of note that a case concerning payment for overtime for a category A member of staff was assigned to the full Tribunal but was brought to a close by removal from the register following an agreement reached by the parties [14]. The Tribunal also heard cases contesting the lawfulness of decisions terminating the contracts of temporary agents [15], of decisions of competition selection boards refusing to admit candidates to the written tests [16] or refusing to place a candidate on a reserve list [17], of decisions taken in the course of appointment procedures [18], of career development reports [19], and of decisions not to promote [20]. In that connection, two judgments of the Tribunal are of particular interest.

By its judgment in *Landgren* v *ETF* [21], delivered by the full Tribunal, the Tribunal held that unilateral termination of a contract of employment for an indefinite period as a member of the temporary staff is not merely subject to observance of the notice requirement provided for by Article 47(2) of the Conditions of Employment, but must also contain a statement of reasons. To ensure sufficient protection against unjustified dismissals, particularly in the case of a contract for an indefinite period or where the contract is for a fixed period and dismissal occurs before it expires, it is important, first, to enable the persons concerned to verify whether their legitimate interests have been respected or prejudiced and to assess whether they should bring the matter before a court and, second, to enable the court to conduct its review, which implies the acknowledgement of the existence of an obligation to state reasons incumbent on the competent authority. Acknowledgement of such an obligation does not preclude the vesting of a wide disretion in the competent authority as regards dismissal and, therefore, the limitation of review by the Community court to verifying that there was no manifest error or misuse of powers. In this case, the decision to dismiss was annulled because it was vitiated by a manifest error of assessment.

13 Judgment of the Tribunal of 14 December 2006 in Case F-10/06 *André* v *Commission*, not yet published in the ECR.

14 Order of the Tribunal of 13 July 2006 in Case F-9/05 *Lacombe* v *Council*, not yet published in the ECR.

15 See, inter alia, judgments of the Tribunal of 26 October 2006 in Case F-1/05 *Landgren* v *ETF* (under appeal, Case T-404/06 P), not yet published in the ECR, and of 14 December 2006 in Case F-88/05 *Kubanski* v *Commission*, not yet published in the ECR.

16 Judgment of the Tribunal of 15 June 2006 in Case F-25/05 *Mc Sweeney and Armstrong* v *Commission*, not yet published in the ECR.

17 Judgment of the Tribunal of 13 December 2006 in Case F-22/05 *Neophytou* v *Commission*, not yet published in the ECR.

18 Judgment of the Tribunal of 14 December 2006 in Case F-122/05 *Economidis* v *Commission*, not yet published in the ECR.

19 See, inter alia, judgment of the Tribunal of 14 December 2006 in Case F-74/05 *Caldarone* v *Commission*, not yet published in the ECR.

20 See, for example, judgment of the Tribunal of 30 November 2006 in Case F-77/05 *Balabanis and Le Dour* v *Commission*, not yet published in the ECR.

21 Judgment in *Landgren* v *ETF*, cited above.

In its judgment in *Economidis* v *Commission* [22], the Tribunal held, on the subject of the recruitment of a Head of Unit in grade AD 9/AD 12, that the Commission decision regarding middle management staff, insofar as it allows the level of the post to be filled to be fixed following a comparative review of candidatures and thus affects the required objectivity of the procedure, was unlawful.

III. *Applications for interim relief*

Two applications for interim relief were made in 2006. In *Bianchi* v *ETF* [23], the application was dismissed on the ground that there was no urgency, whereas the application in *Dálnoky* v *Commission* [24] was dismissed because the main action was prima facie clearly inadmissible.

IV. *Applications for legal aid*

The President of the Tribunal ruled on three applications for legal aid during 2006, which were all made before an action was brought, as provided for by the first subparagraph of Article 95(1) of the Rules of Procedure of the Court of First Instance, applicable *mutatis mutandis*. Those applications were not granted [25].

22 Judgment in *Economidis* v *Commission*, cited above.

23 Order of the President of the Tribunal of 31 May 2006 in Case F-38/06 *R Bianchi* v *ETF*, not yet published in the ECR.

24 Order of the President of the Tribunal of 14 December 2006 in Case F-120/06 *R Dálnoky* v *Commission*, not yet published in the ECR.

25 Order of the President of the Tribunal of 27 September 2006 in Case F-90/06 *AJ Nolan* v *Commission*, not yet published in the ECR. Order of the President of the Tribunal of 1 December 2006 in Case F-101/06 *AJ Atanasov* v *Commission*. Order of the President of the Tribunal of 11 December 2006 in Case F-128/06 *AJ Noworyta* v *Parliament*, not yet published in the ECR.

B — Composition of the Civil Service Tribunal

(Order of precedence as at 1 January 2006)

From left to right:

H. Tagaras, Judge; I. Boruta, Judge; H. Kreppel, President of Chamber; P. Mahoney, President of the Tribunal; S. Van Raepenbusch, President of Chamber; H. Kanninen, Judge; S. Gervasoni, Judge; W. Hakenberg, Registrar.

1. Members of the Civil Service Tribunal

(in order of their entry into office)

Paul J. Mahoney

Born 1946; law studies (Master of Arts, Oxford University, 1967; Master of Laws, University College London, 1969); lecturer, University College London (1967–73); Barrister (London, 1972–74); Administrator/Principal Administrator, European Court of Human Rights (1974–90); Visiting Professor at the University of Saskatchewan, Saskatoon, Canada (1988); Head of Personnel, Council of Europe (1990–93); Head of Division (1993–95), Deputy Registrar (1995–2001), Registrar of the European Court of Human Rights (2001 to September 2005); President of the Civil Service Tribunal since 6 October 2005.

Horstpeter Kreppel

Born 1945; university studies in Berlin, Munich, Frankfurt-am-Main (1966–72); First State examination in law (1972); Court trainee in Frankfurt-am-Main (1972–73 and 1974–75); College of Europe, Bruges (1973–74); second State examination in law (Frankfurt-am-Main, 1976); specialist adviser in the Federal Labour Office and lawyer (1976); Presiding Judge at the Labour Court (Land Hesse, 1977–93); lecturer at the Technical College for Social Work, Frankfurt-am-Main, and at the Technical College for Administration, Wiesbaden (1979–90); national expert to the Legal Service of the Commission of the European Communities (1993–96 and 2001–05); Social Affairs Attaché at the Embassy of the Federal Republic of Germany in Madrid (1996–2001); Presiding Judge at the Labour Court of Frankfurt-am-Main (February to September 2005); Judge at the Civil Service Tribunal since 6 October 2005.

