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

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Foreword

Past, present and future: the year gone by has seen the Court of Justice look back over its history and reflect on its future, whilst, in its daily work, continuing to perform its task of ensuring that the law is observed in the application and interpretation of the Treaty.

The Court's 50th anniversary celebrations provided the opportunity to take stock of half a century of judicial activity, and to recognise how, by its judgments over the years, the Community judicature has brought to light the fundamental principles which were implicit in the wording and the structure of the founding treaties and, by giving judicial expression to those principles, has defined the characteristic features of the Community legal order. The celebrations also provided the ideal opportunity to pay tribute to all those who, since 1952, have assisted in the performance of those tasks. The conference and formal sitting which took place on 3 and 4 December 2002 in Luxembourg were a resounding success, thanks to the number and the exceptional abilities of the participants.

The celebrations did not prevent the Court of Justice from paying close attention to the work carried out throughout the year by those involved in the Convention on the Future of Europe. The fundamental approaches already emerging from that work justify the great interest with which it has been followed by the Court. While taking care to exercise the reserve appropriate to its role in the Community, the Court has, when asked, willingly assisted the various Convention working groups concerning, in particular, the principle of subsidiarity, fundamental rights, and the question of the legal personality of the Union.

As in preceding annual reports, the main judicial activity of the Court of Justice and the Court of First Instance is summarised in the pages which follow, albeit in a somewhat reorganised form.

cont.

It should be noted that in 2002 (using gross figures, before any joinder of cases) the Court of Justice brought 513 cases to a close (434 in 2001), and 477 new cases were registered (504 in 2001). For its part, the Court of First Instance settled 331 cases (340 in 2001) and recorded 411 new cases (345 in 2001). Those figures illustrate the high level of Community judicial activity on the eve of two very important changes: the entry into force of the Treaty of Nice with its consequences for the Community judicial system, and enlargement, for which the Court is industriously preparing, as it must given the importance of that development for the future of Europe and the European Union.

G. C. Rodríguez Iglesias
President of the Court of Justice

Chapter I

The Court of Justice of the European Communities

A – Proceedings of the Court of Justice in 2002

by Mr G.C. Rodríguez Iglesias, President of the Court of Justice

1. This part of the annual report provides a survey of the activity of the Court of Justice of the European Communities in 2002. Apart from a brief statistical appraisal (section 2), it presents the main developments in the case-law, arranged as follows:

jurisdiction of the Court and procedure (section 3); general principles and constitutional and institutional cases (section 4); free movement of goods (section 5); freedom of movement for workers (section 6); freedom of establishment (section 7); freedom to provide services (section 8); free movement of capital (section 9); competition rules (section 10); trade mark law (section 11); public procurement (section 12); social law (section 13); external relations law (section 14); transport policy (section 15); tax law (section 16); Brussels Convention (section 17).

This selection covers only 55 of the 466 judgments and orders pronounced by the Court during 2002 and refers only to their essential points. It also does not include the Opinions of the Advocates General, which are of undeniable importance for a detailed understanding of the issues at stake in certain cases but would increase the length of a report which must necessarily be brief. The full texts of all the judgments, opinions and orders of the Court, as well as of the Opinions of the Advocates General, are available in all the official Community languages on the Court's internet site (*www.curia.eu.int*). In order to avoid any confusion and to assist the reader, this report refers, unless otherwise indicated, to the numbering of the articles of the Treaty on European Union and the EC Treaty established by the Treaty of Amsterdam.

2. As regards statistics, the Court brought 466 cases to a close in 2002 (net figure, that is to say, taking account of joinder). Of those, 269 cases were dealt with by judgments, one case concerned an opinion delivered under Article 300(6) EC and 196 cases gave rise to orders. These figures show a slight increase compared with the previous year (398 cases brought to a close). In 2002, 477 new cases arrived at the Court (503 in 2001). At the end of 2002, there were 907 cases pending (gross figure) compared with 943 at the end of 2001.

The upward trend in the duration of proceedings did not change this year. References for preliminary rulings and direct actions took approximately 24 months, as compared with 22 and 23 months respectively in 2001. The average time taken to deal with appeals was 19 months, compared with 16 months in 2001.

The Court made differing degrees of use of the various instruments at its disposal to expedite its treatment of certain cases (priority treatment, the accelerated or expedited procedure, and the simplified procedure). It was decided, pursuant to Article 55(2) of

the Rules of Procedure, to give two cases priority treatment; while one of them, the action for failure to fulfil obligations brought by the Commission of the European Communities against the French Republic in Case C-274/02, was swiftly removed from the register following withdrawal of the action by the applicant, the other, the reference for a preliminary ruling in Case C-491/01 *British American Tobacco and Imperial Tobacco*, gave rise to an important judgment, delivered within 12 months of receipt of the order for reference from the national court (judgment of 10 December 2002, not yet published in the ECR).

The expedited or accelerated procedure, as provided for in Articles 62a and 104a of the Rules of Procedure, which is even faster inasmuch as it allows for omission of certain stages in the proceedings, was not used in 2002: in the two cases where use of such a procedure was sought, the circumstances invoked by the parties or the national courts did not satisfy the requirement of exceptional urgency laid down in the Rules of Procedure.

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

As regards the distribution of cases between the Court in plenary session and Chambers of Judges, the former disposed of one case in five in 2002, while the remaining judgments and orders were pronounced by Chambers of five Judges (50% of cases) or of three Judges (one case in four).

For further information with regard to the statistics for the 2002 judicial year, the reader is referred to Chapter IV of this report.

3. As regards the *jurisdiction of the Court* and matters of *procedure*, this report covers a case concerning the preliminary reference procedure (3.1), another concerning proceedings for annulment (3.2), a case concerning interim relief (3.3) and a case concerning the effects of expiry of the time-limit for challenging Community decisions (3.4).

3.1. In Case C-99/00 *Lyckeskog* [2002] ECR I-4839, the Court was called upon to interpret the concept of 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' (third paragraph of Article 234 EC) with regard to the Swedish judicial system. Under that system, an individual may appeal to the Högsta domstol (Supreme Court), but the appeal will be examined as to its substance only if the Högsta domstol declares it admissible. If there are no special grounds, such a declaration can be made only if examination of the appeal is important for guidance in the application of the law. In this case, the Court therefore had to determine whether a national court or tribunal whose decisions will be examined by the national supreme court only if the latter declares the appeal to be admissible is to be

regarded as a court or tribunal against whose decisions there is no judicial remedy under national law.

The Court of Justice held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article 234 EC, and that 'the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy' (paragraph 16). It explained that '[i]f a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage' (paragraph 18).

3.2. Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 concerned an appeal against an order of the Court of First Instance declaring inadmissible an action for annulment brought by an association of farmers against a regulation of the Council of the European Union. The Court of Justice's judgment did not concur with the Opinion of the Advocate General and reaffirmed its settled case-law as to the conditions governing admissibility of actions for annulment brought by individuals. The fourth paragraph of Article 230 EC provides that 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. The case-law recognises that a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain persons. That is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation.

The Court held that an individual's entitlement to effective judicial protection of rights which he derives from the Community legal order does not require any change to its earlier case-law. It pointed out that the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them to make a reference to the Court of Justice for a preliminary ruling. Against that background, 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection' (paragraph 41), and national courts are required, so far as possible,

to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

The Court added that while it is necessary to interpret the condition that the applicant be individually concerned in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside that condition, which is expressly laid down in the EC Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts. It also observed that 'while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force' (paragraph 45).

3.3. In Case C-440/01 P(R) *Commission* v *Artegodan* [2002] ECR I-1489, an appeal was brought before the Court against an order of the President of the Court of First Instance of 5 September 2001 dismissing an application – made by the Commission under Article 108 of the Rules of Procedure of the Court of First Instance – for variation or cancellation of an order of the President of the Court of First Instance of 28 June 2000 which has suspended operation of a Commission decision. The 'change in circumstances' relied on by the Commission was, essentially, the setting aside, on appeal by the Commission, of eight orders of the President of the Court of First Instance, [1] which were founded on grounds almost identical to those of the order of 28 June 2000.

Having regard to the 'fundamentally precarious nature of measures granted in interim relief proceedings' (paragraph 62), the Court interpreted the term 'change in circumstances' as 'covering the occurrence of any factual or legal matter such as to call into question the assessment by the judge who heard the application with regard to the conditions ... which are to be met if the operation of an act is to be suspended or other interim relief is to be granted' (paragraph 63). It observed in particular that, unlike an appeal, an application under Article 108 of the Rules of Procedure of the Court of First Instance may be made 'at any time', and its purpose is solely to bring the judge in interim relief proceedings to reconsider, for the future only, an order granting interim relief, including, where appropriate, with regard to the assessment of the pleas of fact and of law which established a *prima facie* case for the grant of that relief. The Court

[1] See the orders of 11 April 2001 in Case C-459/00 P(R) *Commission* v *Trenker* [2001] ECR I-2823; Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865; Case C-474/00 P(R) *Commission* v *Bruno Farmaceutici and Others* [2001] ECR I-2909; Case C-475/00 P(R) *Commission* v *Hänseler* [2001] ECR I-2953; Case C-476/00 P(R) *Commission* v *Schuck* [2001] ECR I-2995; Case C-477/00 P(R) *Commission* v *Roussel and Roussel Diamant* [2001] ECR I-3037; Case C-478/00 P(R) *Commission* v *Roussel and Roussel Iberica* [2001] ECR I-3079; and Case C-479/00 P(R) *Commission* v *Gerot Pharmazeutika* [2001] ECR I-3121.

concluded that the President of the Court of First Instance had erred in law, by equating such an application to an appeal and transposing, without qualification, to the context of interim orders the case-law of the Court of Justice relating to the consequences of expiry of the period prescribed for bringing proceedings inasmuch as he had accorded to interim orders the binding force of a judgment or an order disposing of an action. Hence, the Court set aside the order of the President of the Court of First Instance of 5 September 2001 and, since it considered that the state of the proceedings so permitted, gave a final decision on the application, ending the suspension of operation of the contested Commission decision.

3.4. In Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, the Court was asked for a preliminary ruling on, *inter alia*, whether a Member State may call into question the validity of Community decisions by invoking changes occurring after the expiry of the time-limit for challenging those decisions. The Court noted that a decision adopted by the Community institutions which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of Article 230 EC becomes definitive as against that person. That rule is based on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called into question indefinitely. The Court stated that the same considerations of legal certainty explain why a Member State, which is a party to a dispute before a national court, is not permitted to plead the unlawfulness of a Community decision addressed to it and in respect of which it did not bring an action for annulment within the time-limit laid down for that purpose by the EC Treaty.

4. So far as concerns *general principles of Community law* and cases of a *constitutional* or *institutional* nature, reference must be made to one case concerning fundamental rights (4.1), two cases concerning citizenship of the European Union (4.2), a case dealing with the legal basis and other aspects of the validity of a directive (4.3), a case concerning the rules governing non-contractual liability of the Community (4.4) and another on the direct effect of regulations (4.5).

4.1. Case C-60/00 *Carpenter* [2002] ECR I-6279 dealt with the interpretation of Article 49 EC and Directive 73/148/EEC. [2] It was necessary to determine whether those provisions confer on nationals of non-member States (in the main proceedings, Mrs Carpenter, a Philippine national) the right to reside with their spouse (in this instance Mr Carpenter, a national of the United Kingdom) in the latter's Member State of origin, if their spouse is established in that Member State and provides services to persons established in other Member States.

[2] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p.14).

First of all, the Court found that Mr Carpenter was availing himself of the right freely to provide services guaranteed by Article 49 EC, since a significant proportion of his business consisted in providing services, in particular the sale of advertising space in medical and scientific journals, to advertisers established in other Member States. It also found that Directive 73/148 was not applicable to the case at issue in the main proceedings, stating that that directive does not govern the right of residence of the family members of a provider of services in his Member State of origin. The Court then considered Article 49 EC, relating to the freedom to provide services, and made the following observation: 'the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse' (paragraph 39). It also pointed out that 'a Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures' (paragraph 40).

After finding that the decision to deport Mrs Carpenter constituted an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'), the Court set out the relevant case-law of the European Court of Human Rights, which establishes that the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life. Such interference infringes the Convention if it is not in accordance with the law, motivated by one or more legitimate aims, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX). In the light of that case-law, the Court of Justice held that a decision to deport Mrs Carpenter taken in circumstances such as those in the main proceedings did not strike a fair balance between the right of Mr Carpenter to respect for his family life and the maintenance of public order and public safety. The Court found that since Mrs Carpenter's arrival in the United Kingdom, her conduct had not been the subject of any complaint that could give cause to fear that she might constitute a danger to public order or public safety. It also observed that Mr and Mrs Carpenter's marriage was genuine and that Mrs Carpenter continued to lead a true family life, in particular by looking after her husband's children from a previous marriage. The Court therefore held that Article 49 EC, read in the light of the fundamental right to respect for family life, precludes, in circumstances such as those in the main proceedings, the Member State of origin of a provider of services, established in that Member State, who provides services to recipients established in other Member States, from refusing that provider's spouse, who is a national of a non-member country, the right to reside in its territory.

4.2. In Case C-413/99 *Baumbast and R* [2002] ECR I-7091, the Court gave a preliminary ruling on the question whether Article 18(1) EC, concerning citizenship of the Union, has direct effect.

The Court concluded that 'a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality' (paragraph 94). In reaching that conclusion, the Court deduced from its case-law (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7) that 'the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect' (paragraph 86). The Court also observed that the limitations and conditions referred to in Article 18(1) EC must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued. As regards the main proceedings, the Court held that to refuse to allow Mr Baumbast to exercise the right of residence conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364/EEC [3] on the ground that his sickness insurance did not cover emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.

In Case C-224/98 *D'Hoop* [2002] ECR I-6191, the Court gave a preliminary ruling on the interpretation of the provisions of the EC Treaty relating to citizenship of the Union and to the principle of non-discrimination with regard to Belgian legislation granting the right to tideover allowances to its own nationals only if they had completed their secondary education in a Belgian educational establishment. In the main proceedings, a Belgian national seeking her first employment, who had completed her secondary education in an educational establishment in another Member State, was refused a tideover allowance. The Court held that Community law precludes a Member State from refusing to grant a tideover allowance to one of its nationals, a student seeking first employment, on the sole ground that the student's secondary education was completed in another Member State.

4.3. The primary issue addressed in *British American Tobacco and Imperial Tobacco*, cited above, was the validity of Directive 2001/37/EC concerning the manufacture,

[3] Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p26).

presentation and sale of tobacco products, [4] with regard, in particular, to its legal basis, the principle of proportionality, the fundamental right to property and the principle of subsidiarity.

The Court had to determine whether that directive was invalid in whole or in part by reason of the fact that Articles 95 EC and/or 133 EC did not provide it with an appropriate legal basis. To decide that question, the Court referred to its case-law on Article 95 EC (see, in particular, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, on the advertising of tobacco products). After a detailed examination, the Court held that Directive 2001/37 genuinely has as its object the improvement of the conditions for the functioning of the internal market and that it was, therefore, possible for it to be adopted on the basis of Article 95 EC; it was no bar that the protection of public health was a decisive factor in the choices involved in the harmonising measures which that directive defines. That conclusion was not undermined by the argument that the prohibition on manufacture within the Community of cigarettes which do not comply with the requirements of Article 3(1) of that directive, for export to non-member countries, does not contribute to improving the conditions for the functioning of the internal market. Such a prohibition can be adopted on the basis of Article 95 EC, so long as its purpose is to prevent circumvention, particularly by unlawful reimports into the Community, of certain prohibitions concerning the internal market. The Court also found that Directive 2001/37 incorrectly cited Article 133 EC as a legal basis, since any commercial policy objective which might be pursued by that directive would be secondary to its primary aim, which is to improve the conditions for the functioning of the internal market. The incorrect reference to Article 133 EC was, however, only a purely formal defect which did not invalidate the directive, since the procedure for adoption of the directive was not flawed. The Court therefore concluded that Directive 2001/37 was not invalid for lack of an appropriate legal basis.

The Court also held that Directive 2001/37 and, in particular, Articles 3, 5 and 7 thereof, comply with the principle of proportionality. Those provisions prohibit the manufacture, release for free circulation and marketing of cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide set by the directive. They also lay down the obligation to show information on cigarette packets as to the levels of those substances, as well as warnings concerning the risks to health posed by tobacco products, and they prohibit the use on tobacco product packaging of certain terms, such as 'low-tar', 'light', 'ultra-light' and 'mild', which might mislead consumers. The Court held that those measures are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it.

[4] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p26).

As regards the fundamental right to property, the Court found that the restrictions to that right which result from preventing manufacturers from using the space on some sides of cigarette packets to show their trade marks, and from the prohibition on the use of certain descriptions, such as 'light' or 'ultra-light', on the packaging, in fact correspond to objectives of general interest pursued by the Community, in particular the objective of ensuring a high level of health protection when national laws are harmonised, and do not constitute, having regard to the aim pursued, a disproportionate and intolerable interference which impairs the very substance of the right to property.

The Court also held that Directive 2001/37 does not contravene the principle of subsidiarity. It observed that this principle applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give the Community legislature exclusive competence to regulate economic activity in the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning. The Court held that the objective of Directive 2001/37 cannot be sufficiently achieved by the Member States individually and could be better achieved at Community level. It added that the intensity of the action undertaken by the Community in this instance did not go beyond what was necessary to achieve the objective pursued.

4.4. In its judgment of 10 December 2002 in Case 312/00 P *Commission* v *Camar and Tico*, not yet published in the ECR, given on appeal from the judgment of the Court of First Instance in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, the Court gave a ruling on, *inter alia*, the circumstances in which the Community can incur non-contractual liability.

One of the grounds of appeal alleged that the Court of First Instance had wrongly relied on its case-law according to which, in the field of *administrative action*, any infringement of law constitutes illegality that is capable of rendering the Community liable. In that regard, the Court of Justice referred to the case-law according to which 'Community law confers a right to reparation 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' (paragraph 53). The Court went on to state that 'as to the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion ... Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach' (paragraph 54). Therefore, the decisive test for determining whether there has been such an infringement is not the individual nature of the act in question, but the discretion available to the institution when it was adopted. The Court of Justice accordingly ruled that the Court of First Instance had erred in law when it found that Community liability could arise from the mere illegality of

the measure in question, without taking account of the discretion which the Commission enjoyed in the adoption of that measure. However, the Court replaced the relevant grounds of the judgment of the Court of First Instance. It found that, in the present case, the Commission had manifestly and gravely disregarded the limits placed on its discretion, committing a sufficiently serious infringement of Community law to render the Community liable.

4.5. Case C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289 gave the Court an opportunity to clarify the effects of the general application and direct applicability of two Community regulations. [5] The Court interpreted those regulations to the effect that compliance with certain of their provisions must be capable of enforcement by means of civil proceedings instituted by a trader against a competitor.

In reaching that conclusion, the Court first noted that, pursuant to the second paragraph of Article 249 EC, regulations have general application and are directly applicable in all Member States and that, therefore, owing to their very nature and their place in the system of sources of Community law, they operate to confer rights on individuals which the national courts have a duty to protect. Referring to its case-law (Case 106/77 *Simmenthal* [1978] ECR 629, Case C-213/89 *Factortame and Others* [1990] ECR I-2433 and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297), the Court then pointed out that it is for the national courts to ensure the full effect of the provisions of Community law which it is their task to apply in the areas within their jurisdiction. Finally, examining the objectives pursued by the quality standards laid down in the two regulations at issue in the main proceedings, the Court came to the conclusion that 'the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of [those two regulations] imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor' (paragraph 30). It observed that 'the possibility of bringing such proceedings strengthens the practical working of the Community rules on quality standards' (paragraph 31).

5. So far as concerns the *free movement of goods*, the following cases are worthy of note.

Case C-325/00 *Commission* v *Germany* (judgment of 5 November 2002, not yet published in the ECR) concerned the compatibility with Article 28 EC of the award of a quality label, conferring the right to use the mark 'Markenqualität aus deutschen Landen' on products, only to products made in Germany which meet certain quality standards. The label was managed by a private company, which was supervised and funded by a public body.

[5] Council Regulation (EEC) No 1035/72 of 18 May 1972, and Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437, and OJ 1996 L 297, p. 1, respectively).

The judgment in this case clarifies and supplements the Court's earlier case-law (in particular Case 249/81 *Commission* v *Ireland* [1982] ECR 4005 and Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083). As regards the question whether the contested scheme could be classified as a public measure attributable to the Member State, the Court first pointed out that although the grant and management of the quality label lay within the competence of a private company, that company was established on the basis of a law, was characterised by that law as a central economic body and had, among the objects assigned to it by that law, that of promotion of the sale and exploitation of German agricultural and food products. It then noted that that company was obliged to observe the rules of a public body and to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector. Finally, the Court observed that the company in question was financed by a compulsory contribution from all the undertakings in the sectors concerned. Recalling its judgment in *Apple and Pear Development Council*, the Court concluded that 'such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character ... Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme ... which can have effects on intra-Community trade similar to those arising under ... [a] scheme adopted by the public authorities' (paragraph 18).

Applying its earlier case-law, the Court confirmed that the contested scheme had restrictive effects on the free movement of goods between Member States: the scheme had been set up in order to promote the distribution of agricultural and food products made in Germany and its advertising message emphasised the German origin of the products concerned. The Court stated that the fact that the use of the label at issue was optional did not mean that it ceased to be an unjustified obstacle to trade. It also observed that a scheme such as the one at issue cannot be regarded as a geographic indication capable of justification under Article 30 EC.

In Case C-172/00 *Ferring* [2002] ECR I-6891, the Court held that 'Article 28 EC precludes national legislation under which the withdrawal of the marketing authorisation of reference for a medicinal product on application by the holder thereof means that the parallel import licence for that product automatically ceases to be valid'. However, it accepted that 'if it is demonstrated that there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the market in a Member State such a risk may justify restrictions on the importation of the old version of the medicinal product in consequence of the withdrawal of the marketing authorisation of reference by the holder thereof in relation to that market'.

The Court stated that the cessation of the validity of a parallel import licence following the withdrawal of the marketing authorisation of reference constitutes a restriction on the free movement of goods contrary to Article 28 EC, unless it is justified by reasons

relating to the protection of public health, in accordance with the provisions of Article 30 EC. In the case at issue in the main proceedings, the reason for withdrawal of the marketing authorisation of reference was that its holder had replaced the old version of the medicinal product with a new version, for which it had obtained a new marketing authorisation. The old version was still being lawfully marketed in the Member State of exportation under the marketing authorisation issued in that State. The Court pointed out that in a situation where a marketing authorisation of reference is withdrawn for reasons other than the protection of public health there do not appear to be any reasons to justify the automatic cessation of the validity of the parallel import licence. The withdrawal of an authorisation in those circumstances does not mean of itself that the old version of the medicinal product is called into question and the objective of verifying the quality, efficacy and non-toxicity of the old version can be attained by other, less restrictive measures. In particular, the Court observed that pharmacovigilance can ordinarily be guaranteed through cooperation with the national authorities of the other Member States by means of access to the documents and data produced by the manufacturer or other companies in the same group, relating to the old version in the Member States in which that version continues to be marketed on the basis of a marketing authorisation still in force.

The Court considered it conceivable that there may be reasons relating to the protection of public health which require that a parallel import licence for medicinal products be necessarily linked to a marketing authorisation of reference. It found, however, that no such reasons emerged from the observations submitted to it. The Court stated that if it can be demonstrated that there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the same market, such a risk may justify restrictions on importation. While the question of the existence and the reality of that risk, which a mere assertion by the holder of the marketing authorisation does not suffice to resolve, is a matter primarily for the competent authorities of the Member State of importation to determine, the Court suggested that appropriate labelling may be sufficient to avert that risk.

Case C-443/99 *Merck, Sharp & Dohme* [2002] ECR I-3703 and Case C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759 provided the Court with the opportunity to clarify its case-law on the conditions which must be met in order for repackaging of trade-marked pharmaceutical products by a parallel importer to be lawful. That case-law which originally developed with regard to Article 28 EC, and then with regard to Directive 89/104/EEC, [6] recognises that the proprietor of a trade mark right is justified, for the purposes of the first sentence of Article 30 EC, in preventing a product to which the trade mark has lawfully been applied in one Member State from being put on the market in another Member State after it has been repacked in new packaging to which the trade mark has been affixed by a third party. However, such

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

prevention of marketing constitutes a disguised restriction on trade between Member States, where it is established, in particular, that it would contribute to the artificial partitioning of the markets between Member States. In Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457 and Case C-379/97 *Upjohn* [1999] ECR I-6927, the Court made it clear that, in certain circumstances, where repackaging of pharmaceutical products is necessary to allow the product imported in parallel to be marketed in the importing State opposition to repackaging is to be regarded as constituting artificial partitioning of markets.

The fundamental question raised in *Merck, Sharp & Dohme* and *Boehringer Ingelheim and Others* concerned the requirement that the repackaging be necessary. The Court held that replacement packaging of pharmaceutical products is objectively necessary within the meaning of its case-law if, without such repackaging, effective access to the market concerned, or to a substantial part of that market, must be considered to be hindered as the result of strong resistance from a significant proportion of consumers to relabelled pharmaceutical products.

In addition, in *Boehringer Ingelheim and Others*, the Court confirmed that to be entitled to repackage trade-marked pharmaceutical products, a parallel importer must, in any event, fulfil the requirement of prior notice, and added that it is incumbent on the parallel importer itself to give notice to the trade mark proprietor. It is not sufficient that the proprietor be notified of the intended repackaging by other sources. The trade mark proprietor must be allowed a 'reasonable time', which is to be determined by the national court, in which to react. As guidance for the case at issue, the Court suggested that a period of 15 working days seemed appropriate, given the evidence in the documents before it.

6. In the field of *freedom of movement for workers*, three cases should be noted.

In Case C-55/00 *Gottardo* [2002] ECR I-413, the Court held that 'the competent social security authorities of one Member State [the Italian Republic in the case at issue in the main proceedings] are required, pursuant to their Community obligations under Article 39 EC, to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country [the Swiss Confederation in the main proceedings] by a national of a second Member State [the French Republic in the main proceedings] in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country' (paragraph 39).

To reach that conclusion, the Court deduced from its case-law (in particular Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161) that 'when giving effect to commitments assumed under international agreements, be it an agreement between Member States

or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them' (paragraph 33). Accordingly, when a Member State concludes a bilateral international convention on social security with a non-member country, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

In Case C-459/99 *MRAX* [2002] ECR I-6591 the Court interpreted Community legislation on freedom of movement for workers, freedom to provide services and freedom of establishment [7] in order to enable the Belgian Conseil d'État (Council of State) to assess the compatibility with Community law of national legislation concerning the procedure for publication of banns of marriage and the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage or to obtain a visa for the purpose of reuniting a family on the basis of a marriage contracted abroad.

The Court began by recalling that the Community legislation concerned is not applicable to situations not presenting any link to any of the situations envisaged by Community law. It held that, in view of the importance which the Community legislature has attached to the protection of family life, on a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health, since, in such circumstances, to refuse that person entry at the border would in any event be disproportionate.

The Court then held that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 do not permit a Member State to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State, on the sole ground that he

[7] Articles 1(2), 3(3) and 9(2) of 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); Articles 3 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p485); Articles 3 and 6 of Directive 73/148; Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1).

has entered the territory of the Member State concerned unlawfully. Such a refusal and expulsion order would impair the very substance of the right of residence directly conferred by Community law and would be manifestly disproportionate to the gravity of the infringement. The Court also considered that Directives 68/360, 73/148 and 64/221 preclude a Member State from refusing to issue a residence permit to a third country national who is married to a national of a Member State and who entered the territory of that Member State lawfully, and from issuing an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit. Finally, the Court held that Directive 64/221 confers on a foreign national married to a national of a Member State the right to refer to the competent authority a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

In *Oteiza Olazabal* (judgment of 26 November 2002 in Case C-100/01, not yet published in the ECR), a preliminary ruling was requested from the Court on, *inter alia*, the interpretation of Articles 12 EC, 18 EC and 39 EC with regard to measures limiting a right of residence to a part of the territory of a Member State. The main proceedings were between the French Minister for the Interior and Mr Oteiza Olazabal, a Spanish national. The latter had been refused the right to reside in part of France on the basis of police reports indicating that he maintained relations with the terrorist organisation ETA. In 1991, he had been convicted of conspiracy to disturb public order by intimidation or terror.

As a preliminary point, the Court observed that since Mr Oteiza Olazabal had been employed in France during the whole of the period relevant for the purposes of the main proceedings, his case came within the scope of Article 39 EC. It then examined whether restricting the right of residence to a part of national territory could be 'justified on grounds of public policy, public security or public health' within the meaning of Article 39(3) EC. It referred to its judgment in Case 36/75 *Rutili* [1975] ECR 1219, in which it had ruled that 'measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned'. However, the Court, after recalling the background to *Rutili*, pointed out that in the present case the public order measures were taken against Mr Oteiza Olazabal because he formed part of an armed and organised group whose activity constituted a threat to public order in French territory and that prevention of such activity can be regarded as falling within the maintenance of public security. It also observed that the national court started from the premiss that reasons of public order precluded Mr Oteiza Olazabal's residence in part of national territory, and that, without the possibility of imposing a measure prohibiting residence in that part of national territory, such reasons could justify a measure prohibiting residence in the whole of national territory. Having regard to those circumstances, the Court interpreted Article

39(3) EC, stating, first, that it does not follow from the wording of Article 39(3) that limitations on the freedom of movement of workers justified on grounds of public policy must always have the same territorial scope as rights conferred by that provision. The Court then pointed out that, according to its case-law, 'the reservations contained in Article [39 EC] and Article [46 EC] permit Member States to adopt, with respect to nationals of other Member States, and in particular on the grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto' (paragraph 40). It concluded that 'in situations where nationals of other Member States are liable to deportation or prohibition of residence, they are also capable of being subject to less severe measures consisting of partial restrictions on their right of residence, justified on grounds of public policy, without it being necessary that identical measures be capable of being applied by the Member State in question to its own nationals' (paragraph 41). The Court therefore ruled that neither Article 39 EC nor the provisions of secondary legislation which implement the freedom of movement for workers preclude a Member State from imposing, in relation to a migrant worker who is a national of another Member State, public order or public security measures limiting that worker's right of residence to a part of national territory, provided that: (i) such action is justified by reasons of public order or public security based on his individual conduct; (ii) by reason of their seriousness, those reasons could otherwise give rise only to a measure prohibiting him from residing in, or banishing him from, the whole of the national territory; and (iii) the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it.

7. So far as concerns *freedom of establishment*, first of all the judgment of 5 November 2002 in Case C-208/00 *Überseering*, not yet published in the ECR, should be mentioned. In that case, the Court held that where a company formed in accordance with the law of a Member State in which it has its registered office is deemed, under the law of a second Member State, to have moved its actual centre of administration to that second Member State, Articles 43 EC and 48 EC on the freedom of establishment preclude the second Member State from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in the second Member State.

In reaching that conclusion, the Court considered that such a denial of legal capacity constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC. It found that it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may justify restrictions on freedom of establishment. However, such objectives cannot justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings, of a company properly incorporated in another Member State in which it

has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred by Articles 43 EC and 48 EC.