Irena Boruta

Born 1950; law graduate of the University of Wrocław (1972), doctorate in law (Łodz, 1982); lawyer at the Bar of the Republic of Poland (since 1977); visiting researcher (University of Paris X, 1987–88; University of Nantes, 1993–94); expert of 'Solidarność' (1995–2000); professor of labour law and European social law at the University of Łodz (1997–98 and 2001–05), associate professor at Warsaw School of Economics (2002), professor of labour law and social security law at Cardinal Stefan Wyszynski University, Warsaw (2000–05); Deputy Minister of Labour and Social Affairs (1998–2001); member of the negotiation team for the accession of the Republic of Poland to the European Union (1998–2001); representative of the Polish Government to the International Labour Organisation (1998–2001); author of a number of works on labour law and European social law; Judge at the Civil Service Tribunal since 6 October 2005.

Heikki Kanninen

Born 1952, graduate of the Helsinki School of Economics and of the faculty of law of the University of Helsinki; Legal Secretary at the Supreme Administrative Court of Finland; General Secretary to the Committee for Reform of Legal Protection in Public Administration; Principal Administrator at the Supreme Administrative Court; General Secretary to the Committee for Reform of Administrative Litigation, counsellor in the legislative department of the Ministry of Justice; Assistant Registrar to the EFTA Court; Legal Secretary at the Court of Justice of the European Communities; Judge at the Supreme Administrative Court (1998–2005); member of the Asylum Board; Vice-President of the Committee on the Development of the Finnish Courts; Judge at the Civil Service Tribunal since 6 October 2005.

Haris Tagaras

Born 1955; graduate in law (University of Thessaloniki, 1977); special diploma in European law (Institute for European Studies, Free University of Brussels, 1980); doctorate in law (University of Thessaloniki, 1984); lawyer linguist at the Council of the European Communities (1980–82); Researcher at the Thessaloniki Centre for International and European Economic Law (1982–84); Administrator at the Court of Justice of the European Communities and at the Commission of the European Communities (1986–90); professor of Community law, international private law and human rights at Athens Panteion University (since 1990); external consultant for European matters at the Ministry of Justice and member of the Permanent Committee of the Lugano Convention (1991–2004); member of the Greek Competition Commission (1999–2005); member of the national Postal and Telecommunications Commission (2000–02); member of the Thessaloniki Bar, lawyer to the Court of Cassation; founder member of the Union of European Lawyers (UAE); associate member of the International Academy of Comparative Law; Judge at the Civil Service Tribunal since 6 October 2005.

Sean Van Raepenbusch

Born 1956; graduate in law (Free University of Brussels, 1979); special diploma in international law (Brussels, 1980); Doctor of Laws (1989); Head of the Legal Service of the Société anonyme du canal et des installations maritimes (Canals and Maritime Installations company), Brussels (1979–84); official of the Commission of the European Communities (Directorate-General for Social Affairs, 1984–88); member of the Legal Service of the Commission of the European Communities (1988–94); Legal Secretary at the Court of Justice of the European Communities (1994–2005); lecturer at the University of Charleroi (international and European social law, 1989–91), at the University of Mons-Hainaut (European law, 1991–97), at the University of Liège (European civil service law, 1989–91; institutional law of the European Union, 1995–2005; European social law, 2004–05); numerous publications on the subject of European social law and constitutional law of the European Union; Judge at the Civil Service Tribunal since 6 October 2005.

Stéphane Gervasoni

Born 1967; graduate of the Institute for Political Studies of Grenoble (1988) and the École nationale d'administration (1993); member of the Conseil d'État (contentious proceedings, 1993–97; social affairs, 1996–97; maître des requêtes since 1996); maître de conférences at the Institut d'études politiques, Paris (1993–95); commissaire du gouvernement attached to the special pensions appeal commission (1994–96); Legal Adviser to the Ministry of the Civil Service and to the City of Paris (1995–97); General Secretary of the Prefecture of the Department of the Yonne, Sub-Prefect of the district of Auxerre (1997–99); General Secretary to the Prefecture of the Département of Savoie, Sub-Prefect of the district of Chambéry (1999–2001); Legal Secretary at the Court of Justice of the European Communities (September 2001 to September 2005); titular member of the NATO appeals commission (since 2001); Judge at the Civil Service Tribunal since 6 October 2005.

Waltraud Hakenberg

Born 1955; studied law in Regensburg and Geneva (1974–79); first State examination (1979); postgraduate studies in Community law at the College of Europe, Bruges (1979–80); trainee lawyer in Regensburg (1980–83); Doctor of Laws (1982); second State examination (1983); lawyer in Munich and Paris (1983–89); official at the Court of Justice of the European Communities (1990–2005); Legal Secretary at the Court of Justice of the European Communities (in the Chambers of Judge Jann, 1995–2005); teaching for a number of universities in Germany, Austria, Switzerland and Russia; Honorary Professor at Saarland University (since 1999); member of various legal committees, associations and boards; numerous publications on Community law and Community procedural law; Registrar of the Civil Service Tribunal since 30 November 2005.

2. Order of precedence

from 1 January 2006 to 31 December 2006

P. Mahoney, President of the Tribunal
H. Kreppel, President of Chamber
S. Van Raepenbusch, President of Chamber
I. Boruta, Judge
H. Kanninen, Judge
H. Tagaras, Judge
S. Gervasoni, Judge
W. Hakenberg, Registrar

C — Statistics concerning the judicial activity of the Civil Service Tribunal

General activity of the Civil Service Tribunal

1. New cases, completed cases, cases pending (2005–06)

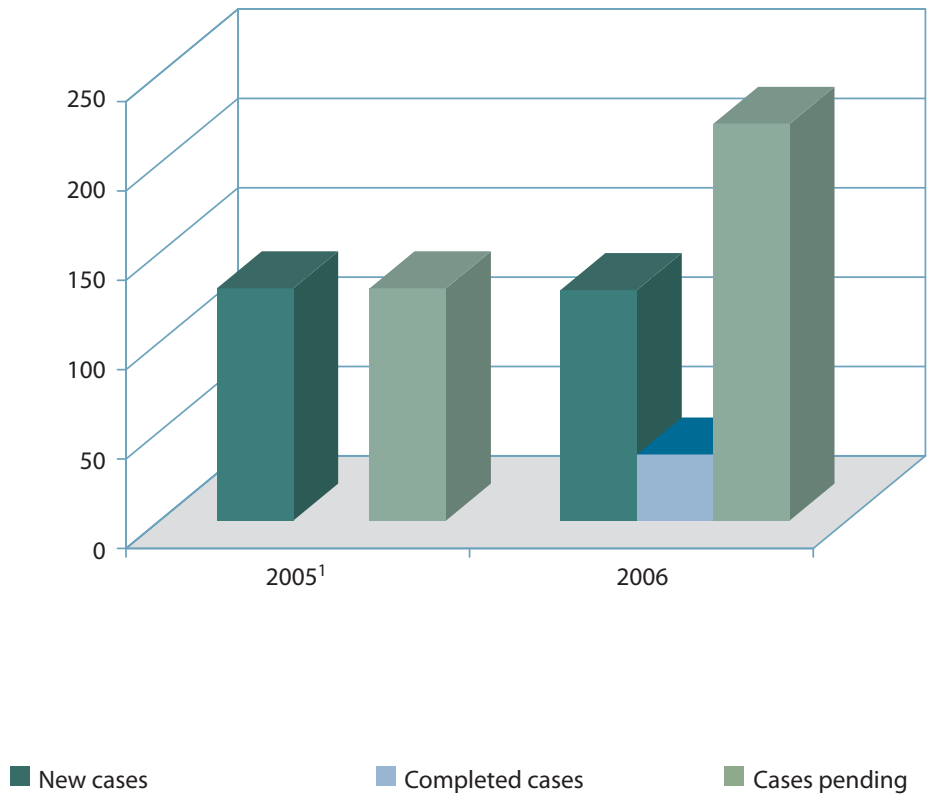
New cases

2. Percentage of the number of cases per principal defendant institution
3. Language of the case
4. Number of applicants (2005–06)

Completed cases

5. Outcome
6. Judgments and orders — Bench hearing action

1. *General activity of the Civil Service Tribunal —* New cases, completed cases, cases pending (2005–06)



	2005[1]	**2006**
New cases	130	148
Completed cases	0	53
Cases pending	130	225

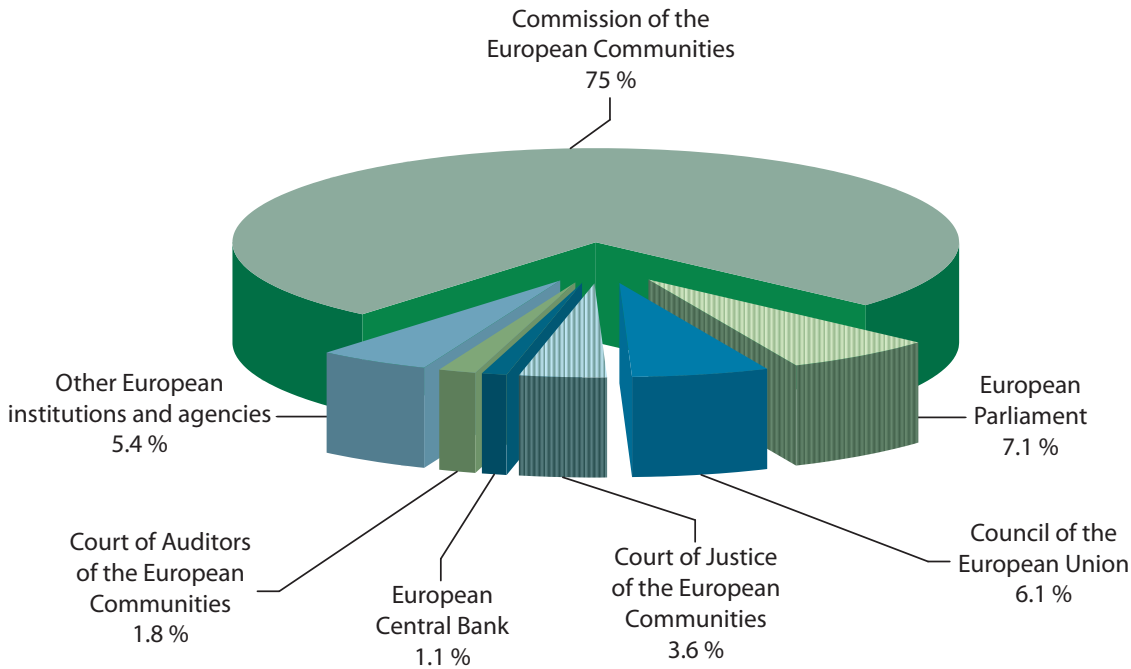
[1] The Tribunal was created by Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ L 333, 9.11.2004, p. 7).

Its judicial activity properly speaking began on 12 December 2005, the date of publication in the *Official Journal of the European Union* of the decision of the President of the Court of Justice recording that the European Union Civil Service Tribunal had been constituted in accordance with law (OJ L 325, 12.12.2005, p. 1).

At the end of 2005, 117 cases were transferred from the Court of First Instance to the Civil Service Tribunal and 13 cases were brought directly before the Tribunal.

2. *New cases* — Percentage of the number of cases per principal defendant institution

Percentage of number of new cases

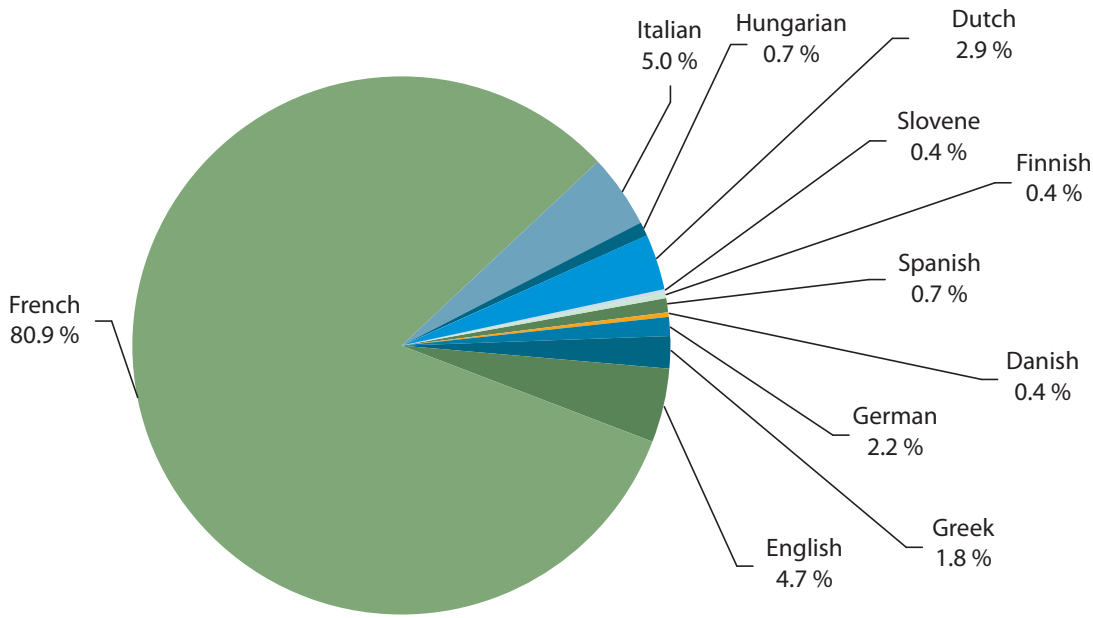


	Percentage of number of new cases	Percentage of total staff per institution[1]
Commission of the European Communities	75 %[2]	62.9 %
European Parliament	7.1 %	15.0 %
Council of the European Union	6.1 %	8.9 %
Court of Justice of the European Communities	3.6 %	4.5 %
European Central Bank	1.1 %	3.5 %
Court of Auditors of the European Communities	1.8 %	2.0 %
Other European institutions and agencies	5.4 %	3.1 %
Total	**100.0 %**	**100.0 %**

[1] Source of information: http//eur-lex.europa.eu/budget/data/D2006_VOL1/EN/nmc-grseqAP2000182/index.html.