Secondly, in eight judgments of 5 November 2002 – Case C-467/98 *Commission* v *Denmark*, Case C-468/98 *Commission* v *Sweden*, Case C-469/98 *Commission* v *Finland*, Case C-471/98 *Commission* v *Belgium*, Case C-472/98 *Commission* v *Luxembourg*, Case C-475/98 *Commission* v *Austria*, Case C-476/98 *Commission* v *Germany* and Case C-466/98 *Commission* v *United Kingdom*, all not yet published in the ECR, – the first seven of which also concerned the Community's *external relations* (see section 14 of this part of the report), the Court declared that by entering into or maintaining in force, despite the renegotiation of bilateral agreements with the United States of America in the air transport sector (the 'open skies' agreements), international commitments granting that non-member country the right to withdraw, suspend or limit traffic rights in cases where air carriers designated by each of those Member States were not owned by the Member State in question or by nationals of that State, those Member States had failed to fulfil their obligations under Article 43 EC. In reaching that conclusion, the Court referred to its case-law on the obligations of Member States when they negotiate treaties on double taxation with non-member countries (see, in particular, *Saint-Gobain ZN*, cited above, paragraph 59). In the cases in point, the clause on the ownership and control of airlines permitted the United States of America to refuse or withdraw licences or authorisations in respect of an airline designated by the Member State in question but of which a substantial part of the ownership and effective control was not vested in that Member State or in nationals of that State or of the United States. Airlines of other Member States could always be excluded from the benefit of such an 'open skies' agreement, while that benefit was assured to the airlines of the Member State which had concluded the agreement. Community airlines therefore suffered discrimination which prevented them from benefiting from the treatment which the host Member State accorded to its own nationals. The Court rejected the public policy and public security justifications put forward by the defendants. The clause concerning the ownership and control of airlines did not limit the power to refuse or withdraw licences or authorisations in respect of an airline designated by the other party solely to the case where that airline represented a threat to public policy or public security. Furthermore, there was no direct link between such a threat and generalised discrimination against Community airlines.

8. In the field of *freedom to provide services*, it is worth briefly mentioning Case C-164/99 *Portugaia Construções* [2002] ECR I-787, which raised the issue of the applicability of provisions of a collective agreement, declared to be of binding general application in a particular Member State and laying down a minimum wage, to an undertaking established in another Member State which posts its workers to the first State for the purpose of providing services.

The Court examined the legislation in question in the light of Articles 49 EC and 50 EC. It recalled its case-law, from which it is clear that 'in principle Community law does not preclude a Member State from requiring an undertaking established in another Member

State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State' (paragraph 21). The Court concluded that 'it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees' (paragraph 22). However, the Court continued, 'there may be circumstances in which the application of such rules would not be in conformity with Articles [49 EC and 50 EC]' (paragraph 23). The assessment of those circumstances is a task for the national authorities or, as the case may be, the national courts, which, more specifically, must 'determine whether, considered objectively, that legislation provides for the protection of posted workers. In that regard, although the declared intention of the legislature cannot be conclusive, it may nevertheless constitute an indication as to the objective pursued by the legislation' (paragraph 30).

In answer to a second question submitted by the national court, the Court ruled that 'the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services' (paragraph 35).

9. As regards the *free movement of capital*, the 'golden shares' cases must be mentioned. In three parallel cases (Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, Case C-483/99 *Commission* v *France* [2002] ECR I-4781 and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809), the Court examined the compatibility with Community law of certain measures by which, in those three Member States, the State retained certain rights to intervene in the activities of specific undertakings which had been privatised or were undergoing privatisation.

Some of the measures at issue in *Commission* v *Portugal* imposed limits on the shareholdings of foreign nationals in privatised undertakings. In addition, a decree-law established a procedure for prior authorisation by the Minister for Financial Affairs of any acquisition by a single natural or legal person of shares which would result in a shareholding in excess of 10% of the voting capital in companies which were to be reprivatised.

In *Commission* v *France*, the action concerned a decree vesting in the French State a 'golden share' in Société nationale Elf-Aquitaine. The rights attached to that 'golden share' included the right to appoint two members of the company's board of directors. It also made 'any direct or indirect shareholding by a natural or legal person, acting alone or in conjunction with others, which exceeds the ceiling of one-tenth, one-fifth or one-third of the capital of, or voting rights in, the company' conditional upon prior authorisation from the Minister for Economic Affairs. Finally, the share conferred on the

French State the right to oppose certain decisions to transfer or use as security various company assets.

In *Commission* v *Belgium*, the rights at issue were those attached to the 'golden shares' of the Belgian State in Société nationale de transport par canalisations and in Société de distribution du gaz Distrigaz. Those 'golden shares' established the obligation to give advance notice to the Minister for Energy of any use as security or change in the intended use of certain assets of those companies, the Minister being entitled to oppose such operations if he considered that they adversely affected the national interest in the energy sector. The shares also conferred the right to appoint to the board of directors two representatives entitled to propose to the Minister the annulment of any decision of the board of directors or management committee which they regarded as contrary to the country's energy policy.

The Court examined the three cases with regard to the principle of the free movement of capital, on the ground that direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitutes movement of capital within the meaning of Article 56 EC.

As regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, the Court found that this amounted to 'unequal treatment of nationals of other Member States and [restricted] the free movement of capital' (*Commission* v *Portugal*, paragraph 40). Since no valid justification was put forward by the Portuguese Government, the Court held that the Portuguese Republic had indeed failed to fulfil its obligations.

The other measures examined by the Court in these three cases did not involve discrimatory treatment of nationals of other Member States. However, the Court pointed out that the prohibition laid down in Article 56 EC 'goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets' (*Commission* v *Portugal*, paragraph 44, and *Commission* v *France*, paragraph 40). Recalling its case-law, the Court found that even though those measures might not give rise to unequal treatment, they were liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings, and were liable, as a result, to render the free movement of capital illusory. It concluded that the rules at issue had to be regarded as restrictions on the movement of capital within the meaning of Article 56 EC.

The Court then examined the grounds relied on by the defendants to justify those measures. While accepting that 'it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those

undertakings are active in fields involving the provision of services in the public interest or strategic services' (*Commission* v *Portugal*, paragraph 47, *Commission* v *France*, paragraph 43, and *Commission* v *Belgium*, paragraph 43), the Court considered that those concerns cannot entitle Member States to plead their own systems of property ownership by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the EC Treaty. To be compatible with the EC Treaty, a national rule which restricts the free movement of capital must be justified by reasons referred to in Article 58(1) EC or by overriding requirements of the general interest and be applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national rule must accord with the principle of proportionality.

In keeping with settled case-law, the Court rejected the economic justifications relied on in *Commission* v *Portugal*. By contrast, the Court accepted that the objectives relating to the need to safeguard energy supplies in the event of a crisis, relied on in *Commission* v *France* and *Commission* v *Belgium*, fell within the ambit of a legitimate public interest and were among the 'public security' objectives covered by Article 58(1)(b) EC.

In *Commission* v *France*, the Court, noting the nature of the powers vested in the French Government and the fact that there were no conditions imposed on their exercise, concluded that the legislation at issue went beyond what was necessary in order to attain the objective indicated.

By contrast, in *Commission* v *Belgium*, the Court, after finding that the scheme at issue was one of opposition, and not of prior authorisation, which was limited to intervention in a number of specific decisions, and that, in order for that power of opposition to be exercised, the public authorities were obliged to adhere to strict time-limits, concluded that that scheme made it possible 'to guarantee, on the basis of objective criteria which [were] subject to judicial review, the effective availability of the lines and conduits ... as well as other infrastructures' and that it thus enabled 'the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on [Société nationale de transport par canalisations] and Distrigaz, whilst at the same time observing the requirements of legal certainty' (paragraph 52). Since the Commission had not shown that less restrictive measures could have been taken to attain the objective pursued, the Court found that the legislation at issue was justified. The Court also dismissed the Commission's action as regards its claim that the Kingdom of Belgium had failed to fulfil its obligations under Article 43 EC, on freedom of establishment, since Article 46 EC also provides for a ground of justification based on public security.

10. As regards the *competition rules*, this report focuses on four cases.

In Case C-309/99 *Wouters and Others* [2002] ECR I-1577, the Court gave a ruling on the interpretation of the competition rules with regard to a regulation prohibiting multi-disciplinary partnerships between members of the Bar and accountants, adopted by the Netherlands Bar pursuant to the Netherlands legislation on the legal profession.

First of all, the Court held that the regulation in question in the main proceedings must be regarded as a decision adopted by an association of undertakings within the meaning of Article 81(1) EC. It considered that members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of the EC Treaty provisions on competition. Accordingly, the Netherlands Bar must be regarded as an association of undertakings when it adopts a regulation such as the one at issue in the main proceedings. Such a regulation constitutes 'the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity' (paragraph 64). That finding is not called into question by the fact that the constitution of the Bar of the Netherlands is regulated by public law. Nor does it infringe the principle of the institutional autonomy of Member States, which remain free to choose between two approaches: either (i) when a Member State grants regulatory powers to a professional association, it is careful to define the public-interest criteria and the essential principles with which the rules of that association must comply and also to retain its power to adopt decisions in the last resort, in which case the rules adopted by the professional association remain State measures and are not covered by the competition rules applicable to undertakings, or (ii) the rules adopted by the professional association are attributable to it alone, in which case the competition rules are applicable.

Second, the Court turned its attention to the question whether the regulation at issue in the main proceedings has the object or effect of restricting competition and is likely to affect trade between the Member States. The Court found that it 'has an adverse effect on competition and may affect trade between Member States' (paragraph 86). By prohibiting multi-disciplinary partnerships between members of the Bar and accountants, it is liable to limit production and technical development within the meaning of Article 81(1)(b) EC. The Court also found that such regulations have an effect on intra-Community trade. The regulation, which applies over the whole of the territory of a Member State, has the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the EC Treaty is designed to bring about. Nevertheless, the Court found that 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81(1) EC]'. It added that 'for the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with

the necessary guarantees in relation to integrity and experience' (paragraph 97). The Court stated that lawyers' obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with accountancy, a profession which is not subject in general, and more particularly in the Netherlands, to comparable requirements of professional conduct. The Court therefore held that the regulation in question in the main proceedings could reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as organised in the Member State concerned, and that its restrictive effects on competition do not go beyond what is necessary in order to ensure the proper practice of the legal profession. Accordingly, the Court ruled that the regulation did not infringe Article 81(1) EC.

Third, the Court held that the Netherlands Bar does not constitute either an undertaking or group of undertakings for the purposes of Article 82 EC because it does not carry on any economic activity and registered members of the Netherlands Bar are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated.

Case C-35/99 *Arduino* [2002] ECR I-1529 concerned the question whether Articles 10 EC and 81 EC preclude a Member State (the Italian Republic in the case at issue in the main proceedings) from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar in a Member State, a tariff fixing minimum and maximum fees for members of the legal profession.

The Court began by recalling its case-law establishing that Articles 10 EC and 81 EC are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16). In this case, the Court considered that the Italian State had not waived its power to make decisions of last resort or to review implementation of the tariff, since, in particular, the professional body of members of the Bar was responsible for producing only a draft which was not binding unless it was approved by the competent Minister, who accordingly had the power to have the draft amended. In those circumstances, the Court ruled that Articles 10 EC and 81 EC did not preclude a measure such as the one at issue.

In the '*PVC II*' cases (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375), the Court ruled, by way of a single judgment, on a series of eight appeals brought by the undertakings to which a Commission decision imposing fines for infringement of the prohibition laid down in Article 81(1) EC was addressed. A first Commission decision relating to that infringement ('the PVC I decision') had been declared non-existent by the Court of First Instance, then annulled

by the Court of Justice on appeal (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555). On 27 July 1994, the Commission adopted a second decision ('the PVC II decision') imposing on the undertakings to which it was addressed fines of the same amounts as those imposed on them by the PVC I decision. Fresh annulment proceedings were brought before the Court of First Instance, which, for the most part, rejected the pleas and arguments put forward by the undertakings concerned.

In its judgment, the Court dismissed the appeals in their entirety, except for two pleas raised by one of the appellants (Montedison SpA) which had been rejected by the Court of First Instance. The Court set aside the judgment of the Court of First Instance in that regard alone; it then examined the merits of Montedison's two pleas and rejected them.

The numerous pleas for annulment raised by all, or some, of the appellants alleged, amongst other things, infringement of the principle of *res judicata*, infringement of the principle *non bis in idem*, invalidity of the procedural measures preceding the PVC I decision and failure by the Commission to fulfil a duty to take a number of those procedural measures again. A second group of pleas alleged that the Commission acted out of time, in the light of both the rules on limitation periods and the principle that decisions must be adopted within a reasonable time. The Court also examined a number of pleas raised by the appellants alleging infringement of the rights of the defence, incomplete examination, or distortion, of the facts by the Court of First Instance, failure of that court to respond to certain pleas, and contradictory and insufficient grounds for the contested judgment. The judgment was also contested on grounds relating to the substance of the case.

The Court of Justice's response to the grounds of appeal alleging infringement of the principle that a body must act within a reasonable time merits attention in this report. It upheld the Court of First Instance's examination of the case in so far as the latter considered that that principle had been respected during each of the two stages of the administrative procedure preceding adoption of the PVC II decision and throughout that administrative procedure taken as a whole. The Court of Justice also held that the duration of the judicial proceedings leading to the contested judgment, while lengthy, was justified in the light of the particular complexity of the case and thus did not infringe the principle that a decision be adjusted within a reasonable time. In response to a plea raised by a number of the appellants, the Court added that 'even assuming that the consideration of the plea alleging infringement of the reasonable period principle requires not only a separate examination of each procedural stage but also a comprehensive assessment of the administrative procedure and any judicial proceedings as a whole, it must be held in this case that the principle that decisions are to be adopted within a reasonable time has not been infringed despite the exceptional duration of the period which has elapsed between the commencement of the administrative procedure and delivery of this judgment' (paragraph 230). The Court ruled that the total duration of that period could be explained and justified by the conjunction of a complex administrative procedure and four successive sets of judicial

proceedings. It found, in particular, that the longest part of the period in question was concerned with the judicial assessment of the case, which provided the appellants with the opportunity to exercise fully their rights of defence. The Court also made reference to the constraints of the language rules applicable to the Community judicature and to the very large number of pleas which were given extensive consideration, some of which raised new and complex legal issues.

Two other significant passages in the judgment should also be noted:

'The principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the [European Convention on Human Rights], precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision. ... The application of that principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. ... The principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second' (paragraphs 59, 60 and 61).

'The mere bringing of an action does not entail the definitive transfer to the Community judicature of the power to impose penalties. The Commission finally loses its power once the court has actually exercised its unlimited jurisdiction. On the other hand, where the Community judicature simply annuls a decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure may reopen the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties' (paragraph 693).

In Case C-94/00 *Roquette-Frères* [2002] ECR I-9011, the French Cour de cassation (Court of cassation) asked the Court for a preliminary ruling on the scope of the review which is to be undertaken by a national court having jurisdiction under domestic law to authorise entry onto the premises of undertakings suspected of having infringed the competition rules where application is made to that court pursuant to a request by the Commission for assistance made under Article 14(6) of Regulation No 17. [8]

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

The Court was thus able to clarify and develop its case-law on this subject, particularly its judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR I-2859, to take account of rulings of the European Court of Human Rights which postdate that judgment, especially Eur. Court HR, Niemietz v. Germany judgment of 16 December 1992, Series A no 251-B and the judgment of 16 April 2002 in *Colas Est and Others* v. *France*, not yet published in the *Reports of Judgments and Decisions*. In *Hoechst* v *Commission* the Court had recognised that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person constitutes a general principle of Community law which the competent authorities of the Member States are required to respect when they are called upon to act in response to a request for assistance made by the Commission. The Court had also held that it is for the competent national body to consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation, and that the Commission for its part must make sure that the national body has all that it needs to perform that supervisory task and to ensure that national law is respected in the implementation of the coercive measures.

Called upon to clarify that case-law, the Court first stated that the review carried out by the national court must concern itself only with the coercive measures applied for and may not go beyond an examination to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation. Such an examination exhausts the jurisdiction of the national court as regards the justification of those measures.

The Court then considered the precise scope of that review and the information that can be required from the Commission. It stated that the Commission is required to provide the national court with 'explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned' (paragraph 61). 'On the other hand, the competent national court may not demand that it be provided with the information and evidence in the Commission's file on which the latter's suspicions are based' (paragraph 62). Where coercive measures are requested on a precautionary basis, 'it is for the Commission to provide the competent national court with the explanations needed by that court to satisfy itself that, if the Commission were unable to obtain, as a precautionary measure, the requisite assistance in order to overcome any opposition on the part of the undertaking, it would be impossible, or very difficult, to establish the facts amounting to the infringement' (paragraph 75). Given that a further aim of the review of proportionality is to establish that the intended measures do not constitute a disproportionate and intolerable interference in relation to the aim pursued by the investigation, it must be open to the national court to refuse to grant the coercive measures applied for 'where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails

necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation' (paragraph 80). It follows that the Commission 'must in principle inform that court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned' (paragraph 81). The Commission must also indicate 'as precisely as possible the evidence sought and the matters to which the investigation must relate' (paragraph 83). However, it is not indispensable that the information communicated should precisely define the relevant market, or indicate the infringement period, and the Commission cannot be required to limit its investigation to requesting the production of documents or files which it is able to identify precisely in advance.

Finally, the Court stated that, where the competent national court considers that the information supplied by the Commission does not fulfil the requirements set out by the Court, it is required to inform, as rapidly as possible, the Commission or the national authority which has brought the latter's request before it of the difficulties encountered and where necessary to ask for additional information, while paying particular heed to the coordination, expedition and discretion necessary to ensure the effectiveness of investigations. For its part, the Commission must provide any additional information with the minimum of delay; however, Community law does not require the information so communicated to be in any particular form. Those reciprocal duties derive from the principle of cooperation in good faith provided for in Article 10 EC.

11. As regards *trade mark law*, four cases concerning the interpretation of Directive 89/104 [9] should be mentioned.

In Case C-299/99 *Philips* [2002] ECR I-5475, the Court gave its first ruling on the interpretation of Directive 89/104 with regard to a sign consisting exclusively of the shape of goods. The questions submitted to it were raised in proceedings consisting of an action for trade mark infringement and a counter-claim for revocation of the trade mark. The infringement proceedings were brought by the proprietor of a trade mark registered in the United Kingdom consisting of a graphic representation of the shape and configuration of the head of an electric shaver, comprising three circular heads with rotating blades in the shape of an equilateral triangle. Asked to interpret several provisions of Directive 89/104 which could be decisive for the validity of that trade mark, the Court clarified the relationship between the various grounds for refusal and invalidity of registration listed in Article 3 of that directive. In particular, as regards the shape of goods, the Court held that 'in order to be capable of distinguishing an article for the purposes of Article 2 of [Directive 89/104], the shape of the article in respect of which the sign is registered does not require any capricious addition, such as an embellishment which has no functional purpose' (paragraph 50). It set out the

[9] Cited in footnote 6.

circumstances in which extensive use of a sign which consists of the shape of an article is sufficient to give the sign a distinctive character for the purposes of Article 3(3) of that directive, concerning distinctive character acquired through use.

The Court above all clarified, in its answer to the fourth question referred by the national court, the interpretation of the grounds for refusal of registration set out in Article 3(1)(e) of Directive 89/104. Under that provision, trade mark registration is to be refused for signs which consist exclusively of the shape which results from the nature of the goods themselves, the shape of the goods which is necessary to obtain a technical result, or the shape which gives substantial value to the goods. Where a sign is refused registration on the above grounds, it cannot under any circumstances be registered under Article 3(3) of the directive (paragraphs 57 and 75). The Court recalled its case-law that the various grounds for refusal of registration listed in Article 3 of Directive 89/104 must be interpreted in the light of the public interest underlying each of them (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraphs 25, 26 and 27). As regards, in particular, signs consisting exclusively of the shape of the product 'necessary to obtain a technical result', the Court noted that that provision 'is intended to preclude the registration of shapes whose essential characteristics perform a technical function, with the result that the exclusivity inherent in the trade mark right would limit the possibility of competitors supplying a product incorporating such a function or at least limit their freedom of choice in regard to the technical solution they wish to adopt in order to incorporate such a function in their product' (paragraph 79). The Court therefore concluded that a sign consisting exclusively of the shape of a product is unregistrable 'if it is established that the essential functional features of that shape are attributable only to the technical result'. Moreover, that ground for refusal or invalidity of registration cannot be overcome by establishing that there are other shapes which allow the same technical result to be obtained.

In Case C-2/00 *Hölterhoff* [2002] ECR I-4187, the Court was called upon to interpret Article 5(1) of Directive 89/104, which entitles the proprietor of a trade mark to prevent all third parties from using in the course of trade any sign which is identical with the trade mark in relation to goods which are identical with those for which the trade mark is registered or any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods in question, there exists a likelihood of confusion on the part of the public. The Court ruled that 'the proprietor of a trade mark cannot rely on his exclusive right where a third party, in the course of commercial negotiations, reveals the origin of goods which he has produced himself and uses the sign in question solely to denote the particular characteristics of the goods he is offering for sale so that there can be no question of the trade mark used being perceived as a sign indicative of the undertaking of origin'.

In its judgment of 12 November 2002 in Case C-206/01 *Arsenal Football Club*, not yet published in the ECR, the Court was asked to interpret Article 5(1)(a) of Directive 89/104 in the context of an action for trade mark infringement brought by Arsenal

Football Club Plc against a trader, concerning the latter's selling of scarves marked in large lettering with the word 'Arsenal', a sign which is registered as a trade mark by that club for those and other goods. The Court ruled that, in a situation where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which the mark is registered, the trade mark proprietor is entitled, in circumstances such as those in this case, to rely on Article 5(1)(a) of Directive 89/104 to prevent that use.

In reaching that conclusion, the Court referred to its case-law, from which it follows that the exclusive right under Article 5(1)(a) of Directive 89/104 was conferred in order to enable the trade mark proprietor to protect his specific interests, that is, to ensure that the trade mark can fulfil its functions. The Court deduced that the exercise of that right must be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods. By contrast, the proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as proprietor of the mark, having regard to its functions. The Court, referring to *Hölterhoff*, pointed out that certain uses for purely descriptive purposes are excluded from the scope of Article 5(1) of Directive 89/104 because they do not affect any of the interests which that provision aims to protect, and do not therefore fall within the concept of use within the meaning of that provision. The Court found, however, that the situation in question in the main proceedings was fundamentally different from that in *Hölterhoff*, since in this case, the use of the sign took place in the context of sales to consumers and was obviously not intended for purely descriptive purposes. The presence on the trader's stall of a notice stating that the goods concerned were not official club products could not call that finding into question.

The Court also found that, in the case at issue in the main proceedings, there was no guarantee that all the goods designated by the trade mark had been manufactured or supplied under the control of a single undertaking responsible for their quality. In those circumstances, the use by a third party of a sign identical to the trade mark is liable to affect the guarantee of origin of the goods and the trade mark proprietor must be able to prevent this. The Court held that it is immaterial that in the context of that use the sign is perceived as a badge of support for, or loyalty or affiliation to, the proprietor of the mark.

In its judgment of 12 December 2002 in Case C-273/00 *Sieckmann*, not yet published in the ECR, the Court was called upon to interpret Article 2 of Directive 89/104 concerning signs of which a trade mark may consist, with regard to an olfactory sign. The Court ruled that that provision must be interpreted as meaning that 'a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective'. As regards olfactory signs, the Court

held, however, that 'the requirements of graphic representability are not satisfied by a chemical formula, by a description in written words, by the deposit of an odour sample or by a combination of those elements'.

In reaching that conclusion, the Court took account of the essential role of registration in the scheme of protection established by both Directive 89/104 and Regulation (EC) No 40/94 on the Community trade mark. [10] While Article 2 of that directive states that a trade mark may consist, in particular, of 'words, ... designs, letters, numerals, the shape of goods or of their packaging', that is a list of examples, as stated in the seventh recital in the preamble to the directive. That provision does not expressly exclude signs which are not in themselves capable of being perceived visually. A trade mark may consist of such a sign provided that it can be represented graphically. The Court set out the requirements which must be met by a graphic representation, given the functions which it is required to perform, particularly in terms of accessibility to the register's users. It drew particular attention to the need for the graphic representation to be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

Applying those requirements to the method of graphic representation of olfactory signs, which was the subject of the national court's request for a ruling, the Court held that a chemical formula 'does not represent the odour of a substance, but the substance as such, and nor is it sufficiently clear and precise' (paragraph 69), that the description of an odour, 'although it is graphic, ... is not sufficiently clear, precise and objective' (paragraph 70), that the deposit of an odour sample does not constitute a graphic representation for the purposes of Article 2 of the directive and that, moreover, such a sample 'is not sufficiently stable or durable' (paragraph 71). For olfactory signs, a combination of those various methods is likewise not capable of satisfying the requirements which must be met by a graphic representation, 'in particular those relating to clarity and precision' (paragraph 72).

12. In the field of *public procurement*, two cases will be noted.

In Case C-92/00 *HI* [2002] ECR I-5553, the Court was asked for a ruling on the interpretation of Directive 89/665/EEC. [11] More specifically, it was requested to rule on whether there is a right to review of the decision of a contracting authority to withdraw an invitation to tender and on the extent of the judicial review to be carried out in such a review procedure.

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

[11] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p.33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

In answer to the questions submitted to it, the Court stated, first, that 'Article 1(1) of [Directive 89/665] requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law' and, second, that that directive 'precludes national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary'.

In Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, the Court turned its attention for the first time to the question whether ecological criteria may be taken into consideration in the procedures for the award of certain public service contracts. The questions referred by the national court principally concerned the interpretation of Directive 92/50/EEC. The Court indicated, however, that its answer would not be different if the procedure for the award of the public contract fell within the scope of Council Directive 93/38/EEC. [12]

The main proceedings concerned the award of a contract for the provision of bus transport services in the city of Helsinki (Finland). The Court held that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that those criteria satisfy certain conditions.

In reaching the conclusion that Directive 92/50 does not preclude the use of criteria relating to the preservation of the environment, the Court noted that the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively in the directive, and that Article 36(1)(a) of the directive cannot be interpreted as meaning that each of the award criteria used by the contracting authority must necessarily be of a purely economic nature, since it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. The Court also referred to the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty (transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC), which provides that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities.

Guided by its settled case-law, the Court listed the conditions which must be met in order for the application of criteria relating to the preservation of the environment to be

[12] Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p84).

compatible with Community law. Those criteria must be linked to the subject-matter of the contract, may not have the effect of conferring on the contracting authority an unrestricted freedom of choice, must be expressly mentioned in the contract documents or the tender notice, and must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

13. As regards *social law*, this report records three cases on social security (13.1), two cases on equal treatment of men and women (13.2) and two cases concerning the interpretation of employment-related directives (13.3).

13.1. Case C-255/99 *Humer* [2002] ECR I-1205 dealt with the question whether the requirement, under Austrian law, that minor children be ordinarily resident in Austria in order to be entitled to advances on maintenance payments was compatible with Community law. The Court first observed that such a benefit is a family benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71 [13] (Case C-85/99 *Offermanns* [2001] ECR I-2261). It then stated that a person, one or other of whose parents is an employed person or is out of work, is covered by that regulation as a member of the family of a worker. Finally, the Court held that Articles 73 and 74 of the regulation are to be construed as meaning that, where, following a divorce, a minor child resides with the parent who has custody in a Member State other than the Member State providing the benefit, and where the other parent, who is under an obligation to pay maintenance, works or is unemployed in the Member State providing the benefit, that child is entitled to receive a family benefit such as the advance on maintenance payments provided for under Austrian law.

In Case C-277/99 *Kaske* [2002] ECR I-1261, the Court ruled on the possibility of applying a convention relating to unemployment insurance concluded between the Federal Republic of Germany and the Republic of Austria, in place of Regulation No 1408/71, by extending the principles set out in *Rönfeldt* (Case C-227/89 [1991] ECR I-323) to unemployment benefit. The Court held that such application was possible in the case at issue in the main proceedings. It stated that the sole purpose of the principles laid down in *Rönfeldt* is to perpetuate entitlement to an established social right not enshrined in Community law at the time when the national of a Member State relying on it enjoyed that right. Accordingly, the fact that Regulation No 1408/71 became applicable in a national's Member State of origin on the date when that Member State acceded to the European Community does not affect his established right to benefit from a bilateral rule which was the only one applicable to him when he exercised his right to freedom of movement.

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

Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829 concerned the validity of certain provisions of Regulation No 1048/71, [14] inasmuch as they provide that persons who pursue an activity as an employee in one Member State and an activity as a self-employed person in another Member State are subject to the legislation of both those Member States. The Court declared that examination of the questions referred had not disclosed any factor of such a kind as to affect the validity of the provisions in question. It added that it is, where appropriate, for the national court hearing disputes in the context of the application of those provisions, first, to ascertain that the legislation of the States concerned applied in that context is applied in accordance with Articles 39 EC and 43 EC, and in particular that the national legislation whose conditions for application are at issue does afford social security cover for the person concerned, and, second, to determine whether those provisions should, exceptionally, be disapplied at the request of the worker concerned where they would cause him to lose a social security advantage which he originally enjoyed under a social security convention in force between two or more Member States.

13.2. In Case C-476/99 *Lommers* [2002] ECR I-2891, the Court held that Article 2(1) and (4) of Directive 76/207/EEC [15] does not preclude a scheme set up by a minister to tackle extensive under-representation of women within his ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the ministry to its staff is reserved for female officials alone, whilst male officials may have access to them only in cases of emergency, to be determined by the employer. The Court added that that is so, however, only in so far, in particular, as that exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to the nursery places scheme on the same conditions as female officials.

Case C-320/00 *Lawrence and Others* [2002] ECR I-7325 dealt with the interpretation of Article 141(1) EC, with regard to female workers who, following a process of compulsory competitive tendering, were transferred from a public body to private undertakings and received lower rates of pay than they received prior to the transfer. In that connection, the Court found that there is nothing in the wording of Article 141(1) EC to suggest that its applicability is limited to situations in which men and women work for the same employer. However, where the differences identified in the pay conditions of workers cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. The Court therefore held that Article 141(1) EC does not apply to a situation in which the

14 Article 14c(1)(b), now Article 14c(b), of, and Annex VII to, Regulation No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p6), and as amended by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p5).

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

differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source.

13.3. In Case C-164/00 *Beckmann* [2002] ECR I-4893, the Court gave a preliminary ruling on the interpretation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings. [16] The order for reference was made in proceedings between Mrs Beckmann and her former employer concerning an early retirement pension and other benefits which Mrs Beckmann considered to be due to her following her dismissal for redundancy, and which her former employer refused to pay to her. The Court held that 'early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of [Directive 77/187]' (paragraph 32).

In reaching that conclusion, the Court held that given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued by Directive 77/187, the exception to the rule that provides for transfer to the transferee of the transferor's rights and obligations arising from a contract of employment, from an employment relationship or from a collective agreement must be interpreted strictly. In that connection, it is only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question, and not benefits paid in circumstances such as those in point in the main proceedings (dismissal for redundancy), that can be classified as old-age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits. The Court also held that the obligations applicable in the event of the dismissal of an employee are transferred to the transferee, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

In its judgment of 12 December 2002 in Case C-442/00 *Rodríguez Caballero*, not yet published in the ECR, the Court gave a preliminary ruling on the interpretation of Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer. [17] Applying the general principle of equality and non-discrimination, the Court ruled that claims in respect of 'salarios de tramitación'

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

17 Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

(post-dismissal remuneration during proceedings) must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of that directive, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.

14. So far as concerns the law relating to the Community's *external relations*, one Opinion and four judgments merit attention.

Opinion 1/00 [2002] ECR I-3493 was given following a request from the Commission, pursuant to Article 300(6) EC, concerning the compatibility with the provisions of the EC Treaty of a proposed agreement on the establishment of a European Common Aviation Area ('the ECAA Agreement') to be concluded between a number of States applying for accession to the European Community and the European Community itself, and, in particular, of the system of legal supervision provided for in that agreement.

In its Opinion, the Court applied the principles set out in Opinion 1/91 [1991] ECR I-6079 and Opinion 1/92 [1992] ECR I-2821 concerning a proposed agreement relating to the creation of the European Economic Area. The Court stated that where a request was made for an Opinion concerning a proposed agreement such as the ECAA Agreement, a large number of whose rules were essentially rules of Community law, it had to ascertain whether the agreement before it included adequate measures to guarantee that neither the endeavour to ensure uniform interpretation of those rules nor the new institutional links established by the agreement between the Community and the States party to it affected the autonomy of the Community legal order. It found that preservation of that autonomy required, first, that the essential character of the powers of the Community and its institutions as conceived in the EC Treaty remained unaltered. Second, it required that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes would not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement. After a detailed examination of the proposed agreement, the Court concluded that it did not affect the essential character of powers of the Community and its institutions to such an extent that it had to be declared incompatible with the EC Treaty.

In Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, the Court declared that, by failing to obtain its adherence before 1 January 1995 to the Berne Convention for the Protection of Literary and Artistic Works, Ireland had failed to fulfil its obligations under Article 300(7) EC in conjunction with Article 5 of Protocol 28 to the Agreement on the

European Economic Area. [18] In this judgment, the Court found that the obligation on Member States to adhere to the Berne Convention, imposed by Article 5 of Protocol 28 to the Agreement on the European Economic Area, comes within the scope of Community law and that the Commission is thus competent to assess compliance with that obligation, subject to review by the Court, given that the obligation features in a mixed agreement concluded by the Community and its Member States and relates to an area covered in large measure by the EC Treaty.

In seven of the eight cases concerning the 'open skies' agreements, referred to in section 7 of this part of the report (*Commission* v *Denmark*, *Commission* v *Sweden*, *Commission* v *Finland*, *Commission* v *Belgium*, *Commission* v *Luxembourg*, *Commission* v *Austria* and *Commission* v *Germany*), the Commission claimed that the Member States had infringed the external competence of the Community by entering into the disputed commitments. It maintained that that competence arose, first, from the necessity, within the meaning of Opinion 1/76 [1977] ECR 741, of concluding an agreement containing such commitments at Community level and, second, from the fact that the disputed commitments affected, within the meaning of the judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263 (the *'ERTA'* judgment), the rules adopted by the Community in the field of air transport.

The Court held first that the principles set out in Opinion 1/76 were not applicable. After a detailed analysis, it found that the present case did not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence. The Court then considered whether the Community had competence in the sense contemplated in the *ERTA* judgment, according to which the Community's competence to conclude international agreements arises not only from an express conferment by the EC Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of these provisions, by the Community institutions. The Court pointed out that the Community acquires an external competence by reason of the exercise of its internal competence in the following cases: (i) where the international commitments fall within the scope of the common rules or within an area which is already largely covered by such rules, even if there is no contradiction between the international commitments and the common rules, (ii) whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, and (iii) where the Community has achieved complete harmonisation in a given area. On the other hand, any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements did not in themselves affect the common rules adopted in that area and were thus not capable of establishing an external competence of the Community. Finally, the Court applied those criteria and, after a detailed examination of Community air transport legislation, declared that, by entering into or

[18] Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p.3).

maintaining in force, despite the renegotiation of the 'open skies' agreements, international commitments with the United States of America concerning air fares and rates charged by carriers designated by that non-member country on intra-Community routes and computerised reservation systems offered for use or used in the territory of the Member States concerned, those Member States had failed to fulfil their obligations under Article 10 EC and under Regulations No 2409/92 and No 2299/89. [19]

In Case C-29/99 *Commission* v *Council* (judgment of 10 December 2002, not yet published in the ECR), the Commission sought the partial annulment of the Council Decision of 7 December 1998 approving the accession of the European Atomic Energy Community ('the EAEC') to the Nuclear Safety Convention. In the Commission's view, the declaration annexed to that decision concerning the respective competences of the EAEC and the Member States with regard to the convention did not refer to a number of articles in the convention in respect of which the EAEC had competence to act. In its judgment, the Court annulled the declaration in so far as Articles 7, 14, 16(1) and (3), 17, 18 and 19 of the convention, which relate to fields in which the EAEC has competence, were not referred to there.

Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 concerned the question whether the Court's interpretation of Article 39 EC (on freedom of movement for workers) in Case C-272/92 *Spotti* [1993] ECR I-5185, to the effect that a provision of the German framework law on higher education could not be applied to Community nationals because of its discriminatory character, could be applied to the provision of the Europe Agreement with the Republic of Poland relating to freedom of movement for workers. [20] After finding that that provision of the agreement has direct effect, so that Polish nationals who assert it may also rely on it before the national courts of the host Member State, the Court held that the interpretation of Article 39 EC could be applied to that provision, in view of the aims of the agreement, and that no argument providing objective justification for the discrimination in question had been advanced before the Court.

15. In the field of *transport*, Case C-115/00 *Hoves Internationaler Transport-Service* [2002] ECR I-6077 merits attention. This case concerned the application of certain provisions in force in Germany to a road haulage undertaking which was established in Luxembourg and authorised in that State to engage in international road haulage. By virtue of that authorisation, the undertaking was entitled, in accordance with Article 1 of

[19] Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), and Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p.1), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p.1).

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

Regulation (EEC) No 3118/93, [21] to operate national haulage services in another Member State (cabotage services by road). In concrete terms, the question arose whether the obligation to register the vehicle in the host Member State (in this case, the Federal Republic of Germany) and the obligation to pay motor vehicle tax there are compatible with that regulation and Directive 93/89/EEC. [22]

The Court noted that 'to require the carrier to register the vehicle in the host Member State would be the very negation of the freedom to provide the cabotage service by road, the exercise of which presupposes, as the second subparagraph of Article 3(3) of Regulation No 3118/93 provides, that the motor vehicle is registered in the Member State of establishment' (paragraph 55). 'Similarly', the Court went on, 'to require a carrier to pay a tax on the motor vehicles in the host Member State, even though he has already paid such a tax in the Member State of establishment, would be contrary to the objective of Regulation No 3118/93, which, according to the second recital in its preamble, is aimed at removing all restrictions against the person providing the services on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is to be provided' (paragraph 56). It concluded that 'Article 6 of Regulation No 3118/93 precludes national provisions of a host Member State which entail the latter levying vehicle tax on the use of motor vehicles for the carriage of goods by road on the ground that those vehicles have their regular base in the territory of that host Member State, when they are registered in the Member State of establishment and are used in the host Member State to carry out cabotage by road, in accordance with authorisations lawfully issued by the Member State of establishment' (paragraph 59).

The Court also found that it is incompatible with Directive 93/89 for the host Member State to levy the tax on motor vehicles. It observed first of all that the dispute in the main proceedings arose from a positive conflict of laws concerning the registration of vehicles, and thus concerning their taxation. Although Directive 93/89 does not contain any conflict of law rule to determine which Member State is competent as regards registration, the Court nevertheless found that the objective of encouraging the development of cabotage services by road, combined with the harmonisation of taxes on certain commercial vehicles effected by Directive 93/89, could not be achieved if the host Member State were able to require payment of the tax in question. It held that 'Article 5 of Directive 93/89 precludes national provisions of a host Member State, within the meaning of Article 1(1) of Regulation No 3118/93, which entail the levying by the latter of vehicle tax on the use of motor vehicles for the carriage of goods by road on the ground that those vehicles have their regular base in the territory of that host

21 Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within aMember State (OJ 1993 L 279, p. 1).

22 Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (OJ 1993 L 279, p.32).

Member State, when they are registered and the tax referred to in Article 3(1) of that directive has been paid in the Member State of establishment and those vehicles are used in the host Member State for cabotage by road, in accordance with authorisations lawfully issued by the Member State of establishment' (paragraph 72).

16. So far as concerns *tax law*, it is worth noting Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315 in which the Court held that, by not adopting the measures necessary to allow adjustment of the taxable amount of a taxable person who has effected reimbursement where money-off coupons are reimbursed, the Federal Republic of Germany had failed to fulfil its obligations under Article 11 of the Sixth Council Directive (77/388/EEC) on value added tax. [23]

The Commission's action concerned the situation in which one or more wholesalers intervene in the distribution chain between the manufacturer and the retailers, and vouchers are reimbursed directly by the manufacturer to the retailers without any intervention by the wholesalers. In that situation the German legislation did not allow deduction from the manufacturer's taxable amount of the amount indicated on the vouchers, such a reduction being allowed only if the manufacturer had delivered the product directly to the retailer presenting the voucher to him. Under the approach adopted by the Commission, on the other hand, the manufacturer is entitled to reduce his taxable amount in the amount of the voucher reimbursed by him. The Court confirmed that approach, which it had already followed in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339. The Court rejected, among others, the arguments advanced by the German and United Kingdom Governments to the effect that the fiscal treatment of money-off coupons in *Elida Gibbs* is incompatible with the principles on which the system of value added tax is based. The Court also concluded that in the situations which may give rise to over-deduction of input tax, mentioned by those two governments, the Sixth Directive (77/388) allows adequate measures to be taken to prevent any claim for deduction which is unjustified and thus any loss of tax revenue.

17. Finally, two cases concerning the *Brussels Convention* (Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters) should be mentioned.

Case C-80/00 *Italian Leather* [2000] ECR I-4995 concerned the interpretation of Article 27(3) of the Brussels Convention which includes, among the possible grounds for refusing to recognise judgments given in another Contracting State, the situation where

[23] 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 1977 L 145, p. 1), in the version resulting from Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

the judgment at issue is 'irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought'.

Since that provision refers to 'judgments' without further precision, the Court drew the conclusion that decisions on interim measures are covered by it. So far as concerns the concept of 'irreconcilable' judgments, the Court referred to its case-law which establishes that it should be examined whether the judgments in question entail legal consequences that are mutually exclusive. As regards a case such as the one at issue in the main proceedings, the Court held that, 'on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought' (paragraph 47).

In Case C-334/00 *Tacconi* [2002] ECR I-7357, the Court held that in a situation characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention. The Court pointed out, in particular, that the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of that provision covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1) of the Convention.

B — Composition of the Court of Justice

(Order of precedence as at 7 October 2002)

First row, from left to right:

Judge C.W.A. Timmermans; Judge R. Schintgen; Judge J.-P. Puissochet; President G.C. Rodríguez Iglesias; Judge M. Wathelet; First Advocate General J. Mischo; Advocate General F.G. Jacobs.

Second row, from left to right:

Judge V. Skouris; Advocate General D. Ruiz-Jarabo Colomer; Advocate General P. Léger; Judge D.A.O. Edward; Judge C. Gulmann; Judge A.M. La Pergola; Judge P. Jann; Advocate General S. Alber.

Third row, from left to right:

Judge A. Rosas; Advocate General L.A. Geelhoed; Advocate General A. Tizzano; Judge N. Colneric; Judge F. Macken; Judge S. von Bahr; Judge J.N. Cunha Rodrigues; Advocate General C. Stix-Hackl; R. Grass, Registrar.

1. The Members of the Court of Justice

(in order of their entry into office)

Gil Carlos Rodríguez Iglesias

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

Francis G. Jacobs, QC

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

Claus Christian Gulmann

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

David Alexander Ogilvy Edward

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

Antonio Mario La Pergola

Born 1931; Professor of Constitutional Law and General and Comparative Public Law at the Universities of Padua, Bologna and Rome; Member of the High Council of the Judiciary (1976-1978); Member of the Constitutional Court and President of the Constitutional Court (1986-1987); Minister for Community Policy (1987-1989); elected to the European Parliament (1989-1994); Judge at the Court of Justice from 7 October 1994 to 31 December 1994; Advocate General at the Court of Justice from 1 January 1995 to 14 December 1999; Judge at the Court of Justice since 15 December 1999.

Jean-Pierre Puissochet

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

Philippe Léger

Born 1938; A member of the judiciary serving at the Ministry for Justice (1966-1970); Head of, and subsequently Technical Adviser at, the Private Office of the Minister for Living Standards in 1976; Technical Adviser at the Private Office of the Minister for Justice (1976-1978); Deputy Director of Criminal Affairs and Reprieves at the Ministry of Justice (1978-1983); Senior Member of the Court of Appeal, Paris (1983-1986); Deputy Director of the Private Office of the Minister for Justice (1986); President of the Regional Court at Bobigny (1986-1993); Head of the Private Office of the Minister for Justice, and Advocate General at the Court of Appeal, Paris (1993-1994); Associate Professor at René Descartes University (Paris V) (1988-1993); Advocate General at the Court of Justice since 7 October 1994.

Peter Jann

Born 1935; Doctor of Law of the University of Vienna (1957); appointed Judge and assigned to the Federal Ministry of Justice (1961); Judge in press matters at the Straf-Bezirksgericht, Vienna (1963-1966); spokesman of the Federal Ministry of Justice (1966-1970) and subsequently appointed to the international affairs department of that Ministry; Adviser to the Justice Committee and spokesman at the Parliament (1973-1978); appointed as Member of the Constitutional Court (1978); permanent Judge-Rapporteur at that court until the end of 1994; Judge at the Court of Justice since 19 January 1995.

Leif Sevón

Born 1941; Doctor of Law (OTL) of the University of Helsinki; Director at the Ministry of Justice; Adviser in the Trade Directorate of the Ministry of Foreign Affairs; Judge at the Supreme Court; Judge at the EFTA Court; President of the EFTA Court; Judge at the Court of Justice from 19 January 1995 to 16 January 2002.

Dámaso Ruiz-Jarabo Colomer

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

Melchior Wathelet

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

Siegbert Alber

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

Jean Mischo

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

Vassilios Skouris

Born 1948; graduated in law from the Free University, Berlin (1970); awarded doctorate in constitutional and administrative law at Hamburg University (1973); Assistant Professor at Hamburg University (1972-1977); Professor of Public Law at Bielefeld University (1978); Professor of Public Law at the University of Thessaloniki (1982); Minister of Internal Affairs (1989 and 1996); Member of the Administrative Board of the University of Crete (1983-1987); Director of the Centre for International and European Economic Law, Thessaloniki (from 1997); President of the Greek Association for European Law (1992-1994); Member of the Greek National Research Committee (1993-1995); Member of the Higher Selection Board for Greek Civil Servants (1994-1996); Member of the Academic Council of the Academy of European Law, Trier (from 1995); Member of the Administrative Board of the Greek National Judges' College (1995-1996); Member of the Scientific Committee of the Ministry of Foreign Affairs (1997-1999); President of the Greek Economic and Social Council in 1998; Judge at the Court of Justice since 8 June 1999.

Fidelma O'Kelly Macken

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

Ninon Colneric

Born 1948; studied in Tübingen, Munich and Geneva; following a period of academic research in London, awarded a doctorate in law by the University of Munich; Judge at the Arbeitsgericht Oldenburg; authorised, by the University of Bremen, to teach labour law, sociology of law and social law; Professor ad interim at the faculty of law of the universities of Frankfurt and Bremen; President of the Landesarbeitsgericht Schleswig-Holstein (1989); collaboration, as expert, on the European Expertise Service (EU) project for the reform of the labour law of Kirghizstan (1994-1995); Honorary Professor at the University of Bremen in labour law, specifically in European labour law; Judge at the Court of Justice since 15 July 2000.

Stig von Bahr

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

Antonio Tizzano

Born 1940; various teaching assignments at Italian universities; Legal Counsel to Italy's Permanent Representation to the European Communities (1984-1992); Member of the Bar at the Court of Cassation and other higher courts; Member of the Italian delegation in international negotiations and at intergovernmental conferences including those on the Single European Act and the Maastricht Treaty; various editorial positions; Member of the Independent Group of Experts appointed to examine the finances of the European Commission (1999); Professor of European Law, Director of the Institute of International and European Law (University of Rome); Advocate General at the Court of Justice since 7 October 2000.

José Narcíso da Cunha Rodrigues

Born 1940; various offices within the judiciary (1964-1977); Government assignments to carry out and coordinate studies on reform of the judicial system; Government Agent to the European Commission of Human Rights and the European Court of Human Rights (1980-1984); Expert on the Human Rights Steering Committee of the Council of Europe (1980-1985); Member of the Review Commission of the Criminal Code and the Code of Criminal Procedure; Attorney General (1984-2000); member of the supervisory committee of the European Union anti-fraud office (OLAF) (1999-2000); Judge at the Court of Justice since 7 October 2000.

Christiaan Willem Anton Timmermans

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

Leendert Adrie Geelhoed

Born 1942; Research Assistant, University of Utrecht (1970-1971); Legal Secretary at the Court of Justice of the European Communities (1971-1974); Senior Adviser, Ministry of Justice (1975-1982); Member of the Advisory Council on Government Policy (1983-1990); various teaching assignments; Secretary-General, Ministry of Economic Affairs (1990-1997); Secretary-General, Ministry of General Affairs (1997-2000); Advocate General at the Court of Justice since 7 October 2000.

Christine Stix-Hackl

Born 1957; Doctor of Laws (University of Vienna), postgraduate studies in European Law at the College of Europe, Bruges; member of the Austrian Diplomatic Service (from 1982); expert on European Union matters in the office of the Legal Adviser to the Ministry of Foreign Affairs (1984-1988); Legal Service of the European Commission (1989); Head of the 'Legal Service - EU' in the Ministry of Foreign Affairs (1992-2000, Minister Plenipotentiary); participated in the negotiations on the European Economic Area and on the accession of the Republic of Austria to the European Union; Agent of the Republic of Austria at the Court of Justice of the European Communities; Austrian Consul-General in Zurich (2000); teaching assignments and publications; Advocate General at the Court of Justice since 7 October 2000.

Allan Rosas

Born 1948; Doctor of Laws (1977) of the University of Turku (Finland); Professor of Law at the University of Turku (1978-1981) and at the Åbo Akademi University (Turku/Åbo) (1981-1996); Director of the latter's Institute for Human Rights (1985-1995); various international and national academic positions of responsibility and memberships of learned societies; coordinated several international and national research projects and programmes, including in the fields of EU law, international law, humanitarian and human rights law, constitutional law and comparative public administration; represented the Finnish Government as member of, or adviser to, Finnish delegations at various international conferences and meetings; expert functions in relation to Finnish legal life, including in governmental law commissions and committees of the Finnish Parliament, as well as the UN, UNESCO, OSCE (CSCE) and the Council of Europe; from 1995 Principal Legal Adviser at the Legal Service of the European Commission, in charge of external relations; from March 2001, Deputy Director-General of the Commission Legal Service. Judge at the Court of Justice since 16 January 2002.

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 2002

In 2002 the composition of the Court of Justice changed as follows:

On 16 January, Judge Leif Sevón left the Court. He was replaced by Mr Allan Rosas as Judge.

3. Order of precedence

from 1 January to 16 January 2002

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

R. Grass, Registrar

from 17 January to 6 October 2002

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

R. Grass, Registrar

from 7 October to 31 December 2002

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

R. Grass, Registrar

4. Former Members of the Court of Justice

Massimo Pilotti, Judge (1952-1958), President from 1952 to 1958
Petrus Josephus Servatius Serrarens, Judge (1952-1958)
Otto Riese, Judge (1952-1963)
Louis Delvaux, Judge (1952-1967)
Jacques Rueff, Judge (1952-1959 and 1960-1962)
Charles Léon Hammes, Judge (1952-1967), President from 1964 to 1967
Adrianus van Kleffens, Judge (1952-1958)
Maurice Lagrange, Advocate General (1952-1964)
Karl Roemer, Advocate General (1953-1973)
Rino Rossi, Judge (1958-1964)
Andreas Matthias Donner, Judge (1958-1979), President from 1958 to 1964
Nicola Catalano, Judge (1958-1962)
Alberto Trabucchi, Judge (1962-1972), then Advocate General (1973-1976)
Robert Lecourt, Judge (1962-1976), President from 1967 to 1976
Walter Strauss, Judge (1963-1970)
Riccardo Monaco, Judge (1964-1976)
Joseph Gand, Advocate General (1964-1970)
Josse J.Mertens de Wilmars, Judge (1967-1984), President from 1980 to 1984
Pierre Pescatore, Judge (1967-1985)
Hans Kutscher, Judge (1970-1980), President from 1976 to 1980
Alain Louis Dutheillet de Lamothe, Advocate General (1970-1972)
Henri Mayras, Advocate General (1972-1981)
Cearbhall O'Dalaigh, Judge (1973-1974)
Max Sørensen, Judge (1973-1979)
Alexander J. Mackenzie Stuart, Judge (1973-1988), President from 1984 to 1988
Jean-Pierre Warner, Advocate General (1973-1981)
Gerhard Reischl, Advocate General (1973-1981)
Aindrias O'Keeffe, Judge (1975-1985)
Francesco Capotorti, Judge (1976), then Advocate General (1976-1982)
Giacinto Bosco, Judge (1976-1988)
Adolphe Touffait, Judge (1976-1982)
Thymen Koopmans, Judge (1979-1990)
Ole Due, Judge (1979-1994), President from 1988 to 1994
Ulrich Everling, Judge (1980-1988)
Alexandros Chloros, Judge (1981-1982)
Sir Gordon Slynn, Advocate General (1981-1988), then Judge (1988-1992)
Simone Rozès, Advocate General (1981-1984)
Pieter Verloren van Themaat, Advocate General (1981-1986)
Fernand Grévisse, Judge (1981-1982 and 1988-1994)
Kai Bahlmann, Judge (1982-1988)
G. Federico Mancini, Advocate General (1982-1988), then Judge (1988-1999)
Yves Galmot, Judge (1982-1988)
Constantinos Kakouris, Judge (1983-1997)
Carl Otto Lenz, Advocate General (1984-1997)
Marco Darmon, Advocate General (1984-1994)
René Joliet, Judge (1984-1995)
Thomas Francis O'Higgins, Judge (1985-1991)
Fernand Schockweiler, Judge (1985-1996)

José Luis da Cruz Vilaça, Advocate General (1986-1988)
Manuel Díez de Velasco, Judge (1988-1994)
Manfred Zuleeg, Judge (1988-1994)
Walter Van Gerven, Advocate General (1988-1994)
Giuseppe Tesauro, Advocate General (1988-1998)
Michael Bendik Elmer, Advocate General (1994-1997)
Krateros Ioannou, Judge (1997-1999)
José Carlos De Carvalho Moithinho de Almeida, Judge (1986-2000)
Paul Joan George Kapteyn, Judge (1990-2000)
Georges Cosmas, Advocate General (1994-2000)
Günter Hirsch, Judge (1994-2000)
Hans Ragnemalm, Judge (1995-2000)
Nial Fennelly, Advocate General (1995-2000)
Antonio Saggio, Advocate General (1998-2000)
Leif Sevón, Judge (1995-2002)

— Presidents

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

— Registrars

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

Ms Lene Espersen, Minister for Justice of the Kingdom of Denmark, President of the Council; Mr Ludwig Adamovich, President of the Constitutional Court of the Republic of Austria; Mr Pat Cox, President of the Parliament; Mr Romano Prodi, President of the Commission; Their Royal Highnesses the Grand Duchess and the Grand Duke of Luxembourg; Mr Gil Carlos Rodríguez Iglesias, President of the Court of Justice.

C — 50th Anniversary of the Court of Justice

'*When the Community falls to recollecting, all its institutions express themselves as one. Even the most reticent of them will shed its reserve when mention is made of the history of its origins. But will it do likewise when it observes, looking back across the years, the continuing process of accomplishing a great design within the legal domain entrusted to its care? ...*

Few generations have witnessed the birth of a system of law. Yet ours has.'

It was by recalling those words, spoken 30 years ago by President Robert Lecourt, that Mr Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, began his speech at the formal sitting on 4 December 2002 to commemorate the inauguration of the Court of Justice in Luxembourg.

Speeches paying tribute to the work of the Court of Justice since 1952 were given by Mr Pat Cox, President of the European Parliament, Ms Lene Espersen, Minister for Justice of the Kingdom of Denmark, President of the Council, Mr Romano Prodi, President of the Commission, and Mr Ludwig Adamovich, President of the Austrian Constitutional Court, in the presence of Their Royal Highnesses the Grand-Duke and Grand-Duchess of Luxembourg.

Created as the judicial body of the European Coal and Steel Community, the Court of Justice was initially assigned a narrow role limited to a specific field. Nevertheless, from the beginning, its rulings formed part of a process which was gradually to lead to the construction of a new legal order. In its judgments over the years, the Court shed light on the fundamental principles implicit in the wording and structure of the founding Treaties and, by giving them expression in its decisions, affirmed the defining features of the Community legal order.

'The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'

That passage of the Court's judgment of 5 February 1963 in Van Gend & Loos, recalled on the occasion of its 50th anniversary, gives clear expression to the legal concept which was later to lead to the development of the other fundamental legal principles which, with direct effect, are today regarded as typifying the Community legal order: the principle that Community law takes precedence over national law, and the principle that

the States are liable for damage caused to individuals as a result of infringement of Community law.

Particular emphasis was also placed at the formal sitting on the Court's role as a constitutional court, especially in interinstitutional disputes in which the Court finds it necessary to protect the balance between institutions sought by the Treaties or, again, where the Court is called upon to resolve issues of competence between the Member States and the Communities.

The role of the Court in ensuring the protection of fundamental rights, and the links of cooperation and mutual trust forged with the national courts over the years were more specifically addressed on 3 December 2002 – the eve of its anniversary – at the conference on cooperation between the Court of Justice and national courts.

At the conference, senior judges of the supreme and constitutional courts of the Member States, of international and European courts, of other international courts in Europe, Latin America and Africa, and of supreme and constitutional courts in the candidate countries, together with former members of the Court of Justice and the Court of First Instance, took part in three workshops on, respectively, the preliminary reference system, cooperation in the judicial protection of rights of individuals, and cooperation in the protection of fundamental rights.

The conference served as a reminder that, from its beginnings, the European Community has, in the judicial sphere, been organised on the basis of the principle of subsidiarity, in the sense that only those powers which could not be conferred on national courts or tribunals were reserved to the Community's own judicature. It is the national courts which are responsible for applying Community law within their territorial jurisdiction and within the sphere of their functions, and which truly are, in the now time-hallowed expression, the ‘ordinary courts’ of Community law.

In that way, the conference, organised in Luxembourg as part of the celebrations to mark the 50th anniversary of the Court of Justice, made it clear that the preliminary ruling procedure is truly the keystone of the Community judicial structure, enabling the decentralised application of Community law to be reconciled with its uniform interpretation.

The speeches given at the formal sitting on 4 December 2002 and the documents relating to the conference of 3 December 2002 have been published separately.

Mr Pat Cox,
President of the European Parliament

Mr Gil Carlos Rodríguez Iglesias,
President of the Court of Justice

Ms Lene Espersen,
Minister for Justice of the Kingdom of Denmark

Mr Ludwig Adamovich,
President of the Austrian Constitutional Court

Mr Romano Prodi,
President of the Commission

Chapter II

The Court of First Instance of the European Communities

A — Proceedings of the Court of First Instance in 2002

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

The statistics for 2002 reveal three major trends.

The first trend is confirmation of an existing trend: the number of actions continues to increase. Almost 400 cases were registered by the Court of First Instance (to be precise 393 cases, excluding special forms of procedure such as legal aid and the taxation of costs), an increase of 20.2% compared with the number of cases registered in the previous year (327 cases).

The second trend, which is also the main explanation for the growth in the total number of new cases, is the considerable increase in the number of cases brought in the field of the Community trade mark [24] (83 cases in 2002 compared with 37 in 2001). While a leading role for this field of litigation has been forecast for several years, [25] that prediction is now becoming a reality since trade mark cases represent more than 20% of all cases brought and that proportion should increase further in the future. Trade mark and staff cases now account for 49.6% of all actions brought before the Court of First Instance.

The third trend is that emergency cases are becoming a genuine branch of litigation. Since 1 February 2001 the Rules of Procedure have provided for the possibility of ruling on the substance of a case under an expedited procedure. In the course of 2002, no less than 25 applications for expedition were made (compared with 12 in 2001) and the Court of First Instance granted expedited treatment on 14 occasions (13 of the successful applications were in cases challenging decisions adopted by the Commission in the field of concentrations of undertakings). The cases dealt with under the expedited procedure were decided by the Court of First Instance within a period ranging from under two months to eight months from the date on which the application was granted. It is undeniable that the possibility of dealing with cases under an

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

25 A similar forecast may be made with regard to actions brought before the Court of First Instance challenging decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in the field of Community designs. However, since the legislation governing Community designs entered into force this year (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p.1); Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ 2002 L 341, p. 28); and Commission Regulation (EC) No 2246/2002 of16 December 2002 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in respect of the registration of Community designs (OJ 2002 L 341, p54)), the first actions before the Court of First Instance are not expected in 2003.

expedited procedure has contributed to the reduction in the number of applications for interim relief (25 applications for interim relief in 2002 compared with 37 in 2001). [26]

The number of cases decided (314) was slightly down compared with the previous year (325) and remained below the number of cases brought, so that the number of pending cases increased from 786 to 865.

Developments in the case-law call for a more detailed exposition.

As in previous years, the most significant judicial decisions of the year will be grouped into proceedings concerning the legality of measures (I), actions for damages (II) and applications for interim relief (III). The imbalance in the presentation of these subject groupings merely reflects the respective positions held by them in terms of volume in the judicial activity of the Court of First Instance. [27]

I. Proceedings concerning the legality of measures

Apart from consideration of the conditions governing the admissibility of actions brought under Article 230 EC (A), this account of proceedings concerning the legality of measures concentrates on the essential aspects of substantive law in the main subject areas dealt with by the Court of First Instance in the course of the year (B to H). It should be noted at the outset that customs, access to documents and reductions in financial assistance (in particular assistance granted by the European Social Fund and the European Agricultural Guidance and Guarantee Fund) are not among the fields dealt with in this report, since the limited number of judgments delivered in those fields confirm well-established case-law.

A. Admissibility of actions for annulment

It is essentially the concept of a reviewable act (1) and standing to bring proceedings (2) that have undergone particular development during the period under consideration.

26 See also the comments below in the section on interim relief proceedings.

27 To assist the reader, articles of the EC Treaty are given *in the version which has been in force since 1 May 1999, including when they are referred to in secondary legislation*.

1. Measures which may be the subject of an action for annulment

(a) Measures of the Commission

It is settled case-law that only measures producing binding legal effects capable of affecting the interests of the applicant (a natural or legal person) by bringing about a distinct change in his legal position are acts against which an action for annulment may be brought under Article 230 EC. In particular, in the case of acts or decisions adopted under a procedure involving several stages, especially where they are the culmination of an internal procedure, it is clear from the same case-law that, in principle, an act is reviewable only if it is a measure definitively establishing the position of an institution at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.

In the light of that case-law, the following were held not to constitute measures which could be brought before the Court: a reduction in the quantities of bananas allegedly marketed by the applicants, made by the Commission in a 'worksheet' falling within the information checking process prescribed by Regulation (EEC) No 1442/93 [28] laying down detailed rules for the application of the arrangements for importing bananas into the Community (Case T-160/98 *Van Parys and Pacific Fruit Company* v *Commission* [2002] ECR II-233); a letter sent by the Commission to a complainant informing it that the assessments contained in the letter are of a provisional nature (Case T-95/99 *Satellimages TV 5* v *Commission* [2002] ECR II-1425); and a letter from the Commission which merely informs a business about the state of the procedure for inclusion of a substance in one of the annexes to a Community regulation (Case T-212/99 *Intervet International* v *Commission* [2002] ECR II-1445). Also, a Commission decision intended to withdraw immunity from fines from undertakings having notified an agreement within the meaning of Article 81 EC is capable of producing binding legal effects only if notification of the agreement did in fact confer such immunity on those undertakings. That is not the case where the decision refers to an agreement between shipping companies containing provisions relating to the fixing of inland transport tariffs, as such provisions fall within Regulation (EEC) No 1017/68 [29] which does not provide for immunity from fines where agreements are notified (Case T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125).

The fact that the contested act does not, in principle, adversely affect an applicant does not dispense the Community judicature from examining whether the assessment contained in it has binding legal effects such as to affect the applicant's interests. Looking at the act's substance, the Court held that a decision declaring notified State

[28] Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6).

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

aid compatible with the common market adversely affected the applicant, who was the recipient of the aid. The Court explained that, in the case of a decision adopted under the rules laid down by the multisectoral framework on regional aid for large investment projects, the Commission's finding concerning the adjustment coefficient upon which the maximum allowable aid intensity depends is likely to have binding legal effects since it affects the amount of aid which may be declared compatible with the common market (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347).