[2] This percentage also includes cases brought against EPSO (European Personnel Selection Office), attached at organisational level to the Commission, that is to say, cases brought by candidates challenging selection procedures. Those persons are therefore not (yet) members of the institutions' staff.

3. *New cases* — Language of the case



Language of the case	Number of cases
Spanish	2
Danish	1
German	6
Greek	5
English	13
French	225
Italian	14
Hungarian	2
Dutch	8
Slovene	1
Finnish	1
Total	**278**

The language of the case corresponds to the language in which the proceedings were brought and not to the applicant's mother tongue or nationality.

4. *New cases* — Number of applicants — 2005–06

New cases with the greatest number of applicants in a single case

Number of applicants per case[1]	Fields[2]
484	Staff Regulations — Pension — Transfer of pension rights acquired in Belgium
483	Staff Regulations — Pension — Transfer of pension rights acquired in Belgium
309	Staff Regulations — Pension — Application of the correction coefficient calculated on the basis of the average cost of living in the country of residence
164	Staff Regulations — Pension — Transfer of pension rights acquired in Belgium
164	Staff Regulations — Pension — Transfer of pension rights acquired in Belgium
143	Staff Regulations — Appointments — Candidates placed on a reserve list before the new Staff Regulations entered into force
59	Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
36	Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations
29	Staff Regulations — Appointments — Candidates placed on a reserve list before the new Staff Regulations entered into force
21	Staff Regulations — Contract staff — Review of classification and remuneration

Total number of applicants for all new cases

Total applicants	Total new cases
2 403	278

[1] Those applicants who have brought more than one action have been counted in respect of each action brought.

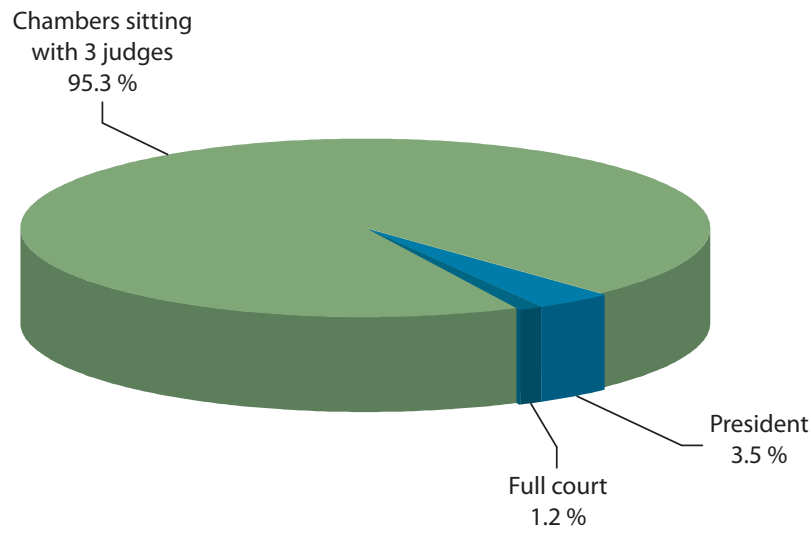
[2] The term 'Staff Regulations' below means the Staff Regulations of Officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

5. *Completed cases* — Outcome[1]

	Judgments Outcome						
Staff Regulations of Officials of the European Communities and Conditions of Employment of other servants of the institutions	**Annulment of the decision or judgment against the defendant**	**Dismissal of the action**	**Orders (actions inadmissible or manifestly inadmissible or unfounded)**	**Amicable settlements as a result of action taken by the Civil Service Tribunal**	**Removals from the register on other grounds**	**Referrals to the CFI**	**Total**
Assignment/Reassignment to a post		1					1
Remuneration and allowances	1	2	1	4	3		11
Assessment/Promotion	2	1	4		2		9
Competitions	1	2					3
Pensions and invalidity allowances	2	1	2		1		6
Social security/Occupational disease/Accidents	1	1	2			1	5
Termination of an agent's contract	1						1
Working conditions			1				1
Disciplinary proceedings			1				1
Recruitment/Appointment/Classification in grade	2	2	2		2		8
Working conditions/Leave	1						1
Fields other than staff cases						1	1
Total	**11**	**10**	**13**	**4**	**8**	**2**	**48**[1]

[1] To this figure must be added three cases completed in the field of legal aid and two orders in proceedings for interim measures.

6. *Completed cases* — Judgments and orders — Bench hearing action



	Judgments	Orders terminating proceedings[1]	Other orders	Total
Full court	2	0	0	2
Chambers sitting with 3 judges	19	26	118	163
President	0	6	0	6
Total	**21**	**32**	**118**	**171**

[1] Orders terminating proceedings by judicial determination, including those removing a case from the register following an amicable settlement reached between the parties as a result of action by the Civil Service Tribunal (other than orders terminating proceedings by removal from the register for other reasons).

Chapter IV

Meetings and visits

A — Official visits and events at the Court of Justice, the Court of First Instance and the Civil Service Tribunal

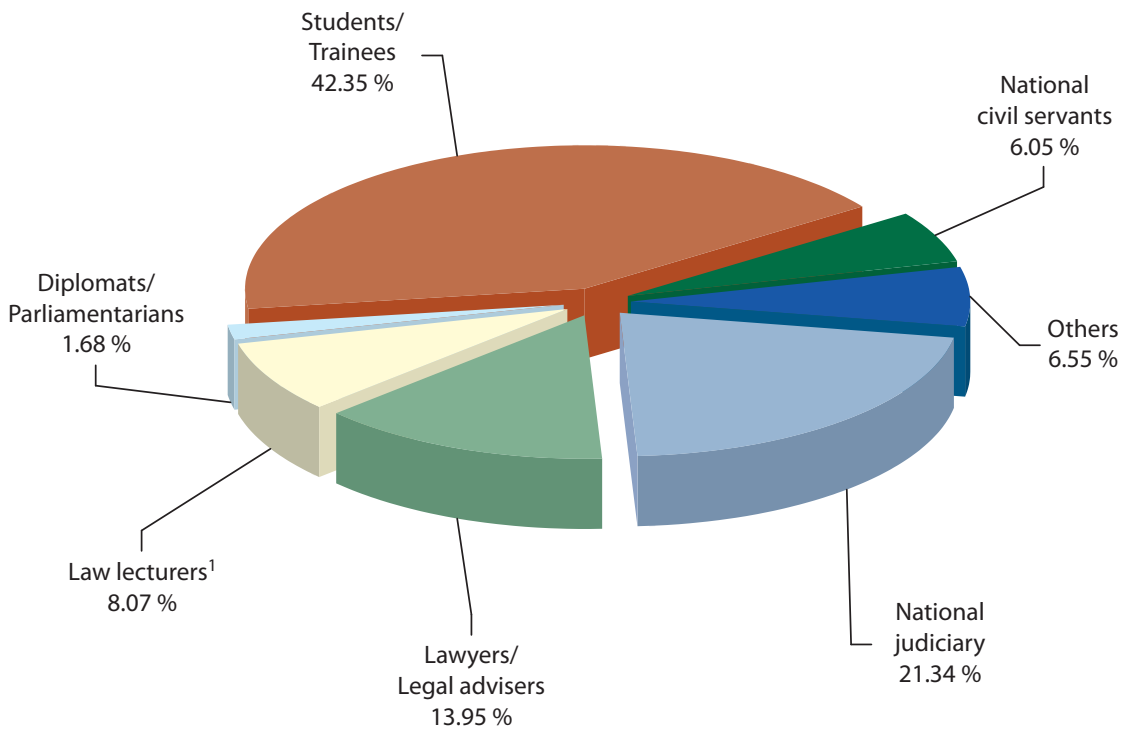
16 January	Delegation from the Steering Committee of the European Network of Councils for the Judiciary (ENCJ)
19 January	HE Edouard Malayan, Ambassador of the Russian Federation to the Grand Duchy of Luxembourg
26 January	HE Pavol Šepelák, Ambassador of the Czech Republic to the Grand Duchy of Luxembourg
3 February	Mr Acevedo Peralta, lawyer and notary in El Salvador
6 and 7 February	Delegation from the Supreme Court of the Republic of Lithuania
9 February	HE Mitsuaki Kojima, Ambassador of Japan to the Grand Duchy of Luxembourg, and Mr Hisashi Owada, Judge at the International Court of Justice
9 February	HE Konstantin Zhigalov, Ambassador of the Republic of Kazakhstan to the Kingdom of Belgium and to the Grand Duchy of Luxembourg
6 March	Mr Nikiforos Diamandouros, European Ombudsman
9 March	HE Václav Klaus, President of the Czech Republic
13 and 14 March	Delegation from the Centrale Raad van Beroep, Kingdom of the Netherlands
22 March	Mr Andris Guļāns, President of the Supreme Court of the Republic of Latvia
3 April	Delegation from the European Court of Human Rights
4 May	Delegation from the Ministry of Justice of the Socialist Republic of Vietnam
15 and 16 May	Delegation from the Tribunal Constitucional of the Kingdom of Spain
18 May	Delegation from the Parliament of the Republic of Lithuania
1 June	HE Ann Louise Wagner, Ambassador of the United States of America to the Grand Duchy of Luxembourg
7 June	Delegation from the Caribbean Community Secretariat
12 June	Mr Günter Gloser, Minister for European Affairs, Federal Republic of Germany

16 and 17 June	Celebration of the 20th anniversary of the European Lawyers' Union at the Court of Justice
19 and 20 June	Delegation from the European Parliament (Hungarian members)
4 July	Ms Monika Harms, General Federal Counsel at the Bundesgerichtshof
14 July	HE László Sólyom, President of the Republic of Hungary
22 September	Mr Claude Wiseler, Minister of Public Works, Grand Duchy of Luxembourg
27 and 28 September	Delegation from the Central American Court of Justice
28 September	HE Hubertus von Morr, Ambassador of the Federal Republic of Germany to the Grand Duchy of Luxembourg
2 October	HE Dionisios Kodellas, Ambassador of the Hellenic Republic to the Grand Duchy of Luxembourg
3 October	Delegation from the Office for Harmonization in the Internal Market at Alicante
11 October	HE Rocco Antonio Cangelosi, Permanent Representative of the Italian Republic to the European Union
12 October	Mr Gregorio Garzón Clariana, Jurisconsult of the European Parliament
19 October	Visit of the EFTA Court
23 October	Inauguration of the exhibition commemorating the events of October 1956 in Hungary
26 October	HE Kazuhito Tatebe, Ambassador of Japan to the Grand Duchy of Luxembourg
17 November	HE Heinz Fischer, President of the Republic of Austria
22 November	Ms Hansine Napwaniyo Donli, President of the Ecowas Court of Justice
23 November	HE Alain Kundycki, Ambassador of the Kingdom of Belgium to the Grand Duchy of Luxembourg
27 November	Mr Guy Canivet, First President of the French Cour de cassation
5 and 6 December	Information days for the new Members of the Court
7 December	HE Vaira Vīķe-Freiberga, President of the Republic of Latvia
7 December	Mr Dimitris Dimitriadis, President of the European Economic and Social Committee

7 and 8 December	Information days for the new Members of the Court of First Instance
7 and 8 December	Ms Albertine Anne Honorine Lipou Massala, Executive Secretary of the Administrative Tribunal of the African Development Bank