The Court likewise held that an action may be brought for annulment of a decision which amends some of the grounds of an earlier decision but does not alter its operative part. As stated in the judgment of 20 November 2002 in Case T-251/00 *Lagardère and Canal*+ v *Commission*, not yet published in the ECR, that is so where the amendment of the grounds of the earlier decision has changed the substance of what was decided in the operative part of that decision, thereby affecting the applicant's interests. In the case in point, the amendment, contained in a Commission decision, of an assessment relating to whether or not restrictions notified by the applicants in connection with a concentration were ancillary — an assessment which had been set out in the decision authorising those concentrations — was considered to amend the substance of what had been decided in the operative part of the decision authorising the concentrations. That amendment produced binding legal effects such as to affect the applicants' interests.

In the field of State aid, three judgments held decisions to initiate the formal investigation procedure provided for in Article 88(2) EC to be open to challenge (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309; and judgments of 23 October 2002 in Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa and Others* v *Commission* and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission*, both not yet published in the ECR).

In *Government of Gibraltar* v *Commission*, the Government of Gibraltar applied for the annulment of two Commission decisions to initiate the formal investigation procedure in relation to Gibraltar company law which granted tax exemptions. The Commission, disputing that those decisions were open to challenge, argued that the State measures at issue had not been classified as new aid, that it had not sought suspension of the measures and that the solution adopted by the Court of Justice in its judgment in Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303 (see the *Annual Report 2001*) was therefore not applicable to the present case. In response, the Court of First Instance stated first of all that, under Article 88 EC and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 EC, [30] initiation of a formal investigation is provided for in four possible situations, namely for the purpose of examining new notified aid, for the purpose of examining possible

[30] OJ 1999 L 83, p. 1.

unlawful aid, in the event of misuse of aid, and where a Member State rejects the appropriate measures proposed by the Commission in respect of an existing aid scheme. In the present case the Court observed, with regard to the category of 'possible unlawful aid', that the Commission in fact initiated the formal investigation procedure inasmuch as, in each of the contested decisions, it provisionally concluded that the legislation in issue constituted unlawful aid that was incompatible with the common market. The Court then examined whether the decisions to open the formal investigation procedure were acts open to challenge: it held that even though the classification of State aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the formal investigation procedure and though the mere initiation of that procedure does not have the same immediately binding character as a suspension injunction addressed to the Member State concerned, the fact that the Commission chooses to initiate the formal investigation procedure and provisionally classifies a State measure as new aid, instead of following the procedure in respect of possible existing aid, has legal effects. First, even a final decision declaring that new aid compatible with the common market does not have the consequence of regularising *ex post facto* the unlawfully adopted implementing measures. Second, the decision initiating the procedure may be invoked before a national court and thus exposes the beneficiaries of the measure and territorial entities to the risk that the national court will order suspension of the measure and/or recovery of the payments made. The Court concluded that the procedural choice of initiating a formal procedure and provisionally classifying a measure as new aid must be amenable to judicial review.

The judgments in *Territorio Histórico de Guipúzcoa and Others* v *Commission* and *Territorio Histórico de Álava and Others* v *Commission* confirm that a decision to initiate the formal investigation procedure entails independent legal effects, particularly in relation to the suspension of measures. The Court stated that that is plainly the case not only where a measure in the course of implementation is regarded by the authorities of the Member State concerned as existing aid, but also where the authorities take the view that the measure to be formally investigated does not fall within the scope of Article 87(1) EC. The Court then held that a decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified by the Commission as new aid constitutes an act open to challenge for the purposes of Article 230 EC, in that it necessarily alters the legal implications of that measure and the legal position of the recipient firms. The significant element of doubt as to the legality of the measure being investigated that is engendered by such a decision must lead the Member State to suspend application of the measure but also may be invoked before a national court and lead both the recipient and his trading partners to take the view that the advantage obtained is not definitively acquired.

(b) Measures of the European Parliament

In the specific case of measures of the European Parliament, the first paragraph of Article 230 EC provides that the Community judicature is to review the legality of such

measures only if they are 'intended to produce legal effects *vis-à-vis* third parties'. It follows that, in accordance with settled case-law, measures of the Parliament which relate only to the internal organisation of its work cannot be challenged in an action for annulment.

In an action brought by 22 Members of the European Parliament, the Court was asked to rule on the legality of the Framework Agreement of 5 July 2000 on Relations between the Parliament and the Commission, which regulates the forwarding of confidential information between those institutions. By order in Case T-236/00 *Stauner and Others* v *Parliament and Commission* [2002] ECR II-135, the Court dismissed their action as inadmissible. Without expressing a view on the question whether the relevant Members of the Parliament were 'third parties', the Court found that the legal effects produced by the Framework Agreement did not affect the applicants' interests inasmuch as it did not alter the conditions for the performance of their parliamentary duties. It held, in particular, that the Framework Agreement, which is limited to governing relations between the Commission and the Parliament, did not alter the legal position of Members of the Parliament, acting individually, as regards the right under the third paragraph of Article 197 EC and did not impair their right, guaranteed by that provision, to put questions to the Commission.

On the other hand, even though the action was ultimately dismissed as inadmissible for lack of standing to bring proceedings (see below), the Court held (Case T-17/00 *Rothley and Others* v *Parliament* [2002] ECR II-579; under appeal, Case C-167/02 P) that a measure of the Parliament which amended its Rules of Procedure, by adding a rule concerning the internal investigations conducted by the European Anti-Fraud Office (OLAF), and approved the Parliament's decision concerning the terms and conditions for internal investigations in relation to the combating of fraud, corruption and any other illegal activities detrimental to the interests of the Community went beyond, in both its object and its effects, the internal organisation of the work of the Parliament. It could therefore be the subject of an action for annulment.

2. Standing to bring proceedings

The conditions under which an individual may apply for annulment of a Community measure are laid down by the fourth paragraph of Article 230 EC, which provides that 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

(a) Classification as a measure

The judgment in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313 (under appeal, Case C-141/02 P) answers the question whether a measure by which the Commission decides not to make use of the power conferred upon it by Article 86(3)

EC constitutes a decision rejecting a complaint alleging infringement of Article 86(1) EC and, therefore, a measure addressed to the complainant. Here, a GSM operator, the company max.mobil Telekommunikation Service GmbH, lodged a complaint with the Commission seeking among other things a finding that the Republic of Austria had infringed Article 82 EC in conjunction with Article 86 EC because, in essence, an Austrian State measure enabled a competitor (Mobilkom) to abuse its dominant position on the mobile telephony market. The Commission stated in a letter to max.mobil that one of the grounds put forward was not sufficiently substantiated. Max.mobil took the view that this letter rejected its complaint and asked the Court to annul the letter.

In its assessment of the action's admissibility, the Court stated first of all that the fact that the Commission enjoys a broad discretion regarding the application of Article 86(3) EC does not in itself prevent an action from being brought for annulment of a decision refusing to continue the examination of a complaint concerning the taking of action under that article of the Treaty, particularly where such a decision is addressed to the author of the complaint. The Court then held that the existence of decisions rejecting complaints concerning the taking of action by the Commission under Article 86(3) EC must be conceded, pointing out that, in contrast to the course of action followed for the examination of complaints alleging infringement of Article 87 EC in relation to State aid, a complaint calling on the Commission to take action on the basis of Article 86(3) EC does not always give rise to a decision addressed to the Member State concerned since it is only where it is 'necessary' to do so that the Commission addresses such a decision to it.

(b) Concept of direct concern

In order for a Community measure to be of direct concern to an individual to whom it is not addressed, it must directly affect his legal situation and its implementation must be purely automatic and result from Community rules alone without other intermediate rules.

In the light of that interpretation, the Court held, by order in Case T-105/01 *SLIM Sicilia* v *Commission* [2002] ECR II-2697, that a company to which the authorities had awarded a concession contract for the carrying out of a project which benefited from assistance under the European Regional Development Fund (ERDF) was not directly concerned by a Commission decision addressed to the Member State refusing to extend the period for submission of the application for final payment in relation to the assistance granted under the ERDF. The Court stated in support of that conclusion that the Italian authorities had paid to the company the total amount provided for by way of Community assistance and that no obligation to refund the difference between that amount and the amount paid by the Commission to the Italian State derived from the contested decision itself or from any provision of Community law intended to govern the effect of that decision.

The Court likewise dismissed an action brought by two companies belonging to a group operating in the cigarette market for annulment of a provision of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [31] (order of 10 September 2002 in Case T-223/01 *Japan Tobacco and JT International* v *Parliament and Council*, not yet published in the ECR). The Court pointed out that the fact that the wording of the fourth paragraph of Article 230 EC does not provide for the possibility of an application by an individual for annulment of a genuine directive is not sufficient to declare his action inadmissible since, in certain circumstances, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them. It then stated that where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State in response to the measure is automatic or is, at all events, a foregone conclusion, then the measure is of direct concern to any person affected by that action. If, on the other hand, the measure leaves it to the Member State whether or not to act, it is the action or inaction of the Member State that is of direct concern to the person affected, not the measure itself. Applying the concept interpreted in that way, the Court then held that, until such time as the provision of the directive at issue had been transposed into the national law of at least one Member State, or until the expiry of the transposition period, the provision would not bring about any change in the applicants' legal position.

(c) Concept of individual concern

In order for an individual to be able to gain access to the Court, he must in particular demonstrate, where the contested measure is not addressed to him, that it is of individual concern to him. It has been repeatedly held ever since the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 that, in order for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

During the period under consideration, the Court followed that interpretation until it departed from it in its judgment of 3 May 2002 in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365 (under appeal, Case C-263/02 P). However, once the Court of Justice confirmed its interpretation of the concept of individual concern in its judgment of 25 July 2002 in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, the Court of First Instance subsequently took account of the Court of Justice's interpretation when it examined whether actions for annulment were admissible.

[31] OJ 2001 L 194, p. 26.

For the purposes of this account, a division will be made between the judgment in *Jégo-Quéré* and cases of assessment of an action's admissibility which belong to the line of case-law that began with *Plaumann*.

– Instances where the *Plaumann* case-law was applied

Several applicants had their actions dismissed as inadmissible because they were not individually concerned by the measures of general application whose legality they challenged. [32]

Thus, the Court concluded that an action brought by a number of businesses for annulment of a regulation imposing a definitive anti-dumping duty [33] was inadmissible (Case T-598/97 *BSC Footwear Supplies and Others* v *Council* [2002] ECR II-1155). Here the applicant companies, which were unrelated importers of shoes into the European Union, submitted that a body of factors differentiated them from all other businesses, in particular: (i) they actively participated in the administrative procedure which led to the adoption of the regulation; (ii) the imposition of the anti-dumping duties entailed adverse consequences for their activities; and (iii) two of them were expressly referred to in the regulation.

The Court recalled first of all, by reference to the judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, that an action brought by an unrelated importer against an anti-dumping regulation has been held to be admissible in exceptional circumstances. It then found that the applicants' situation was in no way comparable to that of Extramet Industrie, in particular because there was no proof that the contested regulation seriously affected their economic activities, and concluded therefrom that they had not proved that that regulation affected them other than in their objective capacity as importers of the products in question, just as it did any other trader finding himself in the same situation. The Court added that, although participation by an undertaking in an anti-dumping proceeding may be taken into account, amongst other factors, in order to establish whether that undertaking is individually concerned by the regulation introducing anti-dumping duties at the conclusion of the proceeding, such participation does not, of itself, give rise to a right enabling the undertaking to bring a

32 For instances where actions for the annulment of regulations were inadmissible,see also the judgment in Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, the order in Case T-339/00 *Bactria* v *Commission* [2002] ECR II-2287 (under appeal, Case C-258/02 P) and the orders of 25 September 2002 in Case T-178/01 *Di Lenardo Adriano* v *Commission* and Case T-179/01 *Dilexport* v *Commission*, both not yet published in the ECR.

For an instance where an action for annulment of a directive was inadmissible, see the order in Case T-84/01 *Association contre l'heure d'été* v *Parliament and Council* [2002] ECR II-99.

33 Council Regulation (EC) No 2155/97 of 29 October 1997 imposing a definitive anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia and collecting definitively the provisional duty imposed (OJ 1997 L 298, p.1).

direct action against the regulation. Similarly, the mere fact that a number of the applicant undertakings were specifically named in the contested regulation could not lead to a different conclusion.

In *Rothley and Others* v *Parliament*, cited above, the Court considered whether the Members of the European Parliament were individually concerned by the measure adopted by that institution. [34] After finding that the contested measure, although called a 'decision', constituted a measure of general application, the Court held that it was not of individual concern to the applicants since it applied without distinction to the Members of the Parliament in office at the time of its entry into force and to any other person subsequently coming to hold the same office.

On the other hand, several actions for the annulment of measures of general application were declared admissible.

By judgments of 11 September 2002 in Case T-13/99 *Pfizer Animal Health* v *Council* and Case T-70/99 *Alpharma* v *Council*, both not yet published in the ECR, Pfizer Animal Health and Alpharma were held to be entitled to challenge Regulation (EC) No 2821/98 [35] withdrawing virginiamycin and bacitracin zinc, respectively produced by those companies, from the list of antibiotics authorised as additives in feedingstuffs. The Court held that, notwithstanding the general nature of the contested measure, at the time of its adoption the legal and factual situation of each of the applicants differentiated them, as regards the measure, from all other businesses concerned. In reaching its finding the Court, which made an identical assessment in both cases, observed that the ban on those substances occurred in the course of the procedure for re-evaluating their authorisation as additives in feedingstuffs. Having regard to that situation, it relied on two fundamental factors.

First, Pfizer and Alpharma alone were in a legal position which would have enabled them to obtain, under the applicable legislation, authorisation to market the substances in question as the person first responsible for putting them into circulation. They were therefore able to rely on an inchoate right in that regard. In addition, by virtue of having made an application for a further authorisation they had obtained a position in respect of which secondary legislation offered legal safeguards. [36]

34 Decision of the Parliament of 18 November 1999 on the amendments to the Rules of Procedure following the Interinstitutional Agreement of 25 May 1999 between the Parliament, the Council and the Commission on the internal investigations conducted by the European Anti-Fraud Office (OLAF).

35 Council Regulation (EC) No 2821/98 of 17 December 1998 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/524/EEC concerning additives in feedingstuffs (OJ 1998 L 351, p. 4).

36 Council Directive 70/524/EEC concerning additives in feedingstuffs (OJ, English Special Edition 1970 (III), p. 840), as amended, guarantees protection for the scientific data and other information

Second, the contested regulation terminated or, at the least, suspended the procedures which had been opened, at the request of each applicant, for the purposes of obtaining new authorisations of their antibiotics as additives in feedingstuffs, and in the course of which those parties had the benefit of procedural guarantees.

By judgments of 14 November 2002 in Joined Cases T-94/00, T-110/00 and T-159/00 *Rica Foods and Others* v *Commission* and Joined Cases T-332/00 and T-350/00 *Rica Foods* v *Commission*, both not yet published in the ECR, the applicants, sugar processing undertakings established in Aruba and the Netherlands Antilles which export their products into the Community, were found to be individually concerned by regulations [37] introducing safeguard measures under Article 109 of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories (OCTs) with the European Economic Community. First, the three applicants were undertakings affected by the contested regulations since they were established in the OCT and were operating in the sector referred to in the contested regulations, and second, those regulations prevented them from performing certain supply contracts.

– The new interpretation of the condition

In *Jégo-Quéré* the Court of First Instance departed from the *Plaumann* case-law, adopting a different interpretation of the concept of 'individual concern'.

The Commission adopted a regulation laying down minimum mesh sizes used in certain fishing zones. [38] Since Jégo-Quéré et Cie was prohibited from using certain nets in one of those zones, it applied to the Court for annulment of two provisions of that regulation.

The Court found first that, on the basis of the criteria hitherto established by Community case-law, the applicant could not be regarded as individually concerned, within the meaning of the EC Treaty, by the generally applicable provisions of the regulation.

However, the Court observed: (i) that the Court of Justice has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and

provided by manufacturers in the dossier submitted with a view to obtaining for their product the first authorisation as an additive linked to a person responsible for putting the additive into circulation.

37 Commission Regulations (EC) No 465/2000 and No 2081/2000 of 29 February 2000 and 29 September 2000, respectively introducing and providing for the continued application of safeguard measures for imports from the overseas countries and territories of sugar sector products with EC/OCT cumulation of origin (OJ 2000 L 56, p. 39, and OJ 2000 L 246, p. 64).

38 Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels (OJ 2001 L 159, p. 4).

is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions; (ii) that the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'); and (iii) that this right has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union. The Court therefore then considered whether, in a case such as the present one, where an individual applicant contests the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.

It found that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation. With regard specifically to references for a preliminary ruling, the Court held it not to be acceptable that in a case where, as claimed in this instance, there are no national implementing measures to form the basis of an action before the national courts, an individual is compelled to infringe Community provisions in order to have access to those courts and, where appropriate, to obtain a reference to the Court of Justice pursuant to Article 234 EC.

In the absence of a compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as a person to which it is addressed, the Court decided *to reconsider the strict interpretation, applied until now, of the notion of a person individually concerned*. It consequently held, without limiting its interpretation solely to situations in which there is no remedy before national courts, that *a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him*. The Court stated that the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.

Since the Court found that the conditions thus interpreted were met, it dismissed the objection of inadmissibility raised by the Commission. In view of the appeal brought by the Commission against this judgment, the Court has decided to stay the proceedings before it until the Court of Justice has given judgment on the appeal.

B. Competition rules applicable to undertakings

The Commission decisions upon which the Court of First Instance ruled in 2002 involved application of Article 81 EC (1), of Article 82 EC (2) and of Regulation No 4064/89 on the control of concentrations between undertakings (3). [39]

1. Article 81 EC

Called upon to review the legality of Commission decisions finding that cartels existed in the transport and the district heating pipes sectors, the Court delivered a number of judgments from which much can be learned. Since this section is primarily concerned with the judgments in Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875 ('the *Trans-Atlantic Agreement* case'), in Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011 ('the *Far Eastern Freight Conference* case'), and in the cases concerning district heating [40] ('the *district heating* cases'), it starts by setting out the facts necessary for an understanding of those cases.

Background to the Trans-Atlantic Agreement *case*

In August 1992, the Trans-Atlantic Agreement ('the TAA'), an agreement between shipping companies on the scheduled transport of containers across the Atlantic between northern Europe and the United States of America and on the inland on-carriage and off-carriage of containers, was notified to the Commission with a view to obtaining, on the basis of Article 12(1) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 EC to maritime transport (OJ 1986 L 378, p. 4), a decision applying Article 81(3) EC.

Given the fixing of prices for transport services, the TAA provided for the fixing in common of the tariffs applicable to maritime transport and intermodal (or multimodal) transport, the price of an intermodal transport service being made up of two elements,

39 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p.1), as corrected at OJ 1990 L 257, p.13, and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p.1).

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

one relating to the maritime service, the other to the inland service. Thus, the TAA established, in addition to a maritime tariff, a tariff for inland transport services supplied within the Community as part of an intermodal transport operation.

By decision of 19 October 1994, [41] the Commission, first, held that provisions of the TAA relating, in particular, to price agreements infringed Article 81(1) EC and, second, refused to grant an exemption to those provisions under Article 81(3) EC and Article 5 of Regulation No 1017/68. [42]

The legality of that decision was disputed by 15 shipping companies which were party to the TAA. Those companies essentially claimed that the Commission had infringed Article 81(1) EC and Article 3 of Regulation No 4056/86 by not applying the block exemption to the TAA, and that it had unlawfully refused to grant an individual exemption.

Background to the Far Eastern Freight Conference *case*

By decision of 21 December 1994, [43] the Commission found that the members of the Far Eastern Freight Conference ('the FEFC') had infringed Article 81 EC and Article 2 of Regulation No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of an intermodal transport operation for the carriage of cargo in containers between northern Europe and the Far East.

Thirteen of the shipping companies to which that decision was addressed sought its annulment, claiming, *inter alia*, breach of Article 81(1) EC, of Article 3 of Regulation No 4056/86, which provides for block exemption for liner conferences, and of Article 81(3) EC and Article 5 of Regulation No 1017/68 concerning the grant of individual exemptions.

Background to the district heating *cases*

According to the Commission decision of 21 October 1998, [44] at the end of 1990 four Danish producers of district heating pipes entered into an agreement on general cooperation on their domestic market and, from the autumn of 1991, two German

41 Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 81 EC (Case IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1).

42 Cited in footnote 6.

43 Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding pursuant to Article 81 EC (Case IV/33.218 — Far Eastern Freight Conference) (OJ 1994 L 378, p.17).

44 Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 81 EC (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1).

producers regularly participated in their meetings. The Commission states that it was in those meetings that negotiations took place which led to an agreement, in 1994, to fix quotas for the whole of the European market. Both European and national quotas were allegedly allocated to each of those undertakings by the 'directors' club' (consisting of the chairmen or managing directors of the participants in the cartel).

In 1995, the Swedish undertaking Powerpipe AB made a complaint to the Commission about the situation. The Commission carried out an investigation which led to the adoption of the decision of 21 October 1998 finding that there had been a series of agreements and concerted practices seeking to divide national and European markets between producers by way of quotas, arrange the withdrawal of other producers from the market, agree prices for products and projects, manipulate tender procedures, and erect barriers to the activity of Powerpipe AB, the only major undertaking in the sector which was not a member of the cartel. The fines imposed on the undertakings which had participated in the cartel totalled approximately EUR 92 million. Eight of those undertakings brought an action before the Court of First Instance seeking annulment of the decision.

(a) Article 81(1) EC

(a.1) Prohibited agreements and concerted practices

– *The* district heating *cases*

As regards the scope *ratione personae* of competition law, the judgment in *HFB and Others* v *Commission* should be mentioned. In the decision contested in that case, the Commission regarded the Henss/Isoplus group as the undertaking that had committed the infringement for which the component companies of the group were held responsible. The Court confirmed the validity of that approach.

It recalled that, in prohibiting undertakings *inter alia* from entering into or participating in anti-competitive agreements or concerted practices, Article 81(1) EC applies to economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision. In that regard, the Court stated that there is no need for an economic entity identified as a 'group' to have legal personality. In competition law, the term 'undertaking' designates an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of more than one natural or legal person.

Since the Court's observations as to what constitutes anti-competitive conduct form part of what is now a firmly established line of authority, [45] the following remarks focus instead on the Court's observations concerning the required standard of proof.

In that connection, the Court found that, with the exception of, first, Dansk Rørindustri's participation in the cartel between April and August 1994 and, second, Sigma Tecnologie's participation in the cartel in the whole of the common market (and not just the Italian market), both the existence of the various constituent elements of the global cartel and the individual participation of the undertakings in the anti-competitive conduct for which they had been held liable had been established.

In the course of its appraisal, the Court first of all pointed out that where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be concluded that the undertaking is a participant in the cartel resulting from those meetings (see, in particular, *LR AF 1998* v *Commission*).

Second, the Court once again clearly stated that a declaration by an undertaking, other than the applicant undertaking, accused of having participated in a cartel, the correctness of which is contested by several of the other undertakings accused, cannot be regarded as adequate proof unless supported by other evidence (*Dansk Rørindustri* v *Commission*).

Lastly, the Court observed that an undertaking which has participated in a multiform infringement [46] of the competition rules by its own conduct, which falls within the definition of an agreement or concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that that undertaking was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct and was prepared to accept the risk (*Dansk Rørindustri* v *Commission*). It follows that a boycott may be attributed to an undertaking which approved it without there being any need for that undertaking to have participated in it (*LR AF 1998* v *Commission*). However, the Court found that the Commission had failed to provide evidence sufficiently precise and consistent to establish that Sigma Tecnologie knew or should have known that by

45 On the definition of such conduct, see *HFB and Others* v *Commission* and *Lögstör Rör* v *Commission*.

46 In *HFB and Others* v *Commission* and *Brugg Rohrsysteme* v *Commission*, cited above, the Court referred not to a multiform infringement, but to a 'single complex infringement' (paragraphs 231 and 73 respectively).

participating in the agreement on the Italian market it was joining the European cartel (*Sigma Tecnologie* v *Commission*).

Similarly, relying on its judgments of 14 May 1998 in the *Cartonboard* cases (see the *Annual Report 1998*), the Court confirmed that an undertaking may be held responsible for a global cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it knew, or should have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (*Dansk Rørindustri* v *Commission*).

– *The* Far Eastern Freight Conference *case*

In this case, the applicants, which did not deny that the agreement forming the subject-matter of the contested decision, by which they collectively fixed the price for the FEFC's inland transport services supplied in the context of intermodal transport, was capable of restricting competition, took the view, not shared by the Commission, that that agreement did not come within the scope of Article 81(1) EC inasmuch as it was not capable of restricting competition and affecting trade between Member States to an appreciable extent in the relevant market, properly defined.

The Court found, first of all, that the Commission had in fact identified the market affected by the agreement, namely the market for inland transport services supplied, within the European Community, to shippers by the member shipping companies of the FEFC as part of the intermodal transport of cargo in containers between northern Europe and the Far East. After a detailed analysis, the Court upheld the definition of the market, concluding that the inland transport services for the on-carriage and off-carriage of containers as part of the intermodal transport of goods constituted a market distinct from that for maritime transport services supplied in that context by the member shipping companies of the FEFC. The Court pointed out that a sub-market which has specific characteristics from the point of view of demand and supply, and which covers products which occupy an essential and non-interchangeable place in the general market of which it forms a part, must be regarded as a distinct product market. Accordingly, the Court confirmed by reference to the market for inland transport services that there had been an appreciable restriction of competition, the applicants controlling almost 40% of that market.

Similarly, the Court confirmed that trade between Member States could be affected, since the agreement in question was an agreement between shipping companies several of which were established in various Member States, and concerned the conditions of sale of inland transport services to shippers also established in various Member States. The Court pointed out that the condition regarding the effect on trade between Member States is intended to determine the scope of Community law in relation to that of the laws of the Member States.

(a.2) Attribution of the unlawful conduct

It falls, in principle, to the natural or legal person managing the undertaking concerned at the time when the infringement of the Community competition rules was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person has assumed responsibility for running the undertaking. That rule was applied by the Court in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843 [47] and in *HFB and Others* v *Commission*, cited above.

In *Stora Kopparbergs Bergslags* v *Commission*, the Court of First Instance gave a fresh decision after the case had been referred back to it by the judgment of the Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, in which it held that the Court of First Instance had erred in law in ruling that Stora was liable for conduct of two of the companies which it acquired during the infringement period. The Court of Justice found that the two companies had continued to exist after control of them had been acquired by Stora. Observing that what matters for application of the above rule is not the fact that the companies continued to exist after their acquisition by Stora, but the existence, *on the date of adoption of the Commission's decision*, of the legal person responsible for their operation during the period prior to that acquisition, the Court of First Instance put a number of questions to Stora in order to determine whether or not that legal person had existed on the date of adoption of the Commission's decision. Since the applicant's replies indicated that that legal person had existed, the Court considered that the onus was on the Commission to provide evidence to the contrary. However, it had failed to do so. The Court therefore reduced the amount of the fine imposed on Stora.

HFB and Others v *Commission* arose from the Commission's 'district heating' decision, in which the six companies which make up the Henss/Isoplus group were held jointly and severally liable for all the anti-competitive acts of the group and for payment of the fine imposed. First of all, the Court held that in the absence of a person at the head of the group to which, as the person responsible for coordinating the group's activities, responsibility could be imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the companies jointly and severally responsible for all the acts of the group. The Court then found that the Commission had erred in law in imputing responsibility for the infringement to two of the six companies which made up the group at the date on which the decision was adopted, since those two companies had not yet come into existence at the time of the infringement. In view of the rule set out above, the situation could have been different only if the legal person or persons responsible for running the undertaking had ceased to exist in law after the infringement had been committed. The contested decision was annulled in that regard.

[47] See, also, T-308/94 *Cascades* v *Commission* [2002] ECR II-813.

(b) Exemptions from the prohibition

The judgments delivered in 2002 (i) help to clarify the material scope of Regulation No 4056/86 on block exemption (the *Trans-Atlantic Agreement* and *Far Eastern Freight Conference* cases) and (ii) provide examples of judicial review of Commission decisions refusing (the abovementioned cases) or granting (Case T-131/99 *Shaw and Falla* v *Commission* [2002] ECR II-2023, Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085 (under appeal, Case C-204/02 P), and the judgment of 8 October 2002 in Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others* v *Commission*, not yet published in the ECR) an exemption under Article 81(3) EC.

(b.1) Interpretation of Regulation No 4056/86

In the decision which gave rise to the *Trans-Atlantic Agreement* case, the Commission held that the TAA was not covered by the block exemption granted to liner conferences by Article 3 of Regulation No 4056/86, [48] *inter alia* because it was not a liner conference within the meaning of that regulation in that it established *at least two rate levels*. The applicants disputed that finding, claiming that a group of shipping companies may constitute a liner conference, so long as the freight rates are established in common by the members of the group, *even if they vary from one member to another*.

The Court began by defining the constituent elements of a 'liner conference' within the meaning of Regulation No 4056/86 and then considered whether the TAA could be regarded as a liner conference.

While a 'liner conference' is defined in Article 1(3)(b) of Regulation No 4056/86 as 'a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services', the meaning and full significance of the expression 'uniform or common freight rates' still required clarification. In providing that clarification, the Court had regard not only to the terms used, but also to the mechanism of the block exemption, the context of Regulation No 4056/86, and the objectives which it pursues.

It deduced that the block exemption provided for by Article 3 of Regulation No 4056/86 can apply only to liner conferences whose members operate by applying a *tariff of freight rates identical for all conference members for the same product*. Since the TAA

[48] Pursuant to Article 3 of Regulation No 4056/86 'agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are ... exempted from the prohibition in Article [81(1) EC] ... when they have as their objective the fixing of rates and conditions of carriage.'

provided for a scheme of tariffs which varied according to the members, it could not be regarded as a liner conference qualifying for a block exemption.

In the *Far Eastern Freight Conference* case, the applicants maintained that their agreement was covered by Article 3 of Regulation No 4056/86 and that therefore the Commission had been wrong to find that the fixing of prices for inland intermodal transport services came within the scope of Regulation No 1017/68. However, the Court found that the Commission had been correct in considering that the price-fixing agreement concluded by the FEFC members for inland transport services provided in combination with other services as part of an intermodal transport operation did not come within the scope of Regulation No 4056/86. The Court held that it is clear both from the wording of the provisions setting out, first, the scope of Regulation No 4056/86 and, second, the agreements covered by the exemption provided for in Article 3 of the regulation, and from the *travaux préparatoires* of that regulation and a Council declaration of December 1991, as well as from the general rules of interpretation, that the exemption laid down in Article 3 for certain agreements between members of liner conferences cannot apply to an agreement such as the one in question.

(b.2) Conditions for exemption under Article 81(3) EC

The four conditions for exemption, and particularly the condition requiring that there be no possibility of eliminating competition in respect of a substantial part of the products in question (Article 81(3)(b) EC) were the subject of a number of interesting observations in the *Trans-Atlantic Agreement* case with regard to both definition of the market and the criteria for assessing the possibility of eliminating competition. However, the necessary brevity of this report prevents any detailed discussion of those matters, which are mentioned here solely to alert the reader to them.

The Commission's assessment of that condition was approved by the Court in *Trans-Atlantic Agreement* but declared unlawful in *M6 and Others* v *Commission*. In the latter judgment, the Court held that the Commission had made a manifest error in its assessment of whether the condition had been met, by determining that the sub-licensing scheme included in the agreements put in place by the European Broadcasting Union (EBU) guaranteed the access of competitors of that association's members to rebroadcasting rights for sporting events which its members had jointly acquired, and consequently avoided the elimination of competition in the relevant product market. The decision granting an individual exemption was therefore annulled.

(c) Fines

(c.1) Administrative procedure

In several of the *district heating* cases (see *LR AF 1998* v *Commission* and *ABB Asea Brown Boveri* v *Commission*), the Court rejected a plea alleging infringement of the

rights of the defence, in which the applicants claimed that the Commission had given no indication in its statement of objections that it would calculate the amount of the fine in accordance with the method set out in its guidelines. [49] The Court held that where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned, and indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether the infringement was committed 'intentionally or negligently', it provides the undertakings concerned with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of a fine. It follows that, so far as concerns determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. The Court considered that the Commission had fulfilled its obligations in that regard.

(c.2) Application of the guidelines on the method of setting fines

In the decision which gave rise to the *district heating* cases, the Commission had determined the fines imposed on the undertakings in accordance with the general method for setting fines described in the guidelines. [50]

In their actions for annulment of the decision imposing the fines, several applicants raised the plea under Article 241 EC that the guidelines were unlawful. In the first stage of its deliberation, the Court declared that plea admissible, ruling that there was a direct legal connection between the individual decision contested and the general measure represented by the guidelines. In that regard, the Court found that although the guidelines do not constitute the legal basis of a decision imposing a fine on a business, which is based instead on Articles 3 and 15(2) of Regulation No 17, [51] they do determine, in general and abstract terms, the method which the Commission has bound itself to use in determining the fine imposed by that decision and, consequently, ensure legal certainty for undertakings (see, in particular, *HFB and Others* v *Commission*). In a second stage, the Court rejected the applicants' pleas challenging the legality of those guidelines. Two of the Court's observations merit attention.

First, the Court held that the Commission is not required, when determining the amount of fines by reference to the gravity and duration of the infringement, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where

49 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 1998 C 9, p.3).

50 Cited in the preceding footnote.

51 Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 EC and 82 EC (OJ, English Special Edition 1959-1962, p. 87).

fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market.

Second, Article 15(2) of Regulation No 17, in providing that the Commission may impose fines of up to 10% of turnover in the preceding financial year for each undertaking which has participated in the infringement, requires that the fine eventually imposed on an undertaking be reduced if it exceeds 10% of its turnover, independently of the intermediate stages in the calculation intended to take the gravity and duration of the infringement into account. Consequently, that provision does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the fine eventually imposed on the undertaking does not exceed that maximum limit. In such a case, the Commission cannot be criticised because certain factors taken into consideration in its calculation, such as duration or mitigating or aggravating circumstances, do not affect the final amount of the fine, since that is the consequence of the prohibition on exceeding 10% of the turnover of the undertaking concerned, laid down in Article 15(2) of Regulation No 17.

(c.3) Setting of fines

It is clear from the *district heating* cases that the Commission is required to observe the general Community law principle of non-retroactivity in any administrative procedure capable of leading to fines under the Treaty rules on competition, even though Article 15(4) of Regulation No 17 provides that Commission decisions imposing fines for infringement of competition law are not of a criminal nature. Observance of that principle requires that the fines imposed on an undertaking for infringing the competition rules correspond to those laid down at the time when the infringement was committed. That was so in the *district heating* cases, in that the guidelines which were applied in calculating the fines did not go beyond the legal framework for the fines set out in Article 15 of Regulation No 17, which was adopted before the infringement started (see, in particular, *LR AF 1998* v *Commission* and *Dansk Rørindustri* v *Commission*).

In its ‘district heating’ decision, the Commission had, for each of the applicant undertakings, applied the guidelines in order to calculate the amount of the fine. Except with regard to one error which it confirmed in *Sigma Tecnologie* v *Commission*, the Court rejected the applicants' complaints relating to the way in which the Commission assessed mitigating or aggravating circumstances.

In the 'district heating' decision, the Commission also applied the leniency notice. [52] The way in which that notice was applied was challenged by the undertakings, which essentially pleaded that they deserved a greater reduction in the fine than had been accorded to them. ABB's plea was accepted, the Court ruling that the principle of equal treatment is infringed where the Commission, after expressly acknowledging in its decision that an undertaking has distinguished itself from the other undertakings in question by not disputing the main facts, does not differentiate the reduction granted to that undertaking for its cooperation during the investigation from the reduction granted to the other undertakings. The Court therefore reduced the fine imposed on ABB from EUR 70 million to EUR 65 million (*ABB Asea Brown Boveri* v *Commission*).

While that plea may have had varying degrees of success, it is however now established (see, *inter alia*, *LR AF 1998* v *Commission*) that the leniency notice creates legitimate expectations on which parties wishing to inform the Commission of the existence of a cartel rely. In the light of the legitimate expectation which undertakings wishing to cooperate with the Commission are able to derive from that notice, the Commission is obliged to comply with it when assessing an undertaking's cooperation for the purpose of setting the fine.

Finally, aside from the Court's observations regarding the circumstances in which companies in a group may be held jointly and severally liable for payment of a fine imposed on the group, the judgment in *HFB and Others* v *Commission* establishes that joint and several liability does not imply, as regards application of the maximum amount of 10% of turnover laid down in Article 15(2) of Regulation No 17, that the amount of the fine is limited, for the companies held jointly liable, to 10% of the turnover achieved by each of those companies during the last financial year. The limit of 10% of turnover for the purposes of that provision must be calculated on the basis of the total turnover of all the companies constituting the economic entity acting as an 'undertaking' for the purposes of Article 81 EC. Accordingly, in the case of an 'undertaking' constituted by a group of companies acting as a single economic unit, only the aggregate turnover of the component companies can constitute an indication of the size and economic power of the undertaking.

(c.4) Exercise of the Court's unlimited jurisdiction

In the exercise of its unlimited jurisdiction within the meaning of Article 229 EC and Article 17 of Regulation No 17, the Court, despite finding that the Commission had made an error of assessment in finding that Dansk Rørindustri had participated in the cartel in the district heating pipes sector during the period between April and August 1994, and annulling the Commission's decision in that regard, did not reduce the

[52] Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). In *Lögstör Rör* v *Commission*, the Court expressly held that that notice did not go beyond the scope of the legal framework laid down by Article 15(2) of Regulation No 17.

amount of the fine. It found that, having regard to the calculations to be made in respect of the aggravating circumstances and in application of the leniency notice, and also to the limit of 10% of turnover achieved by the undertaking concerned during the previous financial year, as provided for in Article 15(2) of Regulation No 17, the amount of the fine to be imposed on the applicant was the same as the amount stated in the decision (*Dansk Rørindustri* v *Commission*). By contrast, as the Commission had not established that Sigma Tecnologie participated in a cartel covering the entire common market and, accordingly, that undertaking could be held liable only for participation in the agreement relating to the Italian market, the Court reduced its fine from EUR 400 000 to EUR 300 000.

Stora Kopparbergs Bergslags v *Commission* raised the question whether, where a case has been referred back by the Court of Justice to the Court of First Instance in order for it to determine the amount of the fine to be imposed on an undertaking whose appeal was granted by the Court of Justice, it is necessary to reconsider the size of the reduction in fine granted to the undertaking by the Commission in recognition of its cooperation in the administrative procedure. In that regard, the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that there was no need, in this reference back to it, to reexamine the size of the reduction. The risk that an undertaking which has been granted a reduction in its fine in exchange for its cooperation will subsequently seek annulment of the decision finding the infringement of the competition rules and imposing a penalty on the undertaking responsible for the infringement, and will succeed before the Court of First Instance or before the Court of Justice on appeal, is a normal consequence of the exercise of the remedies provided for in the Treaty and the Statute of the Court of Justice. Accordingly, the mere fact that an undertaking which has cooperated with the Commission and which for that reason has been granted a reduction in its fine has successfully challenged the decision before the Community judicature cannot justify a fresh review of the size of the reduction granted to it.

Finally, in the *Far Eastern Freight Conference* case, although the Court rejected all the substantive and procedural pleas, it held, in the exercise of its unlimited jurisdiction, that in the light of all the circumstances of that case there was justification for not imposing fines on the applicant undertakings. It therefore annulled the article of the contested decision which imposed a token fine on each of them.

2. Article 82 EC

In Case T-175/99 *UPS Europe* v *Commission* [2002] ECR II-1915, the Court upheld a Commission decision rejecting a complaint by United Parcel Service Europe alleging, *inter alia*, that Deutsche Post had been in a position to acquire its shares in DHL only through its profits on the reserved postal market, in breach of Article 82 EC.

The Court held that, in the absence of any evidence to show that the funds used by Deutsche Post for the acquisition in question derived from abusive practices on its part in the reserved letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition did not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and therefore could not constitute an infringement of Article 82 EC or give rise to an obligation on the part of the Commission to examine the source of those funds in the light of that article.

3. Regulation No 4064/89

In the field of concentrations of undertakings, the Court delivered six judgments annulling decisions, which can be divided into two groups according to whether or not the Commission decision which gave rise to the legal action prohibited the concentration in question.

(a) Actions for annulment of decisions prohibiting a concentration

Ruling in two expedited cases, lasting ten and nine months respectively, the Court annulled the Commission decisions prohibiting concentrations between, first, Schneider Electric and Legrand (judgment of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission*, not yet published in the ECR) and, second, Tetra Laval and Sidel (judgment of 25 October 2002 in Case T-5/02 *Tetra Laval* v *Commission*, not yet published in the ECR; under appeal, Case C-12/03 P). As a consequence, it also annulled the decisions ordering the separation of those undertakings (judgment of 22 October 2002 in Case T-77/02 *Schneider Electric* v *Commission*, not yet published in the ECR, and judgment of 25 October 2002 in Case T-80/02 *Tetra Laval* v *Commission*, not yet published in the ECR (under appeal, Case C-13/03 P)). [53]

Similarly, in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, the Court annulled the decision prohibiting Airtours from acquiring First Choice.

The reasons for the Commission's prohibition of those transactions were related to the type of concentration at issue: a horizontal concentration creating or strengthening a dominant position (*Schneider Electric* v *Commission*) or a collective dominant position (*Airtours* v *Commission*) on one or more than one market, and a conglomerate-type concentration creating a dominant position on a different market from the one on which the purchaser is active and reinforcing its dominant position on its pre-existing market (*Tetra Laval* v *Commission*), all having the effect of significantly restricting competition.

[53] It should be pointed out that the public exchange offer and public bid for shares launched by Schneider and Tetra Laval respectively had already been implemented, as permitted by Article 7(3) of Regulation No 4064/89.

Essentially, it is clear from those cases that while the Court took the view that the Commission's assessments were not based on evidence firm enough to provide grounds for the prohibitions in question, it approved the basic approach adopted by the Commission with regard to both the possibility of prohibiting concentrations which would create a collective dominant position and the power to control conglomerate-type concentrations. Each of the cases referred to above will be individually discussed below.

(a.1) *Airtours* v *Commission*

In its decision of 22 September 1999 prohibiting Airtours, a company whose main activity is as a tour operator and supplier of package holidays, from acquiring all the shares in one of its competitors, First Choice, [54] the Commission had taken the view that were the intended transaction to be effected it *would create a collective dominant position* in the United Kingdom market for short-haul foreign package holidays which would significantly impede competition in the common market.

Airtours principally submitted that it had not been adequately shown that if the transaction had been authorised it would have resulted in the creation of a collective dominant position (shared among Airbus and First Choice, the parties to the concentration, and Thomson and Thomas Cook, the two remaining large tour operators) restrictive of competition. The Court held that that plea was founded.

First of all, the Court set out the three conditions which are necessary for a finding that a concentration will result in a collective dominant position restrictive of competition for the purposes of Article 2(3) of Regulation No 4064/89, and at the same time confirmed that a transaction which would result in such a dominant position may be prohibited.

First, each member of the dominant oligopoly must be in a position to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. It is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them: each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must therefore be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.

[54] Commission Decision 2000/276/EC of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524– Airtours/First Choice) (OJ 2000 L 93, p. 1).

Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. It is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. The Commission must not necessarily prove that there is a specific 'retaliation mechanism' involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct. For a situation of collective dominance to be viable, there must therefore be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative.

Third, it must also be established that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

In its examination of whether these conditions were met in the case at issue, the Court then held (i) that the Commission had made errors of assessment when it concluded that if the transaction were to proceed, the three major tour operators remaining after the merger would have an incentive to cease competing with one another, (ii) that the retaliatory measures which could be taken against a member of the oligopoly if it departed from the common policy were not clearly identified and established, and (iii) that an error of assessment had been made in the evaluation of the reaction of smaller tour operators, potential competitors and United Kingdom consumers. That analysis led the Court to conclude that the Commission decision, far from containing a prospective analysis based on cogent evidence, was vitiated by errors of assessment concerning factors fundamental to any appraisal of whether a collective dominant position might be created.

(a.2) *Schneider Electric* v *Commission*

By decision of 10 October 2001, the Commission prohibited the merger of Schneider and Legrand, two manufacturers of low voltage electrical equipment, [55] on the ground that it would create a dominant position on certain sectoral markets in Denmark, Spain, France, Greece, Italy, Portugal and the United Kingdom and strengthen a dominant position on certain sectoral markets in France, significantly impeding competition on those markets in both cases.

[55] Commission Decision C (2001) 3014 final declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2283– Schneider-Legrand).

The complaints put forward in the action for annulment of that decision related to both its form and substance.

As regards the alleged formal defects, the Court rejected the plea alleging that the decision had not been adopted within the time-limit of four months from the date on which the procedure was initiated. It held that where, in the absence of a reply from the parties notifying a concentration to a letter requesting information within the reasonable deadline set in that letter, the Commission adopts a decision on the basis of Article 11(5) of Regulation No 4064/89 instructing the parties concerned to provide it with the information requested, that decision automatically suspends the four-month time-limit from the date on which it is found that the necessary information has not been provided until the date on which that information is provided.

By contrast, the Court accepted the plea alleging inconsistency between the statement of objections and the decision. It observed that in procedures for reviewing concentrations, the statement of objections is not solely intended to spell out the complaints and give the undertaking to which it is addressed the opportunity to submit comments, but is also intended to give the notifying parties the chance to suggest corrective measures and, in particular, proposals for divestiture, and to allow them sufficient time, given the requirement for speed which characterises the general scheme of Regulation No 4064/89, to ascertain the extent to which divestiture is necessary with a view to rendering the transaction compatible with the common market in good time. With regard solely to the French markets, the Court found that the statement of objections emphasised the 'overlap' in the business of Schneider and Legrand on certain product markets and the strengthening of Schneider's position *vis-à-vis* wholesalers which would result from that overlap, whereas the decision talked of a situation of 'mutual support', which refers to a situation where two undertakings hold leading positions in one country in two distinct but complementary sectoral markets. Since the decision was inconsistent with the statement of objections, the Court held that it had not been possible for Schneider to propose corrective measures capable of resolving the competition problems identified on the relevant French sectoral markets.

As to the substance of the case, the Court found that except in so far as it concerned the French markets, the Commission's economic analysis contained errors and omissions which led it to overestimate the economic power of the new entity and consequently to exaggerate the impact of the concentration on each of the affected national sectoral markets.

First, as regards *the analysis of the geographic coverage* of the merged entity, the Court found that while the Commission had identified the national dimension of the various sectoral markets concerned, it had nevertheless had recourse to evidence of economic power drawn from all the national sectoral markets. While it is open to the Commission to take account of transnational effects which may increase the impact of a concentration on each of the national sectoral markets deemed relevant, in the

present case the existence of those effects had not been established to the requisite legal standard.

Second, the Court found that, given the errors in *the analysis of the distribution structure*, it had not been properly established that the new entity would be an unavoidable trading partner for wholesalers or that they would be incapable of exercising any competitive restraints on it.

Third, the Court held that *the analysis of the merged entity's economic power on the national sectoral markets affected* was incorrect. It observed, *inter alia*, that the Commission was not lawfully entitled, for the purposes of assessing that economic power on those markets, to rely on the notifying parties' product range and wide variety of brands which it deemed to be unrivalled because the various kinds of electrical equipment and the brands owned by them in the EEA as a whole had been taken together in the abstract.

However, since the applicant did not fundamentally dispute the analysis of the impact of the concentration on the French sectoral markets, which make up a substantial part of the common market, it was not the abovementioned shortcomings in the economic analysis which led to the annulment of the decision prohibiting the concentration, but the infringement of the rights of the defence (mentioned above) as a result of the inconsistency between the statement of objections and that decision.

(a.3) *Tetra Laval* v *Commission*

By decision of 30 October 2001, [56] the Commission declared incompatible with the common market and the EEA the acquisition by Tetra Laval, a company belonging to a group with a dominant position on the markets for aseptic carton packaging and for the corresponding packaging machines, of Sidel, a company with a leading position on the markets for certain types of polyethylene terephthalate (PET) packaging machines. The prohibited concentration was thus conglomerate in type, that is, a concentration of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as supplier and customer. Nevertheless, the Commission took the view that notwithstanding the commitments proposed by the notifying parties, the concentration would have harmful effects on competition in the markets referred to above.

Ruling on the action for annulment of that decision, the Court rejected the first plea, which was procedural in nature, but upheld the following pleas, which alleged

[56] Commission Decision C (2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2416– Tetra Laval v Sidel).

essentially that the Commission had erred in its assessment of the effects of the merger, as modified by the parties' commitments. Only the latter pleas are dealt with in this report.

After rejecting as unjustified the regard had by the Commission to horizontal and vertical effects (respectively, control of the market for PET equipment, and the risk of creating a vertically integrated market structure) which would immediately ensue from the merger in its evaluation of the anti-competitive effects on the markets concerned (first substantive plea), the Court ruled on the validity of the analysis of the conglomerate effects (second substantive plea).

To that end, it examined whether the Commission was justified in prohibiting the merger on the ground that it would, in the future, have the anti-competitive conglomerate effects identified by the Commission, that is to say, the merger would (i) enable the merged entity to use its dominant position on the global carton packaging market as a 'lever' in order to achieve a dominant position on the PET packaging equipment markets, (ii) reinforce the current dominant position of Tetra on the markets for aseptic carton packaging equipment and aseptic cartons by eliminating the competitive constraint, in the form of Sidel, coming from the neighbouring PET markets, and (iii) generally strengthen the overall position of the merged entity on the markets for packaging of 'sensitive' products.

The Court confirmed that the Commission is entitled to consider the conglomerate effects of the new structure in its assessment of the compatibility of a merger. Nevertheless, after pointing out that those effects may be either structural in the sense that they arise directly from the creation of an economic structure, or behavioural in the sense that they will occur only if the entity resulting from the merger engages in certain commercial practices, the Court set out the circumstances in which the Commission may rely on foreseeable conduct which is likely to constitute abuse of an existing dominant position in breach of Article 82 EC: when, in its assessment of the effects of such a merger, the Commission relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection make such a strategy unlikely. While it is appropriate for the Commission to take into account, in its assessment, incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, by the illegality of the conduct in question, the likelihood of its detection, action taken against it by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Since the Commission did not carry out such an assessment in the contested decision, the Court rejected those of the Commission's conclusions which took such conduct into account.

The Court did not agree with the conclusions which the Commission drew from its analysis of the conglomerate effects in the present case.

As regards leveraging — a mechanism which, when applied from a market on which the acquiring party is already dominant, enables that party to obtain a dominant position on another market in which the party acquired is active — the Commission started from the premiss that the current overlaps in the markets in question would, in the medium to long-term, have a tendency to grow, so that Tetra Laval, from its strong dominant position on the carton market, would probably put pressure on some of its customers wishing to switch over to PET packaging to use equipment produced by Sidel. The Court agreed, in principle, that the merger could make such leveraging possible, but found that the Commission had not proved, particularly given the lack of reliability of the Commission's forecast of strong growth in the PET market, that the merged entity would have an incentive to exploit that opportunity.

As regards the elimination of potential competition from Sidel, the Court found that it had not been proven that that would strengthen Tetra Laval's current dominant position on the aseptic carton markets.

Finally, since the Commission's reasoning as to strengthening of the merged entity's overall position was not separable from the analysis of leveraging and elimination of potential competition, it was rejected by the Court in the light of the conclusions it had already reached.

(b) Action for annulment of a decision partially revoking an earlier decision

Lagardère and Canal+ v *Commission*, cited above, raised the question whether after adopting a decision authorising certain concentrations on the day before expiry of the prescribed time-limit, the Commission may subsequently adopt a new decision which, without altering the terms of the operative part of the decision authorising the concentrations, amends, to the disadvantage of the parties to the concentrations, the assessment in the original decision of the restrictions notified as being directly related and necessary to the implementation of the concentrations, and if so, in what circumstances it may do so. It was therefore necessary, first, to determine the legal force of observations contained in a decision adopted under Regulation No 4064/89 which relate to restrictions notified by the parties to a concentration as ancillary to that concentration and, second, to determine the temporal scope of the Commission's power to adopt a decision partially revoking, with retroactive effect, an earlier decision.

As regards the first point, which the Court addressed in connection with the admissibility of the action, the Court gave in turn a literal, contextual, historical and purposive interpretation of the second subparagraph of Article 6(1)(b) of Regulation No 4064/89, which provides that 'the decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the

concentration'. In that context, it observed that the exclusive competence conferred on the Commission in respect of the supervision of concentrations with a Community dimension includes the power to classify restrictions, notified by the parties to the concentration, as restrictions directly related and necessary to the implementation of the concentration. After completing its analysis, the Court held that that provision must be interpreted as meaning that where, as in the present case, the Commission has, in the grounds of a decision approving a concentration, classified the restrictions notified by the paries to that concentration as ancillary restrictions, non-ancillary restrictions or ancillary restrictions for a limited period, it has not issued a mere opinion with no binding legal force but, rather, has made legal assessments which, pursuant to the said provision, determine the substance of the operative part of that decision.

As regards the second point, addressed by the Court in its consideration of the substance of the case, it was held that the Commission was entitled under Regulation No 4064/89 to adopt the contested decision, in accordance with the legal principle that, as a general rule, the body empowered to adopt a particular legal act is also empowered to revoke or amend it by adopting an *actus contrarius*, unless that power is conferred on another body by express provision.

However, since the Commission had neither proved that the revoked measure was unlawful, nor stated adequate reasons in its decision revoking that measure, the Court annulled the contested decision.

C. Article 86 EC

The judgment in *max.mobil* v *Commission*, which has already been mentioned in the section on admissibility of actions for annulment, established not only that an action may be brought for annulment of a Commission decision informing an individual that it does not intend to initiate the procedure under Article 86(3) EC, but also the scope of the judicial review to be carried out by the Community judicature where such an action is brought before it, and, further, the nature of the Commission's obligation when a complaint is lodged with it in the context of Article 86 EC.

On that last point, the Court, relying on the general principle of sound administration, a principle confirmed by the Charter of Fundamental Rights of the European Union, on an analogy with the obligation deriving from the application of the other Treaty rules on competition, and on the Commission's general duty of supervision, found that there is an obligation on the part of the Commission to undertake a diligent and impartial examination of complaints submitted to it in the context of Article 86 EC.

Since the fulfilment of that obligation must be amenable to judicial review, it is for the Court to verify that it has indeed been fulfilled. However, in order to take account of the broad discretion conferred on the Commission by Article 86(3) EC as to whether it is

'necessary' to take action against Member States, the Court observed that its role is limited to 'a circumscribed review in which it merely checks, first, that the contested measure includes a statement of reasons which is prima facie consistent and reflects due consideration of the relevant aspects of the case, second, that the facts relied on are materially accurate and, third, that the prima facie assessment of those facts is not vitiated by any manifest error'. After reviewing only whether the Commission had met its obligation to undertake a diligent and impartial examination of the complaint rejected by the contested decision, the Court found that the decision contained an adequate statement of reasons and was not vitiated by any manifest error of assessment.

D. State aid [57]

In the field of State aid, judicial review by the Court of both form and substance led to the total or partial annulment of a number of Commission decisions.

1. Concept of State aid

Leaving aside the specific cases in which the Court found that there was no sufficiently clear statement of the reasons why the State measures in question had been classified as State aid (Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545) or that the Commission had made a manifest error of assessment in treating, in decisions declaring State aid for shipbuilding incompatible with the common market, the concept of a capacity restriction as a limit on actual production, contrary to its approach in the decisions authorising that aid (Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205; under appeal, Case C-181/02 P), the cases settled in 2002 for the most part provided the Court with the opportunity to rule on the constituent elements of State aid (a) and on the distinction between new and existing aid (b).

(a) Constituent elements of State aid

Under Article 87(1) EC, State aid incompatible with the common market is defined as any advantage granted by a Member State or through State resources in any form whatsoever to certain undertakings or for the production of certain goods which affects trade between Member States and which distorts or threatens to distort competition. In the cases decided by the Court in 2002, the State measures classified as aid by the Commission took the form of subsidies, measures affecting the capital of undertakings, waiver of debts, the sale of assets, the provision of guaranties and the grant of tax relief.

[57] In this field, two cases were dealt with using the expedited procedure provided for in Article 76a of the Rules of Procedure (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission*, cited above).

The *advantage* and *the specific nature of the measure* were the subject of interesting observations in the judgments in Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-1275, '*Demesa*' (under appeal, Case C-183/02 P and Case C-187/02 P) and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-1385, '*Ramondín*' (under appeal, Case C-186/02 P and Case C-188/02 P). The actions which gave rise to those judgments challenged the legality of two Commission decisions relating to Basque tax laws. [58] By those two decisions, adopted in 1999, [59] the Commission found that certain advantages granted by the Diputación Foral de Álava to Daewoo Electronics Manufacturing España SA (Demesa), Ramondín SA and Ramondín Cápsulas SA constituted State aid incompatible with the Treaty provisions. Those undertakings, the Diputación Foral de Álava and the Comunidad Autónoma del País Vasco challenged the legality of those decisions.

In *Demesa*, the applicants claimed that the Commission had infringed Article 87(1) EC by classifying as State aid (i) subsidies exceeding the maximum grant allowed under a regional aid scheme approved by the Commission in 1996, (ii) advantages resulting from the sale of a plot of land at less than market price to Demesa to build its refrigerator manufacturing plant and from postponement of payment of the purchase price, and (iii) advantages resulting from the application of Basque tax legislation under which Demesa was granted a tax credit of 45% and a tax-base reduction, which was available to newly established businesses.

In *Ramondín*, the applicant companies considered that the tax credit of 45% and the reduction in the tax base laid down for newly established businesses did not constitute State aid for the purposes of Article 87(1) EC.

As regards the purchase price of the plot of land bought by Demesa, the Court pointed out that the sale of assets by a public authority on preferential terms may constitute State aid. However, in the present case, it found that the Commission had arbitrarily

[58] As regards litigation arising from the Commission's decisions on the compatibility of Basque tax law with the Treaty rules on State aid, two cases already discussed in the section on admissibility of actions for annulment may be noted:

— *Territorio Histórico de Guipúzcoa and Others* v *Commission* concerned the legality of decisions to initiate the formal investigation procedure with respect to the tax credits created by the tax legislation of, first, the Provinces of Vizcaya and Guipúzcoa and, second, the Province of Álava;

— Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission* concerned the legality of the decision to initiate the formal investigation procedure with respect to the reduction in the tax base provided for by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa.

[59] Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p.1) and Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p.36).

determined the market price and therefore had not established that Demesa bought the plot at a price which it would have been unable to obtain under normal market conditions. Moreover, the Commission had not shown that the provision by a public sector undertaking of the land occupied by Demesa, for a nine-month period free of charge, was not the normal conduct of a private undertaking.

As regards the tax measures at issue in both cases, the Court found that the Commission was correct to classify them as State aid, in particular because they were specific in nature.

According to the Court, the specific nature of the tax credit derived from the discretion of the administration (the Diputación Foral de Álava) to vary the amount of, or the conditions for granting, that tax concession according to the characteristics of the investment project submitted for its assessment and from the fact that the concession was granted only in respect of investments exceeding a minimum amount. In that connection, the Court rejected the applicants' plea that the measure in question fell outside Article 87(1) EC on the ground that its selective nature was justified 'by the nature or overall structure of the system'. The specific tax measure in question was not justified by the internal logic of the tax system, since it favoured only undertakings with significant financial resources and therefore breached the principles of progressiveness and redistribution which form an integral part of the Spanish tax system.

As to the measure reducing the tax base, the Court likewise found in *Ramondín*, first, that it was specific in nature since it was granted only to businesses which (i) were newly set up, (ii) made an investment costing more than a minimum amount, and (iii) created at least new jobs and, second, that it was not justified by 'the nature or overall structure of the system'. In *Demesa*, the Court simply found that the Commission had not established that Demesa actually benefited from that measure.

Finally, it is interesting to note that in those two judgments the Court found that the Commission had not based its conclusion that the tax credit was specific in nature on the fact that it applied only to one part of Spain. Accordingly, the Commission had in no way called into question the legislative power of the territorial entity concerned to adopt measures of a general nature applicable to all of the region concerned.

Case T-152/99 *Hijos de Andrés Molina* v *Commission* [2002] ECR II-3049 (under appeal, Case C-316/02 P) raised, *inter alia*, the questions whether, first, the capitalisation of part of the debt of an undertaking to a public entity and, second, the waiver by a public body of the debts of an undertaking in difficulty constituted State aid.

As regards the first question, the Court examined whether the Commission had made a manifest error of assessment in its application of the test of 'the private investor in a market economy' to the recapitalisation in question. It held that the Commission was correct in finding that the public entity had not acted in the manner of a private investor,

given the applicant's financial situation, in particular its level of debt, and the unlikelihood that its financial viability would be restored.

The Court, like the Commission, found that the waiver of debt was specific in nature. While the Spanish law governing suspension of payments does not apply selectively in favour of certain categories of undertakings or certain sectors of activity, the waiver of debt declared unlawful by the Commission did not flow automatically from the application of that law, but from discretionary decisions made by the public bodies in question and hence could not be regarded as general in nature.

On the other hand, the Court found that the method which led the Commission to conclude that the waiver of debt by public bodies did not meet the private investor test and thus constituted State aid was inadequate. The Court observed, first, that the share of the overall debt of an undertaking in difficulty represented by sums due to public bodies is not in itself a decisive factor for determining whether the waiver by those bodies of debts of the undertaking bears some of the hallmarks of State aid. It then added that public bodies waiving debts must be compared to private creditors seeking to obtain payment of sums owed to them by a debtor in financial difficulties and that it accordingly falls to the Commission to assess, with regard to each of the public bodies in question, whether the waiver of debt which had been granted by it is more generous than that which would have been granted by a hypothetical private creditor had it been in a situation *vis-à-vis* the undertaking comparable to that of the public body and seeking to recover the sums owed to it. The Court found that the Commission had not carried out that assessment. It ruled that the plea that the waiver of debt had been incorrectly classified as State aid was well founded and thus annulled the relevant articles of the contested decision.

In its judgment of 17 October 2002 in Case T-98/00 *Linde* v *Commission*, not yet published in the ECR, the Court held that it had not been established to the requisite legal standard that the subsidy granted by Germany to Linde AG constituted State aid and therefore annulled the decision in so far as it declared the aid to be partially incompatible with the common market. [60] The Court observed that the public entity, contractually bound to a third party by a supply agreement from which it could not release itself, had chosen, in view of the losses which it was incurring as a result of performance of that agreement, to transfer performance of its obligation to a different operator, Linde, in consideration for which it accorded Linde a grant of an amount less than the total losses which it would have incurred through performance of its supply obligation. The Court held that that grant could not be regarded as State aid since, taken as a whole, the tripartite arrangement of which it formed a part constituted a normal commercial transaction in which the public entity and the third party to which it was contractually bound had behaved as rational operators in a market economy.

[60] Commission Decision 2000/524/EC of 18 January 2000 on State aid granted by Germany to Linde AG (OJ 2000 L 211, p. 7).

As a final point in this section, it should be noted that the Court clarified the scope of Article 87(1) EC, which refers to aid granted 'by a Member State or through State resources in any form whatsoever', holding that where the conditions laid down in that provision are met, it is not only measures taken by the federal or central authority which fall within its ambit, but also measures taken by the intra-state authorities — decentralised, federated, regional or other — of Member States, whatever their legal status and description (*Demesa* and *Ramondín*).

(b) The distinction between new and existing aid

The question whether changes to an existing aid scheme constitute new aid came before the Court on a number of occasions.

In Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, the Court confirmed that the Commission was justified in considering that a non-notified increase in the ceiling for fixed assets was to be regarded as a substantive amendment to a previously approved aid scheme and thus that the aid granted to the applicant in fact constituted new aid not covered by that scheme. Similarly, in *Demesa*, the Court held that a subsidy which exceeded by several percentage points the ceiling of permissible costs covered by an aid scheme approved by the Commission constituted new aid.