B — Study visits

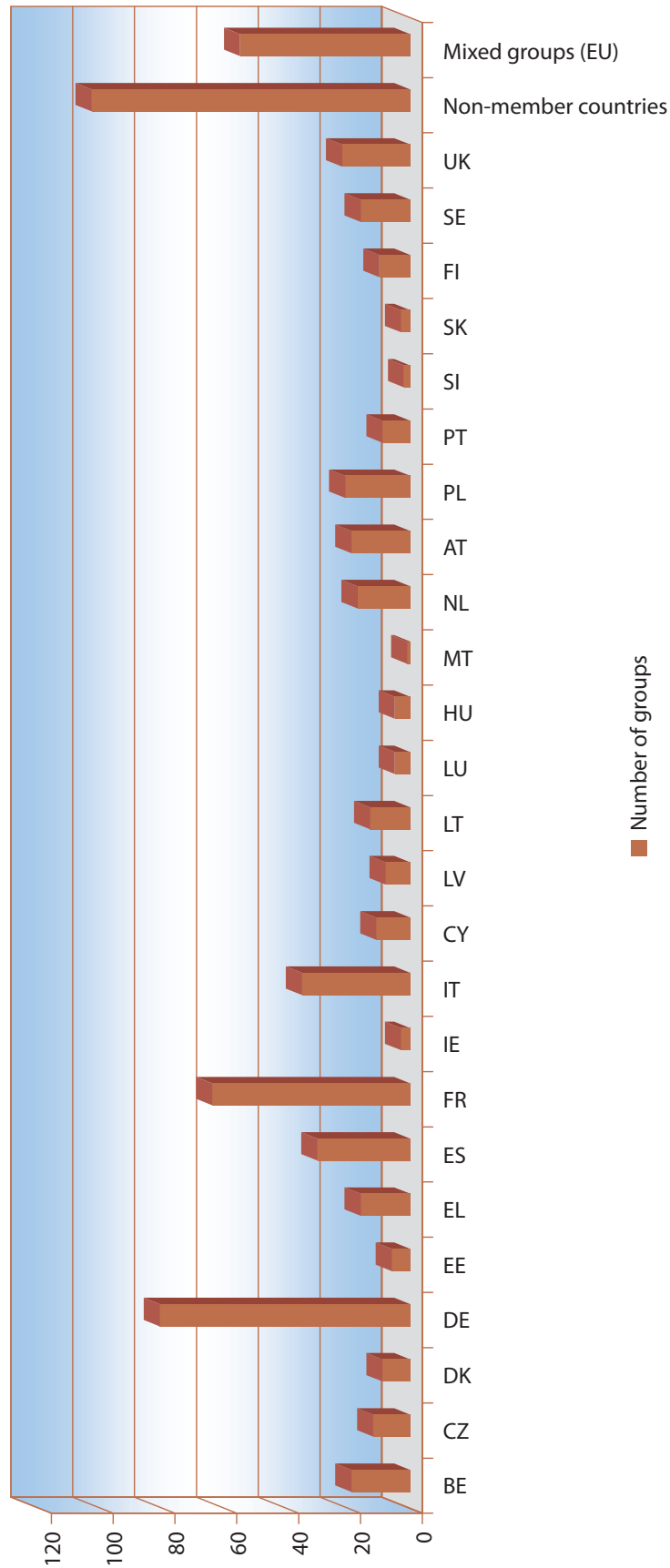
Distribution by type of group



	National judiciary	Lawyers/ Legal advisers	Law lecturers[1]	Diplomats/ Parliamentarians	Students/ Trainees	National civil servants	Others	Total
Number of groups	127	83	48	10	252	36	39	595

[1] Other than those accompanying student groups.

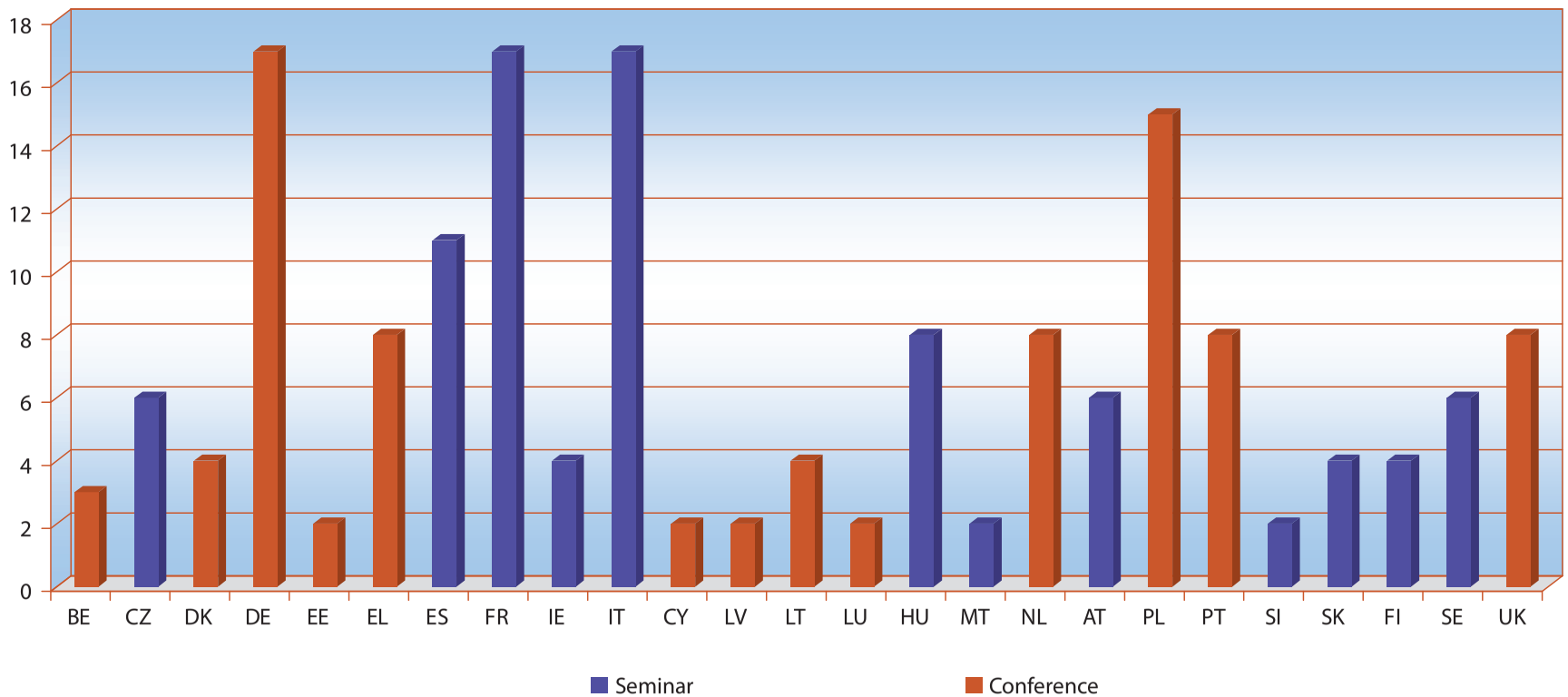
Study visits — Distribution by Member State[1]



	Number of visitors								Number of groups
	National judiciary	Lawyers/ Legal advisers	Law lecturers[1]	Diplomats/ Parliamentarians	Students/ Trainees	National civil servants	Others	Total	
BE	20	43	10		227		56	**356**	**19**
CZ			15	12	32		20	**79**	**12**
DK	16		14		207	28		**265**	**9**
DE	270	362	2	17	1 030	105	320	**2 106**	**81**
EE	66							**66**	**6**
EL	160	34			101	43		**338**	**16**
ES	422	52			143	68		**685**	**30**
FR	225	192			1 142		217	**1 776**	**64**
IE	7				58			**65**	**3**
IT		55	25	25	364		28	**497**	**35**
CY	8	9	3		6			**26**	**11**
LV	21			7				**28**	**8**
LT			13		15			**28**	**13**
LU			2		65			**67**	**5**
HU		11			53			**64**	**5**
MT	2							**2**	**1**
NL		109			330		19	**458**	**17**
AT	7	77	1	29	210	23	41	**388**	**19**
PL	234	336	3		117			**690**	**21**
PT			5		53			**58**	**9**
SI				6				**6**	**2**
SK	2				30			**32**	**3**
FI	21	49			61	22	9	**162**	**10**
SE	114	61		2	67	13		**257**	**16**
UK	112	69			274	3		**458**	**22**
Non-member countries	181	74	15	3	1 516	84	49	**1 922**	**103**
Mixed groups (EU)	156	140			955	325	81	**1 657**	**55**
Total	**2 044**	**1 673**	**108**	**101**	**7 056**	**714**	**840**	**12 536**	**595**

[1] Other than those accompanying student groups.

Study visits — National judiciary



	BE	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
Seminar		6					11	17	4	17					8	2		6			2	4	4	6		87
Conference	3		4	17	2	8					2	2	4	2			8		15	8					8	83

C — Formal sittings

10 January	Formal sitting on the occasion of the departure of Advocate General F. Jacobs and Judge C. Gulmann and the entry into office of Mr L. Bay Larsen and Ms E. Sharpston as Judge and Advocate General respectively
17 March	Formal sitting on the occasion of the partial replacement of the Members of the Court of Auditors of the European Communities
3 May	Formal sitting on the occasion of the departure from the Court of Justice of Judge A. La Pergola and the entry into office of Mr A. Tizzano as Judge at the Court of Justice, the entry into office of Mr P. Mengozzi as Advocate General at the Court of Justice and the entry into office of Mr E. Moavero Milanesi as Judge at the Court of First Instance
6 October	Formal sitting on the occasion of the partial replacement of the Members of the Court of Justice and the entry into office of new Judges at the Court of First Instance

D — Visits and participation in official functions

Court of Justice

2 January	Representation of the Court at the New Year's reception organised by the Cour de cassation of Belgium, in Brussels
6 January	Attendance of a delegation from the Court at the formal sitting of the Cour de cassation, in Paris
18 January	Attendance of a delegation from the Court at the Rechtspolitischer Neujahrsempfang 2006, at the invitation of the Minister of Justice, Ms Brigitte Zypries, in Berlin
20 January	Representation of the Court at the formal sitting of the 'Hoge Raad' on the occasion of the departure of the Principal State Counsel, in The Hague
20 January	Attendance of a delegation from the Court at the formal sitting of the European Court of Human Rights and participation in the seminar 'L'exécution et les effets des arrêts de la Cour européenne des droits de l'homme: le rôle judiciaire', in Strasbourg
27 January	Representation of the Court at the ceremony inaugurating the judicial year of the Corte suprema di cassazione, in Rome
2 to 4 February	Official visit of a delegation from the Court to the Bundesverfassungsgericht, in Karlsruhe
7 February	Representation of the Court at the religious service and the official ceremony organised in memory of Mr Johannes Rau, former President of the Federal Republic of Germany, in Berlin
22 February	Participation of the President of the Court in a meeting with the Prime Minister of Luxembourg, Mr Jean-Claude Juncker, on questions concerning cooperation between the Court of Justice of the European Communities and the European Court of Human Rights, in Luxembourg
16 to 17 March	Representation of the Court at the third Congress of the European Commercial Judges Forum, in Hamburg
5 April	Representation of the Court at the General Assembly of the Constitutional Court of the Republic of Poland, in Warsaw
10 and 11 April	Representation of the Court in the international round table discussion on 'La relation entre le droit constitutionnel et le droit européen dans l'Union européenne', organised by the Constitutional Court of the Republic of Hungary in cooperation with the Venice Commission of

	the Council of Europe and the Budapest Forum for Europe, in Budapest
18 and 19 April	Participation of the President of the Court in the conference on subsidiarity 'L'Europe commence chez soi' organised by the Austrian Presidency of the Council of the European Union in cooperation with the Austrian Parliament and the Province of Niederösterreich, in St Pölten (Niederösterreich)
22 April	Attendance of the President of the Court at the official ceremony organised on the occasion of the 50th anniversary of the Constitutional Court of the Italian Republic, in Rome
21 to 24 May	Official visit of a delegation from the Court to Finland
22 May	Representation of the Court at the colloquium 'Veinte años de España en las Comunidades Europeas. La evolución jurisprudencial del derecho' organised by the Asociación Española para el Estudio del Derecho Europeo, on the occasion of the 80th birthday of the former Judge at the Court, Mr Díez de Velasco, in Madrid
28 May	Attendance of the President of the Court, at the invitation of the Prime Minister, at the event organised on the occasion of the 25th anniversary of the accession of Greece to the European Union, in Athens
28 to 30 May	Representation of the Court at the meeting of the Board and at the colloquium organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, in Leipzig
1 June	Representation of the Court, at the invitation of the President of the Italian Republic, at the ceremony organised on the occasion of the National Day, in Rome
12 and 13 June	Attendance of a delegation from the Court at the second colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union, in Warsaw
16 and 17 June	Representation of the Court at the fifth conference of the Association of European Competition Law Judges, in Wustrau
29 June to 1 July	Attendance of a delegation from the Court at the celebration of the 15th anniversary of the Constitutional Court of the Republic of Bulgaria, in Sofia
24 July	Attendance of the President at the reception given by the President of the Hellenic Republic on the occasion of the 32nd anniversary of the restoration of the Republic, in Athens

18 September	Attendance of the President at the dinner organised by Mr Köhler, President of the Federal Republic of Germany, in honour of the President of the Hellenic Republic, Mr Papoulias, in Berlin
28 September	Representation of the Court at the ceremony during which the Court of Justice was presented with the Gold Medal of the 50th anniversary of thecreation of the Colegio oficial de Graduados Sociales de Madrid, in Madrid
28 to 30 September	Attendance of a delegation from the Court at the ceremonies marking the 10th anniversary of the International Tribunal for the Law of the Sea, in Hamburg
1 and 2 October	Attendance of a delegation from the Court at the Opening of the Legal Year organised by the Lord Chancellor, in London
2 October	Participation of a delegation from the Court in the Verfassungstag (Formal commemoration of the establishment of the Austrian Constitutional Court, in the presence of the President of the Republic of Austria), in Vienna
2 October	Representation of the Court at the reception organised by the Permanent Representation of the Republic of Cyprus to the European Union on the occasion of the 46th anniversary of the Independence of the Republic of Cyprus, in Brussels
3 October	Representation of the Court at the official ceremonies organised for the Tag der deutschen Einheit, in Kiel
17 October	Representation of the Court, at the invitation of the President of the Austrian Constitutional Court, in a round table discussion involving the Presidents of the Constitutional Courts of Poland, Hungary, Slovenia, Croatia, the Czech Republic and Slovakia, on the topic 'Les conséquences de l'appartenance à l'Union européenne pour les Cours constitutionnelles', in Vienna
25 to 27 October	Representation of the Court at the conference organised by the Venice Commission of the Council of Europe and by the Constitutional Court of the Russian Federation, in Moscow
1 November	Presentation to the President of the Court of the decoration of the Grand Cross of the Order of Makarios III, by HE the President of the Republic of Cyprus, in Nicosia
1 to 4 November	Attendance of the President and a delegation from the Court at the FIDE congress, in Cyprus
20 November	Representation of the Court at a meeting of the Board of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, in Brussels