On the other hand, the Court held that, by initiating the formal investigation procedure in respect of the whole of a tax scheme (the exempt companies legislation) and by provisionally classifying that scheme as new aid in its entirety, the Commission had infringed Article 88 EC and Article 1(c) of the regulation on State aid procedure, [61] the latter of which provides that 'alterations to existing aid' are to be regarded as new aid. In *Government of Gibraltar* v *Commission*, cited above, the Court stated that it is only where the alteration affects the actual substance of the original scheme that that scheme is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme. The amendments made to the initial tax scheme at issue had to be regarded as severable elements of that scheme and, consequently, could not have the effect that the original scheme no longer constituted existing aid.

2. Derogations from the prohibition

State aid is not caught by the general prohibition set out in Article 87(1) EC where it is covered by one of the derogations set out in Article 87(2) and (3) EC, or by the derogation provided for in Article 86(2) EC.

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

In *Keller and Keller Meccanica* v *Commission*, cited above, the Court, in the exercise of its limited judicial review of decisions taken by the Commission under Article 87(3) EC, held that the Commission had not manifestly erred in its assessment by finding that the requirement that the applicant companies be restored to viability, as laid down in the Community guidelines for State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), amended in 1997 (OJ 1997 C 283, p. 2), had not been met. [62]

By contrast, in Case T-155/98 *SIDE* v *Commission* [2002] ECR II-1179, a manifest error of assessment by the Commission resulted in the partial annulment by the Court of a decision declaring aid compatible with the common market on the basis of the 'culture derogation' provided for in Article 87(3)(d) EC. [63] In this case, the Commission had considered that the requirements laid down in Article 87(3)(d) were met, in particular because the aid granted to the Coopérative d'exportation du livre français did not affect competition to an extent that was contrary to the common interest. However, the Court considered that that analysis was incorrect inasmuch as the market on which the Commission assessed the effects of the aid in issue had been incorrectly defined. Consequently, by selecting as the reference market the export market for French-language books in general, rather than the market on which the same activity was carried out as that for which the aid was granted, the Commission had been unable to assess the true impact of the aid on competition.

In Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427 the Court also found that the Commission had manifestly erred in its assessment by concluding that part of the aid which Germany had intended to grant to the applicant company was incompatible with the common market. [64] The Court confirmed that the Commission is entitled to refuse the grant of aid where that aid has not induced the undertakings receiving it to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 87(3) EC. Nevertheless, it held that the Commission was wrong to find that the undertaking had not been so induced in the present case.

62 See, also, *Hijos de Andrés Molina* v *Commission*, cited above, which confirmed the Commission decision of 3 February 1999 finding that none of the conditions for approval of the restructuring aid in question, namely restoration of viability, avoidance of undue distortions of competition and proportionality of the aid to the costs and benefits of restructuring, had been met.

63 Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Coopérative d'exportation du livre français (CELF) (OJ 1999 L 44, p.37).

64 Commission Decision 1999/690/EC of 3 February 1999on State aid which Germany is planning to introduce for Graphischer Maschinenbau GmbH, Berlin (OJ 1999 L 272, p.16).

3. Procedural matters

(a) Initiation of a formal investigation procedure

Having been declared admissible (see above), the actions for annulment of the decisions to initiate the formal investigation procedure in respect of certain elements of Basque tax aid [65] were dismissed on their merits (*Territorio Histórico de Guipúzcoa* v *Commission* and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission*, cited above).

By one of the pleas raised in those cases, the applicants denied that the tax measures at issue constituted State aid. Faced with the Commission's preliminary assessments of each of the proposed measures, which sought to determine whether they had the character of aid, the Court had to clarify the extent of its judicial review of the legality of a decision to initiate the procedure provided for in Article 88(2) EC.

It stated that its review must necessarily be limited in order to avoid confusion between the administrative and judicial proceedings, and to preserve the division of powers between the Commission and the Court. The Court must avoid giving a final ruling on questions on which the Commission has merely formed a provisional view. *Thus, where in an action against a decision to initiate the formal investigation procedure the parties challenge the Commission's assessment of a measure as constituting State aid, review by the Court is limited to ascertaining whether or not the Commission has made a manifest error of assessment in forming the view that it was unable to resolve all the difficulties on that point during its initial examination of the measure concerned*. In the case at issue, the applicants' pleas disputing the provisional classification of the measures as State aid were rejected.

In addition, in those two judgments the Court recalled that a decision to initiate the formal investigation procedure implies a provisional assessment of both the aid character of the measure and its compatibility with the common market and that therefore the fact that the Commission had not explicitly set out in its decision its doubts regarding classification of the measure did not indicate that such classification was not temporary. In such a decision the Commission is required to set out explicitly its doubts *only* as to the measure's compatibility with the common market.

[65] The cases concerned aid in the form of a 45% tax credit in the Provinces of Álava, Vizcaya and Guipúzcoa (*Territorio Histórico de Guipúzcoa* v *Commission*) and in the form of a reduction in the basis of assessment of corporation tax provided for in the legislation of those regions (Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others*v *Commission*).

(b) The rights of the parties concerned

(b.1) During the preliminary investigation

Recalling the case-law establishing that the Commission is not under any obligation to conduct an exchange of views and arguments with a complainant during the preliminary investigation, the Court extended that rule to apply in respect of all the parties concerned and all the Member States, on which the applicable provisions confer no right to be involved in an exchange of views. It follows that the Member States and the parties concerned cannot require that the Commission hear their views so that they can influence the 'preliminary assessment' which leads the Commission to initiate the formal investigation procedure (*Government of Gibraltar* v *Commission*).

(b.2) During the formal investigation procedure

In *Demesa*, the Court recalled that the recipient of aid which has been declared incompatible with the common market and must be repaid is a party concerned within the meaning of Article 88(2) EC. As such, the recipient does not enjoy the same rights to a fair hearing as those of individuals against whom a procedure has been initiated, but has only the right to be involved in the administrative procedure. In that regard, under Article 88(2) EC, the recipient has the right to submit observations during the review stage envisaged by that provision.

E. Trade protection measures

The judgments delivered in the field of anti-dumping, by Chambers of five Judges, largely adopt solutions established previously (Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II-2905; judgment of 12 September 2002 in Case T-89/00 *Europe Chemi-Con* v *Council*, not yet published in the ECR (under appeal, Case C-422/02 P); and judgment of 21 November 2002 in Case T-88/98 *Kundan Industries and Tata International* v *Council*, not yet published in the ECR).

The point to be noted in the judgment in *Arne Mathisen* v *Council* is that the Commission is entitled to withdraw its acceptance of a price undertaking not only where the undertaking is infringed but also where it is circumvented and, therefore, to replace it with an anti-dumping duty without having to prove once more the dumping and injury already determined in the course of the investigation which culminated in the undertaking. Such a situation exists where an exporter whose undertaking not to export below a minimum price has been accepted does not directly infringe the terms of that undertaking, but circumvents them by implementing a business practice which makes it difficult, if not impossible, for it to ensure effective control of the actual price of its exports and, therefore, effective compliance with the undertaking. That is the case in particular where the implementation of such a practice involves the participation of

other traders over whom the exporter involved has no control and who, not being bound by a parallel undertaking, are not subject to monitoring by the Commission either.

In *Kundan Industries and Tata International* v *Council*, the Court annulled the contested regulation only in so far as the Council, by taking into account a commission the actual payment of which by the relevant applicant, an exporter, had not, however, been demonstrated, unlawfully adjusted the export price for the purpose of comparing it with the normal value.

F. Public health

In several cases the Court was required to define the circumstances in which the institutions may adopt measures designed to protect public health. While it held that the Council was able lawfully to remove two antibiotics from a list of substances authorised as additives in feedingstuffs (*Pfizer* v *Council* and *Alpharma* v *Council*, cited above), it found, on the other hand, that the Commission was not entitled to withdraw national authorisations for the marketing of medicinal products for the treatment of obesity (judgment of 26 November 2002 in Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission*, not yet published in the ECR; under appeal, Case C-39/03 P).

In the Council regulation contested by Pfizer and Alpharma, the reason given for the withdrawal of authorisation of the antibiotics at issue as additives in feedingstuffs was the *risk* to human health that their use involved, namely the risk of a transfer of antimicrobial resistance from animals to humans with the consequence that the effectiveness of certain medicinal products used in human medicine would be reduced.

The Court observed with regard to the risks to human health linked to the use of those antibiotics as additives in feedingstuffs that, where there is scientific uncertainty as to the existence or extent of such risks, the Community institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of the risks become fully apparent or, *a fortiori*, to wait for the adverse effects of the use of the products to materialise. However, a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified, and may be taken only if the risk, although its reality and extent have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure is taken.

The Court stated next that risk assessment involves, first, determining what level of risk is deemed acceptable and, second, conducting a scientific assessment of the risks. As regards the first aspect, the Court found that, although the Community institutions may

not take a purely hypothetical approach to risk and may not base their decisions on a 'zero-risk', they must nevertheless take account of their obligation, laid down by the Treaty, to ensure a high level of human health protection, which, to be compatible with the Treaty, does not necessarily have to be the highest that is technically possible. As to the aspect concerning a scientific risk assessment carried out by experts, the Court stated that, apart from being as thorough as possible having regard in particular to any urgent need for preventive measures to be taken, such an assessment must give the competent public authority sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts.

In light of those factors, it is *ultimately the public authority* which, even if there is scientific uncertainty and it is impossible to carry out a full risk assessment in the time available, must decide on preventive protective measures if such measures appear essential, regard being had to the level of risk to human health which that authority has decided is the critical threshold above which preventive measures must be taken.

In *Pfizer*, the Court found that the Council had been entitled, when deciding to ban virginiamycin, not to follow the opinion of the competent scientific committee, since the Council relied on a proper examination, carefully and impartially carried out, of all the relevant aspects of the individual case — including the reasoning on which the findings in that opinion were based — and justified the ban by the need to protect human health.

In *Alpharma* the Court likewise rejected the applicant's complaints, notwithstanding the fact that the competent scientific committee was not consulted before the adoption of the regulation banning the use of bacitracin zinc as an additive in feedingstuffs.

In both cases the Court held that, despite uncertainty as to the existence of a link between the use of the antibiotics as additives in feedingstuffs and the development of resistance to them in humans, their ban was not a measure that was disproportionate in relation to the objective of protecting public health.

In *Artegodan*, several pharmaceutical companies contended that the Commission lacked competence to adopt decisions ordering the Member States to withdraw national authorisations, issued to the companies by the competent national authorities, for the marketing of medicinal products for human use containing certain anorectic substances and, in any event, that the conditions necessary for their withdrawal were not met. The Court agreed with them.

It held that the Commission was not competent to adopt the contested decisions. After interpreting the applicable legislation, it found that, even though the national marketing authorisations had been amended and, therefore, partially harmonised by a decision adopted by the Commission in 1996 (which lacked legal basis but had become

definitive), they continued to fall within the residual field of exclusive Member State competence and that the Commission therefore could not order their withdrawal.

In any event, even assuming that the Commission had been competent to adopt the contested decisions, they were flawed since the condition for withdrawal of a marketing authorisation relating to lack of therapeutic efficacy of the substances in question (the first paragraph of Article 11 of Directive 65/65), [66] upon which the decisions were based, was not fulfilled.

In this connection the Court stated that, in the context of the grant and administration of marketing authorisations for medicinal products, the principle that protection of public health must unquestionably take precedence over economic considerations requires: (i) the taking into account exclusively of considerations relating to the protection of public health; (ii) the re-evaluation of the benefit/risk balance of a medicinal product where new data give rise to doubts as to its efficacy or safety; and (iii) the application of rules of evidence in accordance with the precautionary principle. The latter principle has acquired the rank of a general principle of Community law and can be defined as requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests; it requires the suspension or withdrawal of a marketing authorisation where new data give rise to serious doubts as to either the safety or the efficacy of the medicinal product in question and those doubts lead to an unfavourable assessment of the benefit/risk balance of that medicinal product. Against that background, the competent authority need do no more than provide, in accordance with the general rules of evidence, solid and convincing evidence which, while not resolving the scientific uncertainty, may reasonably raise doubts as to the safety and/or efficacy of the medicinal product.

According to the Court, however, that was not the case here. The medical and scientific data upon which the contested decisions were based were strictly identical to those taken into consideration in 1996 so far as concerns the therapeutic effects of the substances in question, and the assessment made as to acceptable risks in respect of the short-term effects of those substances had not changed. In those circumstances, mere changes in a scientific criterion applied when assessing the efficacy of medicinal products in the treatment of obesity and relating to consideration of a product's long-term effects — changes in respect of which there was said to be a consensus within the medical community but which were not based on new scientific data or information — could not on their own justify the withdrawal of a marketing authorisation for a medicinal product.

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

G. Trade mark law

Litigation relating to registration of Community trade marks now has an important place in the Court's work, since 25 judgments were delivered in this field alone in 2002 (12 of which annulled decisions in whole or in part). Ruling on the legality of decisions made by Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office'), the Court reviewed whether the Boards of Appeal had applied correctly the conditions governing registration of Community trade marks. It is to be remembered that Regulation No 40/94 [67] provides that registration as a Community trade mark is to be refused, *inter alia*, where the mark is devoid of any distinctive character (Article 7(1)(b) of the regulation) or is descriptive (Article 7(1)(c)) (absolute grounds for refusal), or in the case of opposition duly based upon the existence of an earlier trade mark protected in a Member State or as a Community trade mark (Article 8) (relative grounds for refusal). Also, cases decided by the Court of First Instance show that marks capable of registration by the Office may be word marks, [68] figurative marks, [69] three-dimensional marks, [70] marks taking the form of a design applied to the surface of goods, [71] marks which are colours, [72] marks comprising the shape of a product [73] or marks of a complex nature. [74]

67 Cited in footnote 1.

68 In particular, Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683; Case T-79/00 *Rewe Zentral* v *OHIM (LITE)* [2002] ECR II-705; Case T-106/00 *Streamserve* v *OHIM (STREAMSERVE)* [2002] ECR II-723 (under appeal, Case C-150/02 P); Case T-219/00 *Ellos* v *OHIM (ELLOS)* [2002] ECR II-753; Case T-355/00 *DaimlerChrysler* v *OHIM (TELE AID)* [2002] ECR II-1939; Case T-356/00 *DaimlerChrysler* v *OHIM (CARCARD)* [2002] ECR II-1963; Case T-358/00 *DaimlerChrysler* v *OHIM (TRUCKCARD)* [2002] ECR II-1993; Case T-323/00 *SAT.1* v *OHIM (SAT.2)* [2002] ECR II-2839 (under appeal, Case C-329/02 P); judgment of 9 October 2002 in Case T-360/00 *Dart Industries* v *OHIM (UltraPlus)*, not yet published in the ECR; judgment of 20 November 2002 in Joined Cases T-79/01 and T-86/01 *Bosch* v *OHIM (Kit Super Pro and Kit Pro)*, not yet published in the ECR; and judgment of 5 December 2002 in Case T-130/01 *Sykes Enterprises* v *OHIM (REAL PEOPLE, REAL SOLUTIONS)*, not yet published in the ECR.

69 In particular, judgment of 23 October 2002 in Case T-6/01 *Matratzen Concord* v *OHIM – Hukla Germany (MATRATZEN Markt CONCORD)*, not yet published in the ECR (under appeal, Case C-3/03 P).

70 Case T-88/00 *Mag Instrument* v *OHIM (torch shape)* [2002] ECR II-467 (under appeal, Case C-136/02 P).

71 Judgment of 9 October 2002 in Case T-36/01 *Glaverbel* v *OHIM (surface of a sheet of glass)*, not yet published in the ECR.

72 Judgments of 25 September 2002 in Case T-316/00 *Viking-Umwelttechnik* v *OHIM (juxtaposition of green and grey)* and of 9 October 2002 in Case T-173/00 *KWS Saat* v *OHIM (shade of orange)*, both not yet published in the ECR.

73 Judgment of 12 December 2002 in Case T-63/01 *Procter and Gamble* v *OHIM (soap bar shape)*, not yet published in the ECR.

74 Judgments of 23 October 2002 in Case T-388/00 *ILS Institut für Lernsysteme* v *OHIM – Educational Services, Inc (ELS)* and of 5 December 2002 in Case T-91/01 *BioID* v *OHIM (BioID)* (under appeal, Case C-37/03 P), both not yet published in the ECR.

1. Absolute grounds for refusal of registration

The Court observed that the question whether a trade mark is descriptive must be assessed, first, in relation to the goods or services in respect of which registration of the sign has been requested and, second, in relation to the perception of the relevant section of the public which is composed of the consumers of those products or services. It thus confirmed that the word ELLOS is descriptive in relation to clothing, footwear and headgear (*Ellos* v *OHIM (ELLOS)*, cited above), but annulled decisions finding that the term STREAMSERVE is descriptive in relation to goods falling within the category 'manuals' and 'publications' (*Streamserve v OHIM (STREAMSERVE)*, cited above), that 'UltraPlus' is descriptive in relation to plastic ovenware (*Dart Industries* v *OHIM (UltraPlus)*, cited above), that the word 'CARCARD' is descriptive in relation to data-processing media (*DaimlerChrysler* v *OHIM (CARCARD)*, cited above) and that 'SAT.2' is descriptive in relation to services intended for general consumption and for professionals in the film and media industries (*SAT.1* v *OHIM (SAT.2)*, cited above).

A trade mark has distinctive character if it is capable of distinguishing the goods or services in respect of which registration is applied for according to their commercial origin. Distinctiveness is accordingly established where the trade mark enables a consumer who purchases the goods or services identified by the mark to make the same choice on a subsequent purchase, if his experience is a positive one, or to choose differently if it is not (see, in particular, *Mag Instrument* v *OHIM (torch shape)*, cited above). On the other hand, distinctive character is lacked by marks which, from the point of view of the relevant public, are commonly used, in trade, for the presentation of the goods or services concerned or in connection with which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner (*SAT.1* v *OHIM (SAT.2)*, cited above). In the light of those criteria, Boards of Appeal were right in holding that no distinctive character was possessed by torch shapes in relation to torches (*Mag Instrument* v *OHIM (torch shape)*, cited above), a design applied to the surface of a sheet of glass (*Glaverbel* v *OHIM (surface of a sheet of glass)*, cited above), 'Kit Pro' and 'Kit Super Pro' in relation to vehicle parts (*Bosch* v *OHIM (Kit Super Pro and Kit Pro)*, cited above), the slogan 'REAL PEOPLE, REAL SOLUTIONS' in relation to services connected with information technology (*Sykes Enterprises* v *OHIM (REAL PEOPLE, REAL SOLUTIONS)*, cited above), the juxtaposition, in no particular arrangement, of the colours green and grey in relation to gardening machinery (*Viking-Umwelttechnik* v *OHIM (juxtaposition of green and grey)*, cited above) and a shade of the colour orange in relation to seeds and certain agricultural machinery (*KWS Saat* v *OHIM (shade of orange)*, cited above).

Finally, the Court held with regard to distinctiveness acquired through use of the trade mark (Article 7(3) of Regulation No 40/94) that that use must be before the trade mark application was filed (judgment of 12 December 2002 in Case T-247/01 *eCopy* v *OHIM (ECOPY)*, not yet published in the ECR).

2. Relative grounds for refusal of registration

On six occasions the Court ruled on the legality of decisions made in opposition proceedings relating to registration of a trade mark. [75] It will be noted that, in those *inter partes* cases, the Office, which is formally the defendant before the Court of First Instance, may be led to contend that the Opposition Division's decision was well founded and, therefore, to consider that the Board of Appeal erred in law by overturning that decision. It follows that in such a case the Office supports the applicant's line of argument (*Chef Revival USA* v *OHIM — Massagué Marín (Chef)*, cited above). However, the Office cannot formally claim that a decision adopted by a Board of Appeal should be annulled or altered (*Vedial* v *OHIM — France Distribution (HUBERT)*, cited above).

So far as concerns the substance of cases, the Court clarified the matters which should be taken into account when assessing whether there is a likelihood of confusion. After comparing, first, the goods concerned and, second, the signs in question (entailing an assessment of their visual, aural or conceptual similarity), the Court held that there was indeed a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94, in the mind of the public between the mark claimed and an earlier protected mark and accordingly upheld (in *Oberhauser* v *OHIM — Petit Liberto (Fifties)* and *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN Markt CONCORD)*, both cited above) or annulled (in *ILS Institut für Lernsysteme* v *OHIM — Educational Services, Inc (ELS)*, cited above) the decision of the Board of Appeal.

3. Procedure

On various occasions the Court reviewed whether the Office had complied with Article 73 of Regulation No 40/94, which provides that the Office's decisions are to be based only on reasons on which the parties concerned have had an opportunity to present their comments.

The Court held that a Board of Appeal is entitled to use any of the items of information included by the applicant in the trade mark application form without first inviting him to comment on them (Case T-198/00 *Hershey Foods* v *OHIM (Kiss device with plume)* [2002] ECR II-2567). On the other hand, it held that a Board of Appeal which decides to exercise the powers vested in the examiner after finding an error by him is not entitled

[75] Case T-232/00 *Chef Revival USA* v *OHIM — Massagué Marín (Chef)* [2002] ECR II-2749; judgment of 23 October 2002 in Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)*, not yet published in the ECR; *ILS Institut für Lernsysteme* v *OHIM — Educational Services, Inc (ELS)*, cited above; *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN Markt CONCORD)*, cited above; judgment of 12 December 2002 in Case T-39/01 *Kabushiki Kaisha Fernandes* v *OHIM — R.J. Harrison (HIWATT)*, not yet published in the ECR; and judgment of 12 December 2002 in Case T-110/01 *Vedial* v *OHIM — France Distribution (HUBERT)*, not yet published in the ECR.

to refuse the application for registration without giving the applicant an opportunity to present its observations. In *Glaverbel* v *OHIM (surface of a sheet of glass)*, cited above, the decision of the Board of Appeal was annulled in its entirety for failure to comply with that obligation. The Court also annulled, for infringement of the rights of defence, decisions of Boards of Appeal founded on absolute grounds for refusal of registration which were raised by them of their own motion and upon which the persons concerned had not been invited to comment (*Eurocool Logistik* v *OHIM (EUROCOOL)* and *Rewe Zentral* v *OHIM (LITE)*, both cited above).

In *Chef Revival USA* v *OHIM — Massagué Marín (Chef)*, cited above, the Court clarified the distinction between matters which fall within the conditions of admissibility of the opposition to registration of a Community trade mark and those which fall within the scope of the examination of the opposition. It held that the evidence and supporting documents which the opponent is to produce within the period laid down by the Office, in particular the translation of the registration certificate for the earlier national mark into the language of the opposition proceedings, are among the matters falling within the scope of the examination, so that failure to produce them on time cannot result in inadmissibility of the opposition.

With regard to the power to alter decisions conferred on the Court by Article 63(3) of Regulation No 40/94, the Court stated that the possibility of altering decisions is, in principle, restricted to situations in which the case has reached a stage permitting final judgment (*SAT.1* v *OHIM (SAT.2)*, cited above).

Also, and for the first time, the Court stated that the Boards of Appeal of the Office are not judicial in nature. It pointed out that, although the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they constitute a department of the Office with the same powers as the examiner and concluded that they cannot be classified as 'tribunals'. Consequently, an argument based on a right to a fair 'hearing' before the Boards of Appeal cannot succeed (*Procter and Gamble* v *OHIM (soap bar shape)*, cited above).

H. Staff cases

Of the approximately 50 judgments pronounced by the Court of First Instance in staff cases, five were delivered by the Court sitting as a single judge (Case T-386/00 *Gonçalves* v *Parliament* [2002] ECR-SC I-A-13 and II-55; Case T-117/01 *Roman Parra* v *Commission* [2002] ECR-SC I-A-27 and II-121; Case T-187/01 *Mellone* v *Commission* [2002] ECR II-389; judgment of 11 July 2002 in Case T-263/01 *Mavromichalis* v *Commission*, not yet published in the ECR; and judgment of 3 October 2002 in Case T-6/02 *Platte* v *Commission*, not yet published in the ECR).

Given that a large number of cases were decided and that this report is necessarily succinct, it may simply be noted that the following were among the matters submitted to the Court: decisions not to admit candidates to tests in competitions (in particular Case T-193/00 *Felix* v *Commission* [2002] ECR-SC I-A-23 and II-101, Case T-139/00 *Bal* v *Commission* [2002] ECR-SC I-A-33 and II-139; Joined Cases T-357/00, T-361/00, T-363/00 and T-364/00 *Martínez Alarcón and Others* v *Commission* [2002] ECR-SC I-A-37 and II-161; and judgment of 28 November 2002 in Case T-332/01 *Pujals Gomis* v *Commission*, not yet published in the ECR); the conduct of disciplinary proceedings and the penalties imposed on their conclusion (Case T-197/00 *Onidi* v *Commission* [2002] ECR-SC II-325; [76] judgment of 9 July 2002 in Case T-21/01 *Zavvos* v *Commission*, not yet published in the ECR; judgment of 11 September 2002 in Case T-89/01 *Willeme* v *Commission*, not yet published in the ECR; and judgment of 5 December 2002 in Case T-277/01 *Stevens* v *Commission*, not yet published in the ECR); refusal of promotion (judgments of 9 July 2002 in Case T-233/01 *Callebaut* v *Commission* and 11 July 2002 in Case T-163/01 *Perez Escanilla* v *Commission*, both not yet published in the ECR); the legality of an appointment (judgment of 9 July 2002 in Case T-158/01 *Tilgenkamp* v *Commission*, not yet published in the ECR); and classification in grade or in step when duties are taken up (Case T-206/00 *Hult* v *Commission* [2002] ECR-SC I-A-19 and II-81 and judgment of 11 July 2002 in Case T-381/00 *Wasmeier* v *Commission*, not yet published in the ECR).

With regard to an aspect concerning the Community civil service in a more general way, namely rules of professional conduct, the judgments in *Zavvos* v *Commission* and *Willeme* v *Commission*, both cited above, clarified the scope of the first paragraph of Article 11 [77] and Article 14 of the Staff Regulations. [78]

According to the judgments, the first of those provisions requires an official to conduct himself, in all circumstances, in a manner guided exclusively by the interests of the Communities and therefore prohibits generally any action, whether or not linked to breach of a particular rule, which, in the light of the circumstances of the case, shows that the official concerned intended to favour a particular interest to the detriment of the Community interest.

76 In its judgment in this case, the Court recalled the fundamental rule that the time-limits laid down in relation to disciplinary proceedings by the Staff Regulations of Officials of the European Communities (the first paragraph of Article 7 of Annex IX to the Staff Regulations) constitute rules of sound administration, failure to comply with which may render the institution concerned liable for any harm caused to those concerned but does not in itself affect the validity of a disciplinary measure imposed after they have expired.

77 'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.'

78 'Any official who in the performance of his duties is called upon to decide on a matter in the handling or outcome of which he has a personal interest such as to impair his independence shall inform the appointing authority.'

The second provision, designed to ensure the independence and integrity of officials, covers any circumstance which an official must reasonably understand, having regard to the duties performed by him and the circumstances of the case, as being such as to appear to third parties to be a possible source of prejudice to his independence.

II. Actions for damages [79]

On two occasions the Court, in cases following on from Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, declared the Community liable for the damage caused to certain producers who had been prevented from delivering milk owing to Community legislation (Case T-187/94 *Rudolph* v *Council and Commission* [2002] ECR II-367 and Case T-201/94 *Kustermann* v *Council and Commission* [2002] ECR II-415). None of the other actions for damages disposed of in 2002 was successful.

1. Admissibility

An action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution. As was held in Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203 (under appeal, Case C-234/02 P), an action for damages may also relate to conduct attributable to a *Community body* established by the Treaty and intended to contribute to achievement of the Community's objectives, such as the *European Ombudsman*.

Such an action may also seek compensation for damage ensuing from the implementation of Community legislation by national authorities where they have no discretion in that regard. In those circumstances, such damage is attributable to the Community (Case T-174/00 *Biret International* v *Council* [2002] ECR II-17 (under appeal, Case C-93/02 P) and Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47 (under appeal, Case C-94/02 P).

Finally, proceedings in matters arising from non-contractual liability are time-barred after a period of five years, as provided by Article 43 of the EC Statute of the Court. In cases where liability stems from a legislative measure, that period cannot begin before the injurious effects of the measure have been produced. Where those effects continue as a result of an unlawful measure remaining in force, the time bar applies to the period preceding by more than five years the date of the event which interrupted the limitation period and does not affect rights which have arisen during subsequent periods (*Biret International* v *Council*, cited above; see also *Rudolph* v *Council and Commission*, cited above, *Kustermann* v *Council and Commission*, cited above, and Case T-261/94

[79] Excluding staff cases.

Schulte v *Council and Commission* [2002] ECR II-441 (under appeal, Case C-128/02 P).

2. Conditions for incurrence of liability for an unlawful act

It is settled case-law, which has been reiterated once again, that in order for the Community to incur non-contractual liability a number of conditions must be met: the conduct alleged against the institutions must be unlawful, the existence of the damage pleaded must be shown, and there must be a causal link between that conduct and that damage. With regard to the first of these conditions, case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals.

Where the Court dismissed actions, it did so because the conduct complained of was not unlawful (*Biret International* v *Council*, cited above; *Biret et Cie* v *Council*, cited above; Case T-199/94 *Gosch* v *Commission* [2002] ECR II-391; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515; and *Lamberts* v *Ombudsman*, cited above) or because there was no causal link (judgment of 28 November 2002 in Case T-40/01 *Scan Office Design* v *Commission*, not yet published in the ECR).

With regard to the requirement for a causal link, the Court held in Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265 that the applicant company had not established that there was a direct link between the adoption of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait [80] and the harm, consisting in the applicant's inability to recover a debt owed to it by the Iraqi Government, since, first, the non-payment of the sum owed was not the consequence of the adoption by Iraq of a measure of retaliation against that regulation and the maintenance of the Community embargo, and second, the transaction giving rise to the debt did not come within the scope of the regulation.

3. Conditions for incurrence of liability for a lawful act

While the principle that the Community can be liable for a lawful act has never been established and, *a fortiori*, liability has never been incurred on that basis, the Court, once again (for a previous example, see the *Annual Report 2001*) stated that, in the event of the principle of such liability being recognised in Community law, a precondition for liability would be the existence of 'unusual' and 'special' damage, defined in such a way that special damage is that which affects a particular class of economic operators in a disproportionate manner by comparison with other operators and unusual damage is that which exceeds the limits of the economic risks inherent in

[80] OJ 1990 L 213, p. 1.

operating in the sector concerned, without the legislative measure that gave rise to the damage pleaded being justified by a general economic interest (*Förde-Reederei* v *Council and Commission*, cited above).

III. Applications for interim relief

The number of applications for interim relief lodged in 2002 (25) is appreciably lower than that for the three previous years (37 in 2001, 43 in 2000 and 38 in 1999). This drop is explained, in part, by the considerable number of applications for expedited treatment made in the course of the year (also 25), a substantial proportion of which were undoubtedly made because it is difficult, or impossible, to obtain interim relief in certain circumstances. If the statistics concerning what may be called 'urgent procedures' (interim relief proceedings and the accelerated procedure) are taken as a whole, it is noteworthy that applications to the Court for a rapid decision, whether interim or final, have been made in almost 13% of all actions brought in 2002.

In certain cases, applications for interim relief were made concomitantly with applications for expedition (Case T-155/02 *VVG International Handelsgesellschaft and Others* v *Commission* in the field of commercial policy; Case T-211/02 *Tideland Signal* v *Commission* and Case T-345/02 *European Dynamics* v *Commission* in the field of public procurement) or in connection with the grant of expedition (Cases T-310/01 and T-77/02 *Schneider Electric* v *Commission* and Cases T-5/02 and T-80/02 *Tetra Laval* v *Commission*, in the field of concentrations of undertakings). *Tideland Signal* v *Commission* illustrates the complementary nature of the two procedures. An application for interim relief was made on 15 July 2002. The President of the Court of First Instance, by an order made the next day on the basis of Article 105(2) of the Rules of Procedure, suspended the tender procedure from which the applicant considered itself to have been unlawfully excluded. In parallel the expedited procedure, which was ordered with regard to the substance of the case, enabled the Court — the tender procedure having been frozen — to put a rapid end to a legal situation prejudicial to the applicant, the Commission and the third parties to which it had been announced that the contract would be awarded. Since the judgment of 27 September 2002 in Case T-211/02 *Tideland Signal* v *Commission* annulled the contested decision, it was found that there was no longer any need to give a further decision on the application for interim relief.