6 December	Representation of the Court at the reception organised by the President of the Republic of Finland on the occasion of Finnish Independence Day, in Helsinki
7 to 10 December	Representation of the Court at the conference organised by the Constitutional Court of the Republic of Latvia, on the occasion of the national celebrations of its 10th anniversary, in Riga

Court of First Instance

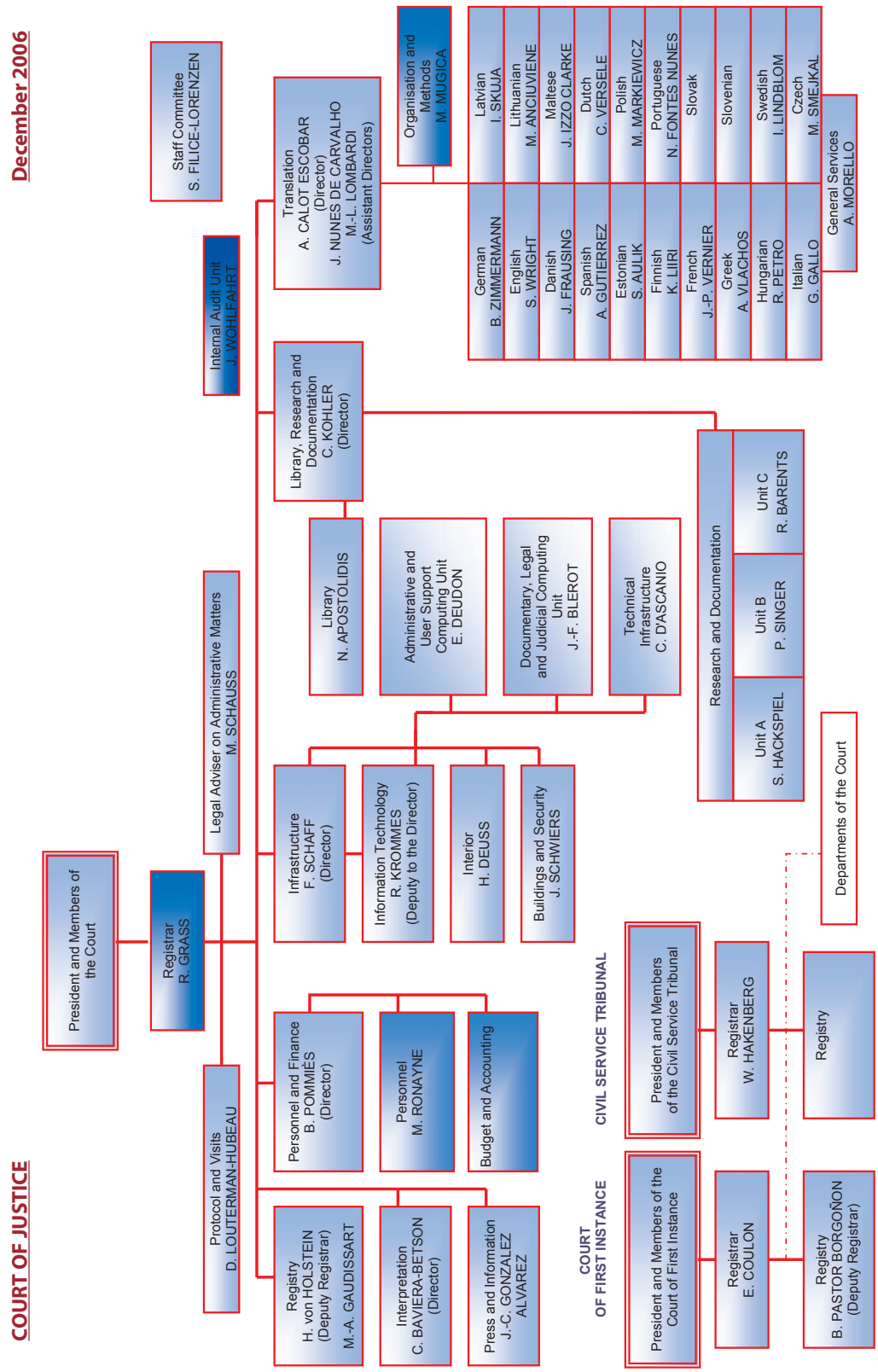
27 January	Attendance of the President of the Court at an official reception in honour of Mr Claus Gulmann, Judge at the Court of Justice, in Copenhagen
8 and 9 February	Attendance and participation of the President of the Court in a round table discussion as part of the '2006 International Cartel Workshop' organised by the International Bar Association's Legal Practice Division and Antitrust Section, in London
30 March	Speech of the President of the Court at the 'Manuel Chrysoloras' conference, organised by the European Public Law Center, in Athens
4 and 5 May	Attendance and participation of the President of the Court at the 'Challenges in Nordic cases' conference, organised by the Academy of Nordic Jurists, in Helsinki
10 and 11 May	Attendance and participation of the President of the Court at the XIIIth St Gallen International Competition Law Forum (ICF), organised by the University of St Gallen
19 May	Attendance of the President of the Court at the 2006 European Conference on the European Perspective, organised by the Commission of the European Communities and the European Parliament
27 June	Attendance of the President of the Court at an official dinner given by the Danish Minister of Justice on the occasion of the departure of Mr Claus Gulmann
3 July	Attendance of the President of the Court at the summer reception of the Academy of European Law, in Trier
7 August	Presentation to the President of the Court, by Her Majesty the Queen of Denmark, of the decoration of Commander 1st Class, in Copenhagen
23 October	Attendance of the President of the Court at a meeting in London with the Rt Hon. the Lord Brown of Eaton-under-Heywood (Chairman) and Dr Chris K. Kerse (Legal Adviser) as part of the

	inquiry carried out by the House of Lords regarding the possible creation of a 'European Competition Court'
23 October	Participation of the President of the Court in a debate, and the giving of a speech, in London as part of a conference, organised by The Jevons Institute at University College London, on the topic 'A Competition Court of the EU?'
31 October	Speech of the President of the Court on the topic 'ne bis in idem' at the Danish Competition Law Society (Dansk Forening for Konkurrenceret), in Copenhagen
13 November	Participation of the President of the Court in a round table discussion in Trier as part of a conference organised by the Academy of European Law (AEL) at the AEL Congress Centre, on the topic 'State aid and taxation: regional devolution in tax matters in the perspective of State aid'
23 and 24 November	Attendance and participation of the President of the Court at a conference in Vilnius on 'The impact of the Jurisprudence of the European Court of Justice and the Court of First Instance on European and national legal orders', organised by the Committee for European Affairs of the Parliament of the Republic of Lithuania

Civil Service Tribunal

23 to 25 November	Attendance of Mr Mahoney, President, and of Mr Tagaras, Judge, at the colloquium of the European Lawyers' Union on the topic 'Nouvelles frontières pour la construction de l'Union européenne: l'effectivité et l'efficacité du système de justice', in Venice

Abridged organisational chart



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Court of Justice of the European Communities

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