Apart from that particular instance, only one application for interim relief was granted. By order in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 (upheld by order of the President of the Court of Justice in Case C-232/02 P(R) *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977), the President of the Court of First Instance found that it was necessary to suspend the operation of a Commission decision ordering the recovery from the applicant of State aid declared incompatible with the common market. He held in particular that immediate operation of the decision would imperil the applicant's existence soon if not immediately. However, in order to take account of the Community's interest in the

effective recovery of State aid, the suspension of operation of the decision was limited in time and accompanied by conditions designed to ensure recovery of the aid in so far as the applicant's financial situation so allowed.

Several applications were dismissed as inadmissible on the ground that the main proceedings to which they formed an adjunct appeared themselves to be inadmissible. By order of 8 August 2002 in Case T-155/02 R *VVG International Handelsgesellschaft and Others* v *Commission* [2002] ECR II-3239, the President of the Court of First Instance dismissed the application for interim relief because the applicants did not appear to be individually concerned, as interpreted by the Court of Justice in *Unión de Pequeños Agricultores* v *Council*, cited above, by the contested regulation. [81]

The other applications were dismissed for lack of urgency (in particular, orders of the President of the Court of First Instance in Case T-132/01 R *Euroalliages and Others* v *Commission* [2002] ECR II-777, Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387 and Case T-34/02 R *B* v *Commission* [2002] ECR II-2803) or because there was no urgency and the balance of interests did not favour the applicant (in particular, orders of the President of the Court of First Instance of 5 December 2002 in Case T-181/02 R *Neue Erba Lautex* v *Commission* and of 6 December 2002 in Case T-275/02 R *D* v *EIB*, both not yet published in the ECR).

[81] It should be noted, first, that the parties were of course invited to submit their observations on that judgment of the Court of Justice and, second, that this is the first case where the Court of First Instance applied the approach contained in the Court of Justice's judgment following the judgment in *Jégo-Quéré*, cited above.

Table of Contents for the Proceedings of the Court of First Instance in 2002

B — Composition of the Court of First Instance

(Order of precedence as at 20 September 2001)

First row, from left to right:

Judge R. García Valdecasas y Fernández; Judge M. Jaeger; Judge R.M. Moura Ramos; President B. Vesterdorf; Judge J.D. Cooke; Judge M. Vilaras; Judge K. Lenaerts.

Second row, from left to right:

Judge H. Legal; Judge A.W.H. Meij; Judge J. Pirrung; Judge V. Tiili; Judge P. Lindh; Judge J. Azizi; Judge P. Mengozzi; Judge N.J. Forwood; H. Jung, Registrar.

1. The Members of the Court of First Instance

(in order of their entry into office)

Bo Vesterdorf

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

Rafael García Valdecasas y Fernández

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

Koenraad Lenaerts

Born 1954; lic.iuris, Ph.D. in Law (Katholieke Universiteit Leuven); Master of Laws, Master in Public Administration (Harvard University); Associate Professor, Katholieke Universiteit Leuven; Visiting Professor at the Universities of Burundi, Strasbourg and Harvard; Professor at the College of Europe, Bruges; Legal Secretary at the Court of Justice; Member of the Brussels Bar; Judge at the Court of First Instance since 25 September 1989.

Virpi Tiili

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

Pernilla Lindh

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

Josef Azizi

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

Rui Manuel Gens de Moura Ramos

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

John D. Cooke

Born 1944; called to the Bar of Ireland 1966; admitted also to the Bars of England & Wales, of Northern Ireland and of New South Wales; Practising barrister 1966 to 1996; admitted to the Inner Bar in Ireland (Senior Counsel) 1980 and New South Wales 1991; President of the Council of the Bars and Law Societies of the European Community (CCBE) 1985 to 1986; Visiting Fellow, Faculty of Law, University College Dublin; Fellow of the Chartered Institute of Arbitrators; President of the Royal Zoological Society of Ireland 1987 to 1990; Bencher of the Honourable Society of Kings Inns, Dublin; Honorary Bencher of Lincoln's Inn, London; Judge at the Court of First Instance since 10 January 1996.

Marc Jaeger

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

Jörg Pirrung

Born 1940; academic assistant at the University of Marburg; civil servant in the German Federal Ministry of Justice (Section for International Civil Procedure Law, Section for Children's Law); Head of the Section for Private International Law in the Federal Ministry of Justice; Head of a Subdivision for Civil Law; Judge at the Court of First Instance since 11 June 1997.

Paolo Mengozzi

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

Arjen W. H. Meij

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

Mihalis Vilaras

Born 1950; lawyer (1974-1980); national expert with the Legal Service of the Commission of the European Communities, then Principal Administrator in Directorate General V (Employment, Industrial Relations, Social Affairs); Junior Officer, Junior Member and, since 1999, Member of the Greek Council of State; Associate Member of the Superior Special Court of Greece; Member of the Central Legislative Drafting Committee of Greece (1996-1998); Director of the Legal Service in the General Secretariat of the Greek Government; Judge at the Court of First Instance since 17 September 1998.

Nicholas James Forwood

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

Hubert Legal

Born 1954; Maître des Requêtes at the French Conseil d'État from 1991 onwards; graduate of the École normale supérieure de Saint-Cloud and of the École nationale d'administration; Associate Professor of English (1979-1985); rapporteur and subsequently Commissaire du Gouvernement in proceedings before the judicial sections of the Conseil d'État (1988-1993): legal adviser in the Permanent Representation of the French Republic to the United Nations in New York (1993-1997); Legal Secretary in the Chambers of Judge Puissochet at the Court of Justice (1997-2001); Judge at the Court of First Instance since 19 September 2001.

Hans Jung

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

2. Order of precedence

from 1 January to 30 September 2002

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

H. Jung, Registrar

from 1 October to 31 December 2002

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

H. Jung, Registrar

3. Former Members of the Court of First Instance

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

Presidents

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

Chapter III

Meetings and visits

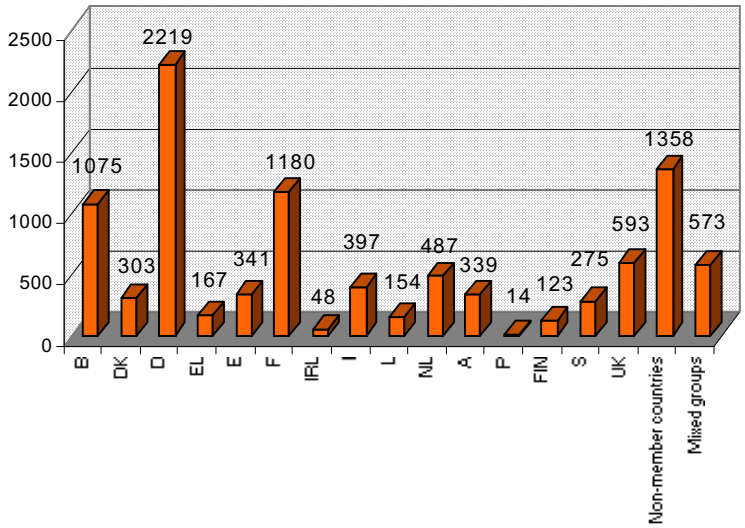
A — Official visits and functions at the Court of Justice and the Court of First Instance in 2002

21 February	HE Tudorel Postolache, Ambassador Extraordinary and Plenipotentiary of Romania to the Grand Duchy of Luxembourg
7 March	Mr Willi Rothley, Member of the European Parliament
11 March	HE Libor Secka, Ambassador Extraordinary and Plenipotentiary and Head of Mission of the Czech Republic to the European Union in Brussels
18 to 22 March	Ms Adjia Awa Nana, Judge at the Court of Justice of the Economic Community of West African States (ECOWAS)
12 April	Ms Benita Ferrero-Waldner, Federal Minister for Foreign Affairs of the Republic of Austria
15 April	Mr Kamtoh, Judge, and Mr Ramadane Gounoutch, Chief Registrar, Court of Justice of the Central African Economic and Monetary Community (CAEMC)
16 April	Study and information visit to the Court of Justice by judges and professors from the Slovak Republic
15 to 18 April	Delegation from the Court of Justice of the Central African Economic and Monetary Community (CAEMC)
24 April	Dr Cornelis Canenbley, President of the Association for the Study of Competition Law (Studienvereinigung Kartellrecht e.V.)
25 April	Delegation from the Constitutional Court of the Slovak Republic
16 May	His Royal Highness the Grand Duke Henri of Luxembourg
28 May	Mr Mohamed Abdelaziz, Legal advisor to the Ministry of Justice – Cairo
29 to 31 May	Delegation from the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA)
30 May	Dr Nadezda Siskova, Head of the department of international and European law, Palacky University, Olomouc, Czech Republic
3 June	European Parliament Committee on Legal Affairs and the Internal Market
3 June	HE Marek Grela, Ambassador Extraordinary and Plenipotentiary, Head of Mission of the Republic of Poland to the European Union in Brussels
13 June	Mr Jim Wallace QC, Deputy First Minister of Scotland
13 June	Ms Nina Christensen of the Danish Ministry for Justice and Mr Jorgen Molde of the Danish Ministry for Foreign Affairs
27 June	Mr Duff, Member of the European Parliament
1 July	HE Yuri Krapalov, Ambassador Extraordinary and Plenipotentiary

	of the Russian Federation to the Grand Duchy of Luxembourg
2 July	HE Peter Turpeluk Jr., Ambassador Extraordinary and Plenipotentiary of the United States of America to the Grand Duchy of Luxembourg
4 July	HE Luis Xavier Grisanti, Ambassador Extraordinary and Plenipotentiary, Head of Mission of the Bolivarian Republic of Venezuela to the European Union
25 July	HE Pierre Garrigue-Guyonnaud, French Ambassador to the Grand Duchy of Luxembourg
9 September	Seminar by Mr António Vitorino, Member of the Commission of the European Communities
10 September	Delegation of senior judges from Latin America (Konrad Adenauer Stiftung)
12 September	Mr Mohamed Dzaiddin Bin Haji Abdullah, Minister for Justice, Malaysia
13 September	Association of European Competition Law Judges (Court of First Instance)
16 September	Mr John Ashcroft, U.S. Attorney General
17 September	Legal Affairs Committee of the Luxembourg Parliament
10 October	Ms Ingrida Labucka, Minister for Justice, Republic of Latvia
14 October	Ms Rodica Mihaela Stanoiu, Minister for Justice, Romania
14 October	Mr Georgi Petkanov, Minister for Home Affairs, and Mr Anton Stankov, Minister for Justice, Republic of Bulgaria
14 to 18 October	Delegation from the Court of Justice of the West African Economic and Monetary Union (UEMOA)
17 October	Mr Mario Monti, Member of the Commission of the European Communities
17 October	HE Ib Ritto Andreasen, Ambassador Extraordinary and Plenipotentiary of Denmark to the Grand Duchy of Luxembourg
18 October	Mr Thomas L. Sansonetti, U.S. Assistant Attorney General
22 October	Delegation from the Parliament of the Land of Rhineland-Palatinate
22 October	Delegation from the Supreme Court of Shanghai
22 October	Delegation of judges from the Republic of Slovenia
24 October	The Bridge Forum Dialogue – Conference on 'l'espace de liberté, de sécurité et de justice: défis et enjeux pour l'Union' ('The area of freedom, security and justice: challenges and issues for the Union')
21 November	HE Roland Lohkamp, Ambassador Extraordinary and Plenipotentiary of the Federal Republic of Germany to the Grand

	Duchy of Luxembourg
4 December	Mr Pat Cox, President of the European Parliament
9 December	Ms Katerina Samoni, legal adviser to the Ministry for Foreign Affairs of the Hellenic Republic and Mr Roberto Adam, legal adviser to the Permanent Representation of the Republic of Italy, in their capacity as future presidents of the Court of Justice working party in the European Union

B — Study visits to the Court of Justice and the Court of First Instance in 2002 Distribution by Member State

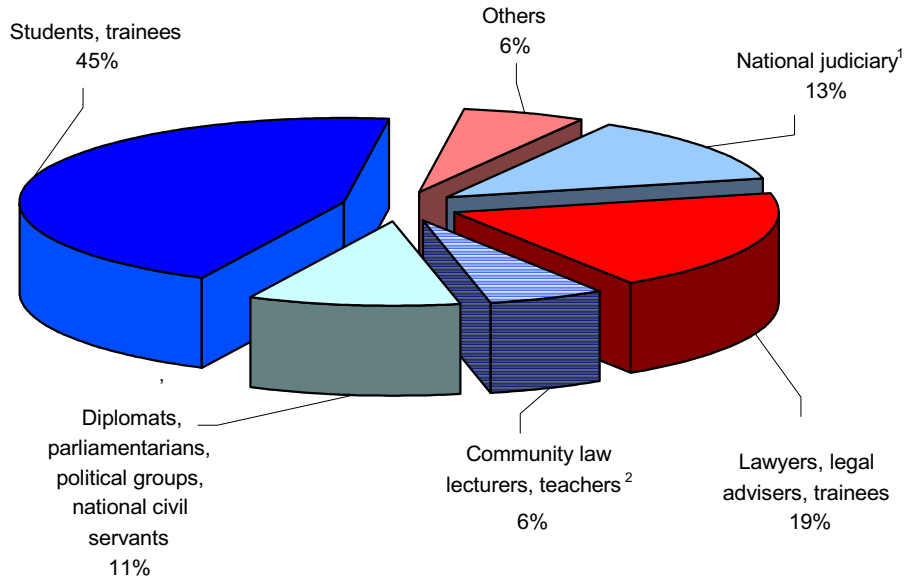


	National judiciary [1]	Lawyers, legal advisers, trainees	Community law lecturers, teachers [2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	**Total**
B	76	47		130	723	99	1075
DK	13	9		75	206		303
D	214	216	3	93	1309	384	2219
EL	60	36	1		70		167
E	12	160	35	22	112		341
F	19	513	2	98	508	40	1180
IRL	12				36		48
I	15	27	11		344		397
L	1	33			120		154
NL	32	18		57	346	34	487
A	8	20	5	104	202		339
P	6	4	1		3		14
FIN	4	18	7	56	38		123
S	92	24	10	125	24		275
UK	53	29	9		477	25	593
Non-member countries	208	78	58	91	912	11	1358
Mixed groups	50	169		20	294	40	573
Total	**875**	**1401**	**142**	**871**	**5724**	**633**	**9646**

1 The judges of the Member States who participated in the traditional Judges' Forum organised by the Court of Justice in the spring are included under this heading. In 2002, the figures were as follows: Belgium: 6; Denmark: 4; Germany: 12; Greece: 4; Spain: 12; France: 12; Ireland: 4; Italy: 12; Luxembourg: 1; Netherlands: 4; Austria: 4; Portugal: 4; Finland: 4; Sweden: 4; United Kingdom:12.

2 Other than those accompanying student groups.

Study visits to the Court of Justice and the Court of First Instance in 2002
Distribution by type of group



	National judiciary [1]	Lawyers, legal advisers, trainees	Community law lecturers, teachers [2]	Diplomats, parliamentarians, political groups, national civil servants	Students, trainees	Others	Total
B	2	3		4	18	4	31
DK	2	1		3	6		12
D	8	11	1	4	42	12	78
EL	3	3	1		2		9
E	1	7	1	1	5		15
F	2	20	2	2	20	1	47
IRL	2				1		3
I	2	4	8		10		24
L	1	2			2		5
NL	2	4		3	12	2	23
A	2	4	3	6	6		21
P	2	2	1		2		7
FIN	1	1	1	3	1		7
S	5	3	1	9	2		20
UK	4	2	1		17	1	25
Non-member countries	13	7	4	7	30	4	65
Mixed groups	1	5		1	7	1	15
Total	**53**	**79**	**24**	**43**	**183**	**25**	**407**

1 This heading includes, *inter alia*, the Judges' Forum organised in the spring.

2 Other than those acccompanying student groups.

C — Formal sittings in 2002

16 January	Formal sitting on the occasion of the departure from office of Mr Leif Sevón, Judge at the Court of Justice, and the entry into office of Mr Allan Rosas as Judge at the Court of Justice
30 January	Formal sitting for the giving of solemn undertakings by the new Members of the Court of Auditors
24 April	Formal sitting in memory of Mr Fernand Grévisse, former Member of the Court of Justice
12 June	Formal sitting in memory of Mr Francesco Capotorti, former Member of the Court of Justice
6 November	Formal sitting in memory of Mr Albert Van Houtte, former Registrar of the Court of Justice
21 November	Formal sitting in memory of Baron Josse Mertens de Wilmars, former President of the Court of Justice
4 December	Formal sitting on the occasion of the 50th anniversary of the Court of Justice

D — Visits and participation in official functions in 2002

11 January	Attendance of a delegation from the Court of Justice at the formal sitting for the reopening of the Court of Cassation in Paris
31 January	Opening speech by the President of the Court of Justice at the formal sitting of the European Court of Human Rights in Strasbourg
3 to 5 February	Visit of the President of the Court of Justice to the Supreme Court of the Czech Republic and participation in a meeting of the Supreme Courts of the Czech Republic, Hungary, Poland and Slovenia in Brno
28 February	Participation of the President of the Court of Justice at the inaugural session of the Convention on the Future of Europe in Brussels
3 to 5 March	Visit of the President of the Court of Justice to Bucharest, Romania, by invitation of the Romanian Parliament, the Minister for Integration and the Minister for Justice. Meetings with the President of the Republic and the Prime Minister. Visit to the Romanian Academy.
3 to 7 April	Visit of the President of the Court of Justice and a delegation from the Court of Justice to the Italian Constitutional Court in Rome
10 May	Participation of the President of the Court of Justice at the closing ceremony of the course 'Los principios de primacía y efecto directo en la jurisprudencia reciente des TJCE y en la práctica judicial española' ('The principles of supremacy and direct effect in the recent case-law of the Court of Justice and in judicial practice in Spain') organised by Oviedo University and the Tribunal Superior de Justicia del Principado de Asturias as part of a Robert Schuman event in Oviedo
14 to 16 May	Participation of a delegation from the Court of Justice at the 12th Congress of the Conference of European Constitutional Courts in Brussels
20 and 21 May	Participation of a delegation from the Court of Justice at the conference held by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union in Helsinki
23 and 24 May	Visit of the President of the Court of Justice and a delegation from the Court of Justice to the Portuguese Constitutional Court in Lisbon
29 to 31 May	Participation of a delegation from the Court of Justice at the conference of presidents and prosecutors general of the supreme courts in the European Union, in Dublin
30 and 31 May	Participation of the President of the Court of Justice at the conference 'Rechtsraum Europa – Perspektiven für die Harmonisierung' ('The European legal area – prospects for

	harmonisation') by invitation of the German Federal Minister for Justice in Berlin
11 June	Participation of the President of the Court of Justice in a debate on 'Future Perspectives of the European Court of Justice' at the seat of the European Parliament in Strasbourg
19 July	Speech by the President of the Court of Justice and the President of the Supreme Court of Spain at the closing ceremony of the course 'Derecho y Justicia en la Unión Europea' ('Law and justice in the European Union') in San Lorenzo de El Escorial (Madrid)
18 to 20 August	Participation of the President of the Court of Justice in the 'Global Judges Symposium on Sustainable Development and the Role of Law' in Johannesburg
17 to 20 September	Participation of a delegation from the Court of Justice in the '11th Symposium of European Patent Judges' in Copenhagen
20 and 21 September	Participation of a delegation from the Court of Justice in the UniDem seminar 'Constitutional Courts and European Integration' in Košice, organised by the Venice Commission
27 September to 1 October	Visit of the President of the Court of Justice to Bulgaria, by invitation of the President of the Supreme Court of Cassation in Sofia. Visit to the Constitutional Court and meeting with the President of the Republic
10 and 11 October	Participation of a delegation from the Court of Justice in the 'Symposium on Environmental Law for Judges' in London
12 October	Participation of the President of the Court of Justice at the reception held in Madrid on the occasion of the Spanish national holiday, by invitation of His Majesty the King of Spain
30 October to 2 November	Participation of the President of the Court of Justice and a delegation from the Court of Justice and the Court of First Instance at the 20th Congress of the International Federation for European Law (FIDE) in London. Opening speech by the President of the Court of Justice
7 November	Participation of the President of the Court of Justice and a delegation from the Court of Justice and the Court of First Instance at a meeting of members of the European and Spanish judiciaries entitled 'Justicia y Libertad en la Unión Europea: Memorial Magistrado José María Lidón' ('Justice and Freedom in the European Union: in memory of Judge José María Lidón') in Bilbao

Chapter IV

Tables and statistics

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

General activity of the Court

Cases completed

New cases

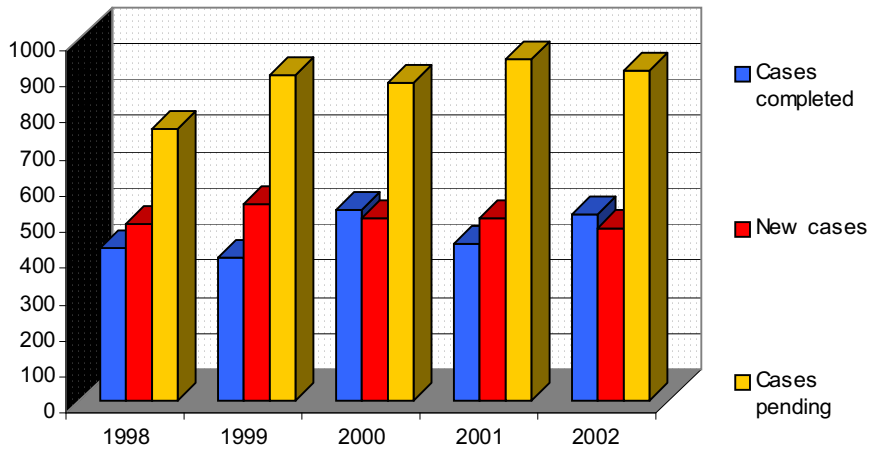
Cases pending as at 31 December

General trend in the work of the Court (1952-2002)

[1] The introduction of new software in 2002 has enabled the statistics in the Annual Report to be presented with greater clarity. The tables and figures have, in large part, been revised and improved, at the cost of certain adjustments. Consistency with the tables of past years has been preserved where possible.

General activity of the Court

1. Cases completed, new cases, cases pending (1998 – 2002)[82]

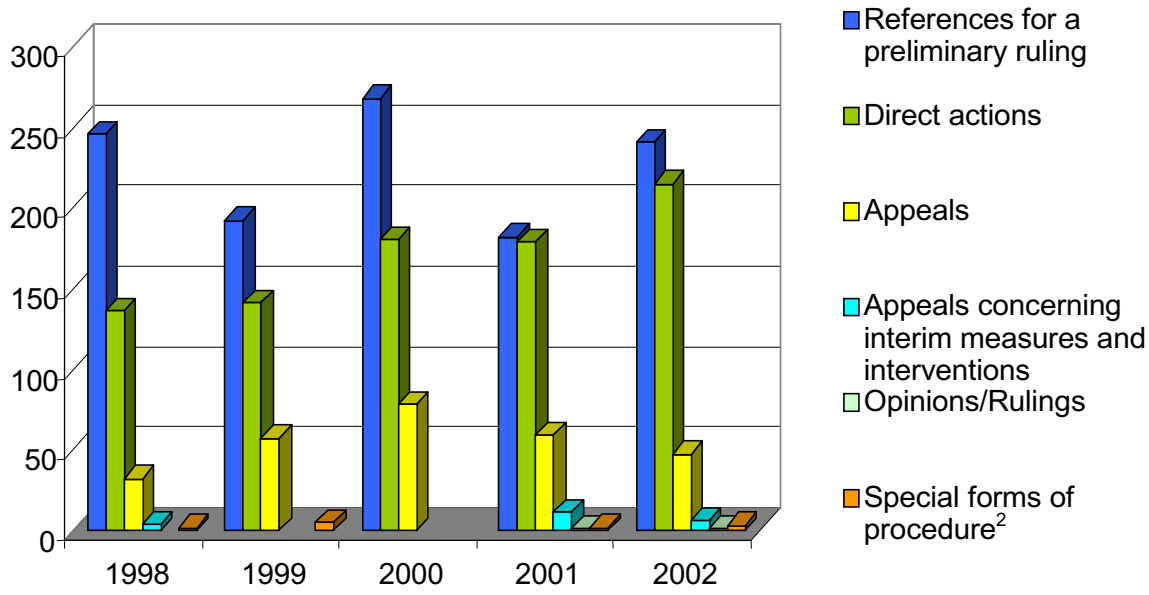


	1998	1999	2000	2001	2002
Cases completed	420	395	526	434	513
New cases	485	543	503	504	477
Cases pending	748	896	873	943	907

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

Cases completed

2. Nature of proceedings (1998 – 2002) [1]

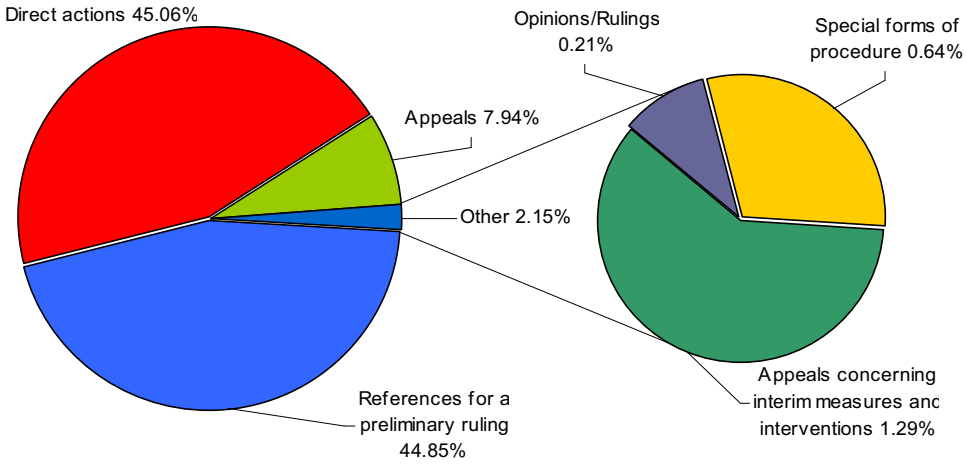


	1998	1999	2000	2001	2002
References for a preliminary ruling	246	192	268	182	241
Direct actions	136	141	180	179	215
Appeals	32	53	73	59	47
Appeals concerning interim measures and interventions	4	4	5	11	6
Opinions/Rulings				1	1
Special forms of procedure[2]	2	5		2	3
Total	**420**	**395**	**526**	**434**	**513**

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

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

3. Judgments, orders, opinions (2002) [1]



	Judgments	Non-interlocutory orders [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary ruling	131	22		56		209
Direct actions	120	1	1	88		210
Appeals	17	15	1	4		37
Appeals concerning interim measures and interventions			4	2		6
Opinions/Rulings					1	1
Special forms of procedure	1	1		1		3
Total	**269**	**39**	**6**	**151**	**1**	**466**

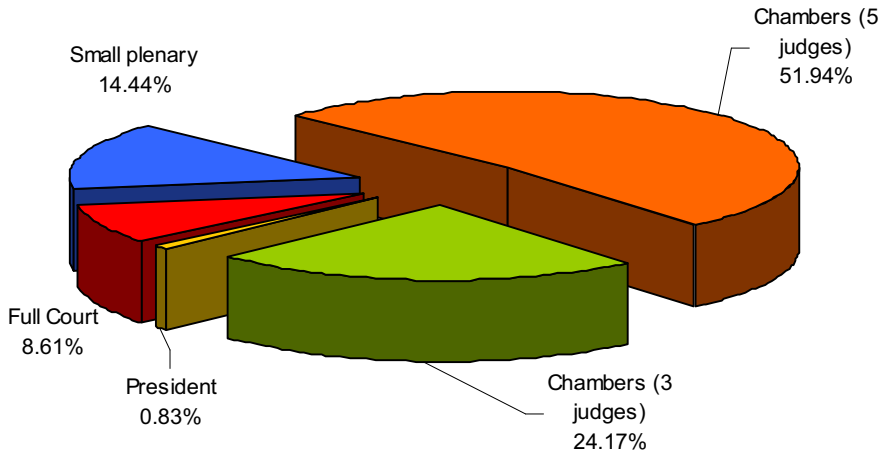
1 The figures given (net figures) represent the number of cases, after joinder on the grounds of similarity (a set of joined cases = one case).

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

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

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

4. Completed cases — Bench hearing actions [1]



	Judgments/ Opinions	Orders [2]	Total
Full Court	27	4	31
Small plenary	52		52
Chambers (5 judges)	177	10	187
Chambers (3 judges)	60	27	87
President		3	3
Total	**316**	**44**	**360**

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

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

5. Completed cases — Subject-matter of the action (2002) [1]

	Judgments/Opinions	Orders [2]	Total
Accession of new States	1		1
Agriculture	36	2	38
Approximation of laws	20	3	23
Brussels Convention	7	2	9
Commercial policy	1		1
Common Customs Tariff	7		7
Community own resources	1		1
Company law	6	4	10
Competition	13	1	14
Customs union	2	1	3
Energy	1		1
Environment and consumers	38	2	40
External relations	7		7
Fisheries policy	10		10
Free movement of capital	24		24
Free movement of goods	7		7
Freedom of establishment	8	3	11
Freedom of movement for persons	10		10
Freedom to provide services	13	3	16
Industrial policy	4		4
Intellectual property	1		1
Law governing the institutions	2	3	5
Principles of Community law	4		4
Regional policy	1		1
Social policy	11	2	13
Social security for migrant workers	11	1	12
State aid	15	2	17
Taxation	22	3	25
Transport	23	2	25
EC Treaty	306	34	340
CS Treaty	3	1	4
EA Treaty	2	1	3
Procedure	1	1	2
Staff Regulations	4	7	11
Others	5	8	13
OVERALL TOTAL	**316**	**44**	**360**

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

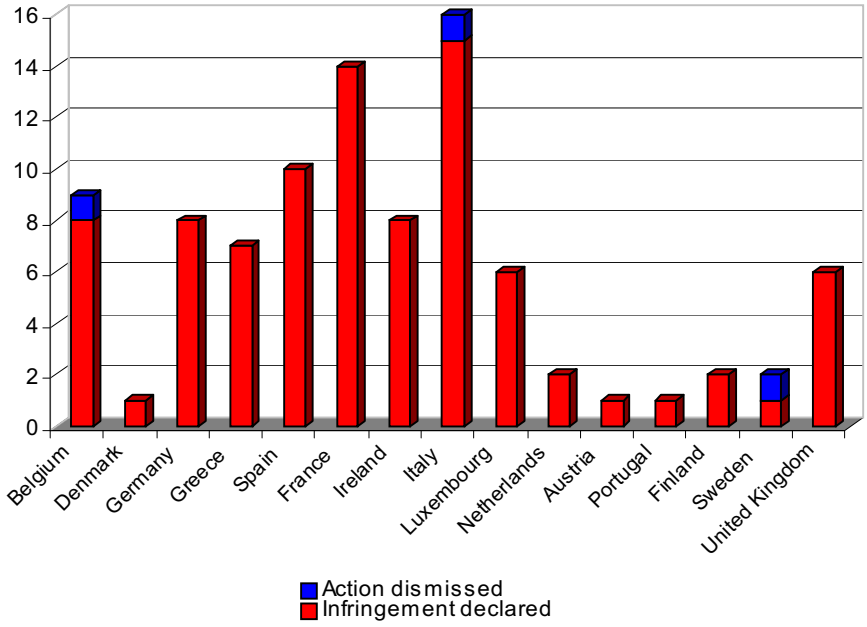
[2] Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

6. Proceedings for interim measures: outcome (2002) [1]

	Number of applications for interim measures	Number of appeals concerning interim measures and interventions	Outcome	
			Dismissed/ Contested decision upheld	Granted/ Contested decision set aside
Accession of new States	1		1	
Competition		3	3	
Environment and consumers		1		1
Law governing the institutions	1		1	
State aid		1	1	
Total EC Treaty	2	5	6	1
CS Treaty				
EA Treaty				
Others		1	1	
OVERALL TOTAL	2	**6**	**7**	**1**

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

7. Completed cases — Judgments concerning failure of a Member State to fulfil its obligations: outcome (2002) [1]

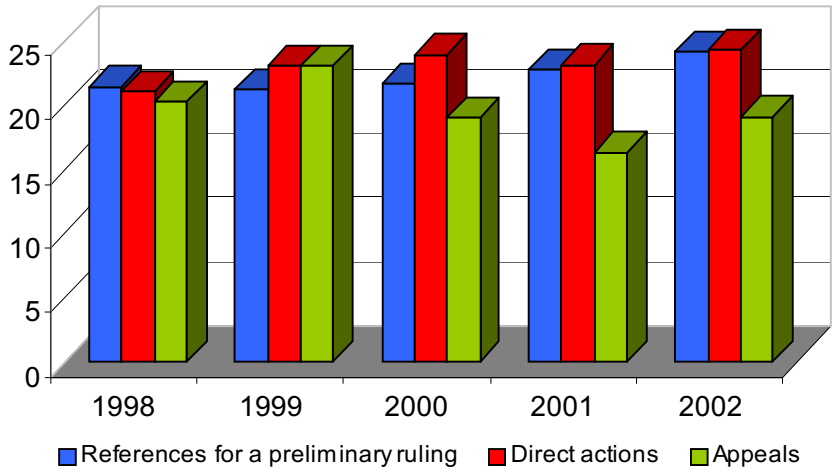


	Infringement declared	Action dismissed	Total
Belgium	8	1	9
Denmark	1		1
Germany	8		8
Greece	7		7
Spain	10		10
France	14		14
Ireland	8		8
Italy	15	1	16
Luxembourg	6		6
Netherlands	2		2
Austria	1		1
Portugal	1		1
Finland	2		2
Sweden	1	1	2
United Kingdom	6		6
Total	**90**	**3**	**93**

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

8. Completed cases — Duration of proceedings (1998 – 2002) [1]

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



	1998	1999	2000	2001	2002
References for a preliminary ruling	21.4	21.2	21.6	22.7	24.1
Direct actions	21	23	23.9	23.1	24.3
Appeals	20.3	23	19	16.3	19.1

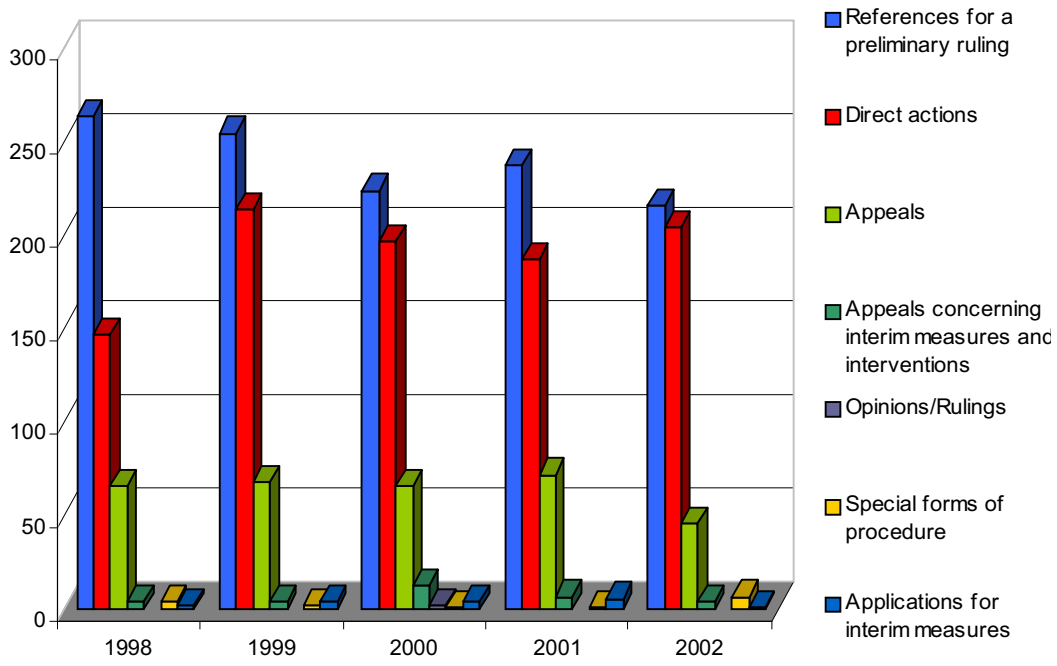
[1] The following types of cases are *excluded* from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions and rulings on agreements; special forms of procedure (namely taxation of costs, legal aid, application to set a judgment aside, 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

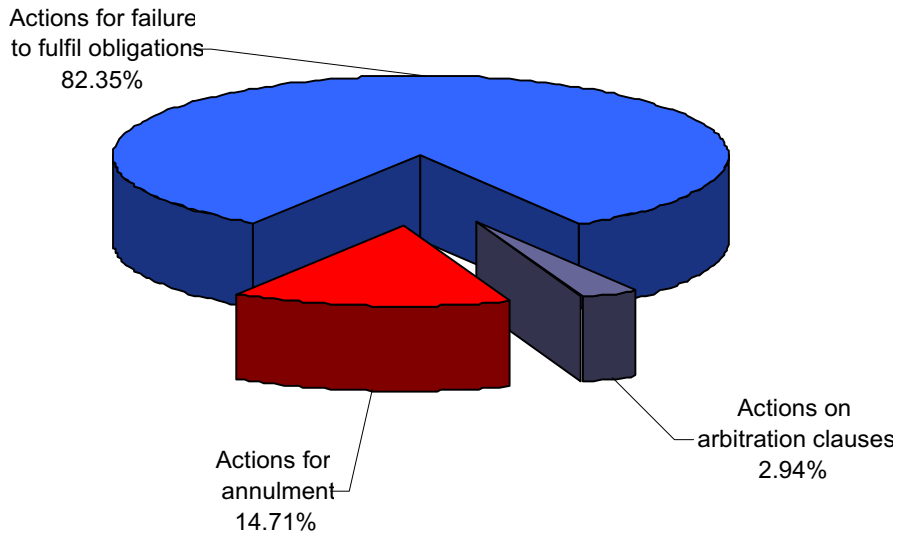
9. Nature of proceedings (1998 – 2002) [1]



	1998	1999	2000	2001	2002
References for a preliminary ruling	264	255	224	237	216
Direct actions	147	214	197	187	204
Appeals	66	68	66	72	46
Appeals concerning interim measures and interventions	4	4	13	7	4
Opinion/Rulings			2		
Special forms of procedure	4	2	1	1	7
Total	**485**	**543**	**503**	**504**	**477**
Applications for interim measures	2	4	4	6	1

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

10. New cases — Direct actions — Type of action (2002) [1]



Actions for annulment	30
Actions for failure to act	
Actions for damages	
Actions for failure to fulfil obligations	168
Actions on arbitration clauses	6
Total	**204**

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

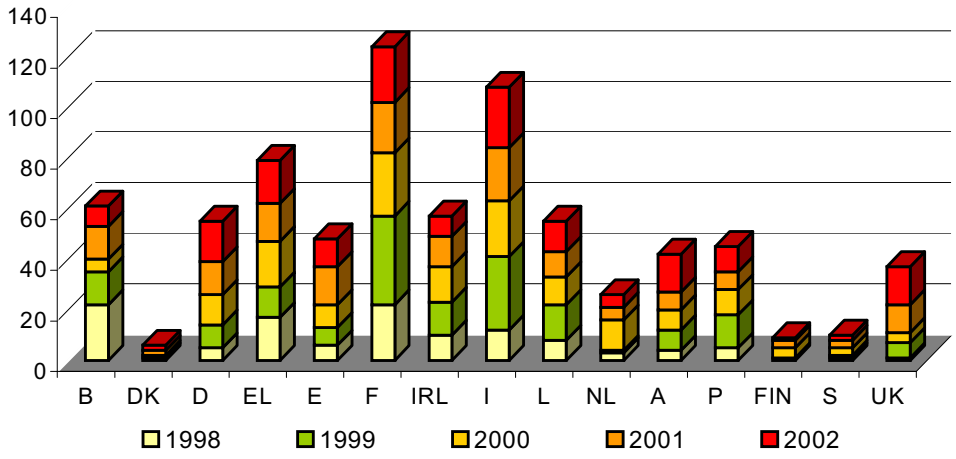
11. New cases [1] — Subject-matter of the action (2002) [2]

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Special forms of procedure
Accession of new States	1	1			2	
Agriculture	27	21	5		53	
Approximation of laws	14	24			38	
Brussels Convention		10			10	
Commercial policy		1	1		2	
Common Customs Tariff		4			4	
Community own resources	2				2	
Company law	5	10			15	
Competition	1	1	11		13	
Customs union	1	12			13	
Energy	2				2	
Environment and consumers	57	14			71	
European citizenship	1	3			4	
External relations	1	9			10	
Fisheries policy	5				5	
Free movement of capital		3			3	
Free movement of goods	5	9			14	
Freedom of establishment	4	8			12	
Freedom of movement for persons	12	9			21	
Freedom to provide services	12	16			28	
Industrial policy	10				10	
Intellectual property	2		6		8	
Law governing the institutions	9		6		15	
Principles of Community law		1			1	
Social policy	8	14	1		23	
Social security for migrant workers		10			10	
State aid	8	3	6	1	18	
Taxation	6	30			36	
Transport	7	2			9	
EC Treaty	**200**	**215**	**36**	**1**	**452**	
CS Treaty			**4**		**4**	
EA Treaty	**4**				**4**	
Privileges and immunities						1
Procedure						6
Staff Regulations		1	6	3	10	
Others		**1**	**6**	**3**	**10**	**7**
OVERALL TOTAL	**204**	**216**	**46**	**4**	**470**	**7**

1 Taking no account of applications for interim measures.

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

12. New cases — Actions for failure of a Member State to fulfil its obligations (1998-2002) [1]



	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	TOTAL [2]
1998	22	1	5	17	6	22	10	12	8	3	4	5	1	1	1	**118**
1999	13	1	9	12	7	35	13	29	14	1	8	13		1	6	**162**
2000	5		12	18	9	25	14	22	11	12	8	10	4	3	4	**157**
2001	13	2	13	15	15	20	12	21	10	5	7	7	3	3	11	**157**
2002	8	2	16	17	11	22	8	24	12	5	15	10	1	2	15	**168**

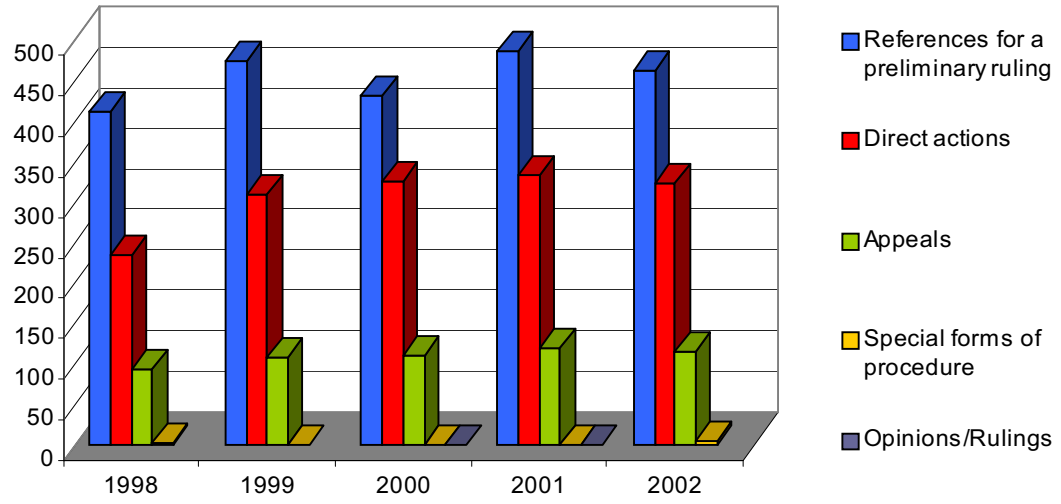
[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

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

[2] No action was brought in these years under Article 170 of the EC Treaty (now Article 227 EC).

Cases pending as at 31 December [1]

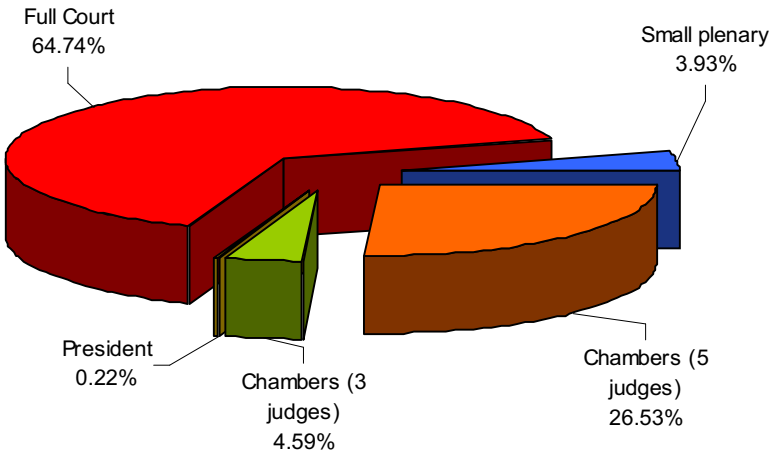
13. Nature of proceedings (1998 – 2002)



	1998	1999	2000	2001	2002
References for a preliminary ruling	413	476	432	487	462
Direct actions	236	309	326	334	323
Appeals	95	110	111	120	117
Special forms of procedure	4	1	2	1	5
Opinions/Rulings			2	1	
Total	**748**	**896**	**873**	**943**	**907**

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

14. Cases pending as at 31 December — Bench hearing actions (2002) [1]



	Direct actions	References for a preliminary ruling	Appeals	Other proceedings	Total
Full Court	238	279	75	1	593
Small plenary	4	23	9		36
Chambers (5 judges)	62	142	30		234
Chambers (3 judges)	19	18	1	4	42
President			2		2
Total	**323**	**462**	**117**	**5**	**907**

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

General trend in the work of the Court (1952 – 2002)

15. New cases and judgments

Year	New cases [1]						
	Direct actions [3]	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Applications for interim measures	Judgments [2]
1953	4				4	-	-
1954	10				10	-	2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43	-	10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37	-	24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79	-	64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	61	69			130	5	78
1976	51	75			126	6	88
1977	74	84			158	6	100
1978	145	123			268	7	97
1979	1216	106			1322	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	216	129			345	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165
1985	294	139			433	22	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	194	179			373	17	238
1989	246	139			385	20	188
1990[4]	222	141	15	1	379	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	4	210
1993	265	204	17	-	486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	5	244
2002	204	216	46	4	470	1	269
Total	**7027**	**4834**	**500**	**46**	**12407**	**327**	**5782**

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

2 Net figures.

3 Including opinions of the Court.

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

16. General trend in the work of the Court (1952 – 2002) — New references for a preliminary ruling (by Member State per year) [1]

	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	Benelux [2]	Total
1961	-		-			-		-	-	1							1
1962	-		-			-		-	-	5							5
1963	-		-			-		-	1	5							6
1964	-		-			-		2	-	4							6
1965	-		4			2		-	-	1							7
1966	-		-			-		-	-	1							1
1967	5		11			3		-	1	3							23
1968	1		4			1		1	-	2							9
1969	4		11			1		-	1	-							17
1970	4		21			2		2	-	3							32
1971	1		18			6		5	1	6							37
1972	5		20			1		4	-	10							40
1973	8	-	37			4	-	5	1	6					-		61
1974	5	-	15			6	-	5	-	7					1		39
1975	7	1	26			15	-	14	1	4					1		69
1976	11	-	28			8	1	12	-	14					1		75
1977	16	1	30			14	2	7	-	9					5		84
1978	7	3	46			12	1	11	-	38					5		123
1979	13	1	33			18	2	19	1	11					8		106
1980	14	2	24			14	3	19	-	17					6		99
1981	12	1	41	-		17	-	11	4	17					5		108
1982	10	1	36	-		39	-	18	-	21					4		129
1983	9	4	36	-		15	2	7	-	19					6		98
1984	13	2	38	-		34	1	10	-	22					9		129
1985	13	-	40	-		45	2	11	6	14					8		139
1986	13	4	18	2	1	19	4	5	1	16		-			8		91
1987	15	5	32	17	1	36	2	5	3	19		-			9		144
1988	30	4	34	-	1	38	-	28	2	26		-			16		179
1989	13	2	47	2	2	28	1	10	1	18		1			14		139
1990	17	5	34	2	6	21	4	25	4	9		2			12		141
1991	19	2	54	3	5	29	2	36	2	17		3			14		186
1992	16	3	62	1	5	15	-	22	1	18		1			18		162
1993	22	7	57	5	7	22	1	24	1	43		3			12		204
1994	19	4	44	-	13	36	2	46	1	13		1			24		203
1995	14	8	51	10	10	43	3	58	2	19	2	5	-	6	20		251
1996	30	4	66	4	6	24	-	70	2	10	6	6	3	4	21		256
1997	19	7	46	2	9	10	1	50	3	24	35	2	6	7	18		239
1998	12	7	49	5	55	16	3	39	2	21	16	7	2	6	24		264
1999	13	3	49	3	4	17	2	43	4	23	56	7	4	5	22		255
2000	15	3	47	3	5	12	2	50	-	12	31	8	5	4	26	1	224
2001	10	5	53	4	4	15	1	40	2	14	57	4	3	4	21		237
2002	18	8	59	7	3	8	-	37	4	12	31	3	7	5	14	-	216
Total	**453**	**97**	**132**	**70**	**137**	**646**	**42**	**751**	**52**	**554**	**234**	**53**	**30**	**41**	**352**	**1**	**4834**

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

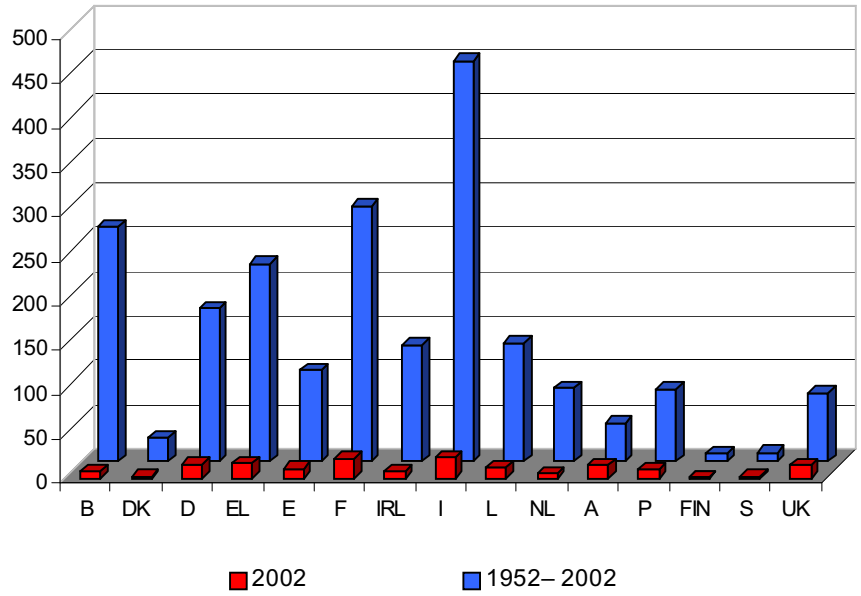
[2] Case C-265/00 *Campina Melkunie*.

17. General trend in the work of the Court (1952 – 2002) New references for a preliminary ruling (by Member State and by court or tribunal)

Belgium	Cour de cassation	56	TOTAL
	Cour d'arbitrage	1	
	Conseil d'État	25	
	Other courts or tribunals	371	453
Denmark	Højesteret	17	
	Other courts or tribunals	80	97
Germany	Bundesgerichtshof	85	
	Bundesarbeitsgericht	4	
	Bundesverwaltungsgericht	55	
	Bundesfinanzhof	198	
	Bundessozialgericht	69	
	Staatsgerichtshof	1	
	Other courts or tribunals	909	1321
Greece	Arios Pagos	3	
	Simvoulio tis Epikratias	8	
	Other courts or tribunals	59	70
Spain	Tribunal Supremo	9	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	120	137
France	Cour de cassation	65	
	Conseil d'État	26	
	Other courts or tribunals	555	646
Ireland	Supreme Court	12	
	High Court	15	
	Other courts or tribunals	15	42
Italy	Corte suprema di Cassazione	77	
	Consiglio di Stato	39	
	Other courts or tribunals	635	751
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	2	
	Other courts or tribunals	27	52
Netherlands	Raad van State	42	
	Hoge Raad der Nederlanden	114	
	Centrale Raad van Beroep	42	
	College van Beroep voor het Bedrijfsleven	101	
	Tariefcommissie	34	
	Other courts or tribunals	221	554
Austria	Verfassungsgerichtshof	3	
	Oberster Gerichtshof	48	
	Bundesvergabeamt	20	
	Verwaltungsgerichtshof	37	
	Vergabekontrollsenat	3	
	Other courts or tribunals	123	234
Portugal	Supremo Tribunal Administrativo	29	
	Other courts or tribunals	24	53
Finland	Korkein hallinto-oikeus	10	
	Korkein oikeus	3	
	Other courts or tribunals	17	30
Sweden	Högsta Domstolen	3	
	Marknadsdomstolen	3	
	Regeringsrätten	11	
	Other courts or tribunals	24	41
United Kingdom	House of Lords	29	
	Court of Appeal	26	
	Other courts or tribunals	297	352
Benelux	Cour de justice/Gerechtshof [1]	1	1
Total			4834

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

18. General trend in the work of the Court (1952-2002) — New actions for failure of a Member State to fulfil its obligations [1]



	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	Total
2002	8	2	16	17	11	22	8	24	12	5	15	10	1	2	15	168
1952–2002	264	26	172	222	102	287	131	451	133	82	43	81	9	10	77	2090

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

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

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

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

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

General activity of the Court of First Instance [1]

1. New cases, completed cases, cases pending (1995 – 2002)

New cases

2. Nature of proceedings (1998 – 2002)
3. Type of action (1998 – 2002)
4. Subject-matter of the action (1998 – 2002)

Completed cases

5. Nature of proceedings (1998 – 2002)
6. Subject-matter of the action (2002)
7. Bench hearing action (2002)
8. Duration of proceedings in months (1998 – 2002)

Cases pending as at 31 December of each year

9. Nature of proceedings (1998 – 2002)
10. Subject-matter of the action (1998 – 2002)

Miscellaneous

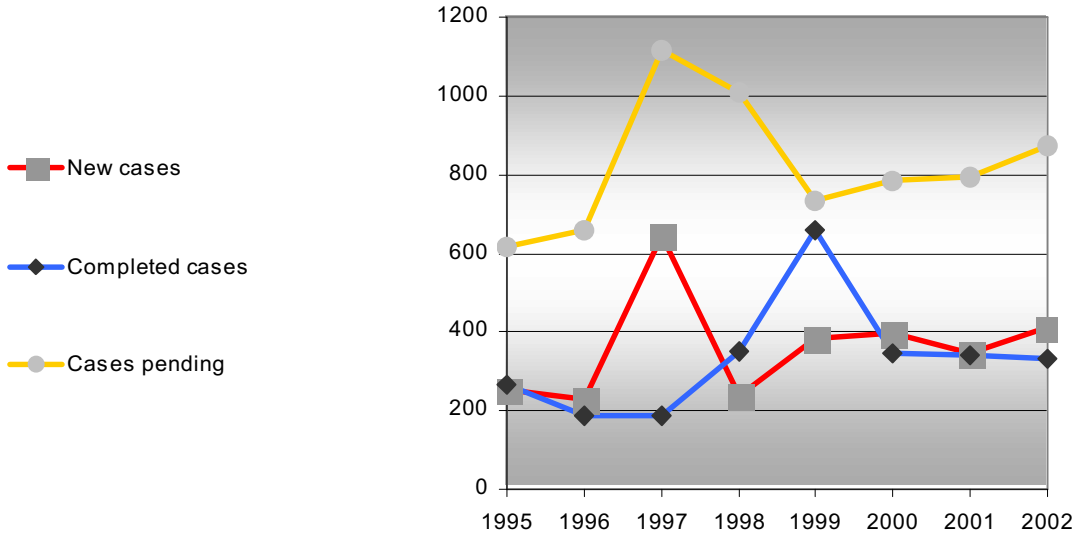
11. Decisions in proceedings for interim measures: outcome (2002)
12. Appeals against decisions of the Court of First Instance
13. Results of appeals
14. General trend — New cases, completed cases, cases pending

[1] The introduction of new software in 2002 has enabled the statistics in the Annual Report to be presented with greater clarity. The tables and figures have, in large part, been revised and improved, at the cost of certain adjustments. Consistency with the tables of past years has been preserved where possible.

General activity of the Court of First Instance

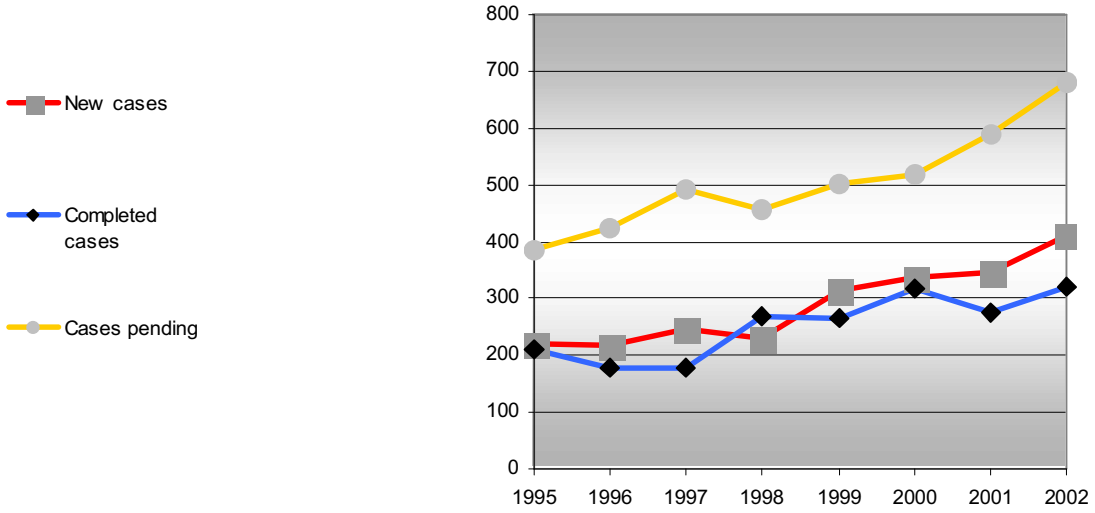
1. New cases, completed cases, cases pending (1995 – 2002)

	1995	1996	1997	1998	1999	2000	2001	2002
New cases	253	229	644	238	384	398	345	411
Completed cases	265	186	186	348	659	344	340	331
Cases pending	616	659	1117	1007	732	786	792	872



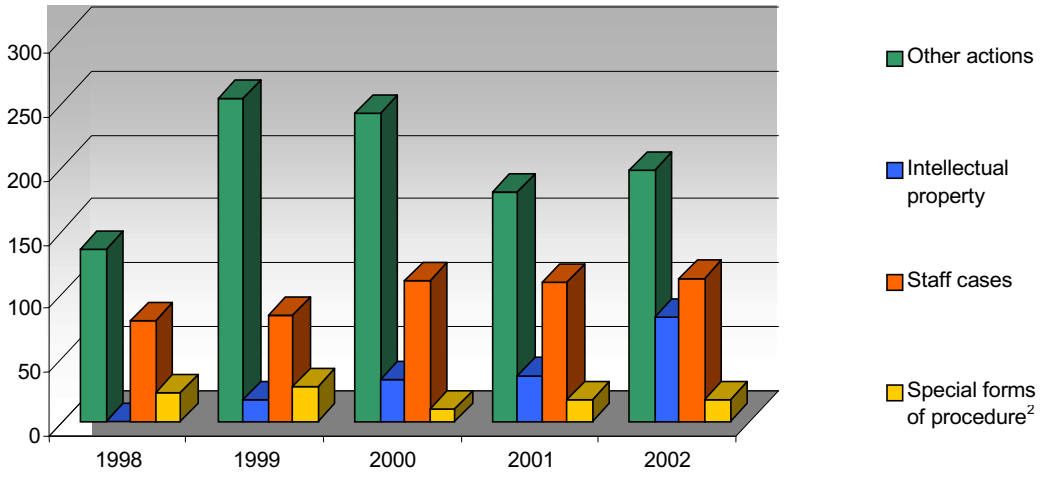
In the above table, the figures include certain *groups of identical or related cases* (cases concerning milk quotas, customs agents, State aid in the Netherlands for service-stations and State aid in the region of Venice, and staff cases). If those sets of cases are excluded, the following figures are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

	1995	1996	1997	1998	1999	2000	2001	2002
New cases	221	217	246	231	313	336	345	411
Completed cases	210	178	178	268	267	318	275	320
Cases pending	385	424	492	456	501	519	589	680



New cases

2. Nature of proceedings (1998 – 2002) [1]



	1998	1999	2000	2001	2002
Other actions	135	254	242	180	198
Intellectual property	1	18	34	37	83
Staff cases	79	84	111	110	112
Special forms of procedure[2]	23	28	11	18	18
Total	**238**	**384**	**398**	**345**	**411**

1999: The figures include 71 cases concerning State aid in the Netherlands for service-stations.

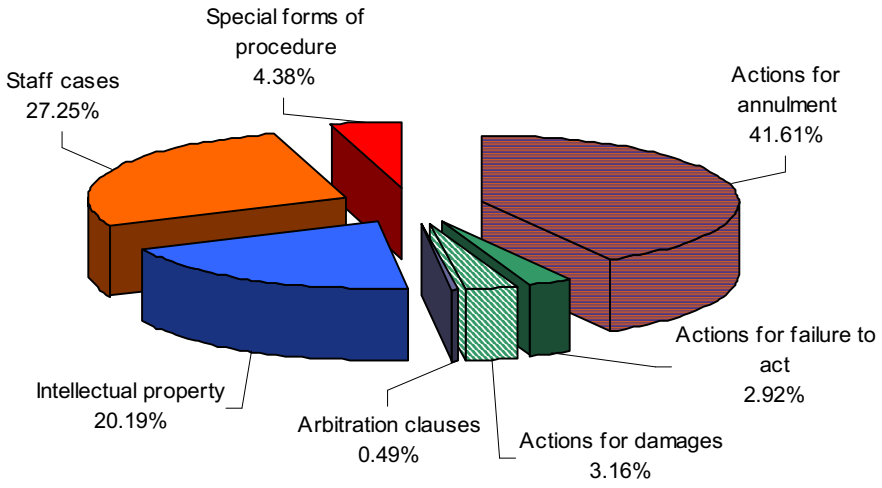
2000: The figures include three cases concerning State aid in the Netherlands for service-stations and 59 cases concerning State aid in the region of Venice.

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

[2] The following are considered to be 'special forms of procedure' (in this and the following tables): application to set a judgment aside (Article 38 of the EC Statute; Article 122 of the Rules of Procedure of the Court of First Instance); third party proceedings (Article 39 of the EC Statute; Article 123 of the Rules of Procedure); revision of a judgment (Article 41 of the EC Statute; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 40 of the EC Statute; Article 129 of the Rules of Procedure); taxation of costs (Article 92 of the Rules of Procedure); legal aid (Article 94 of the Rules of Procedure); rectification of a judgment (Article 84 of the Rules of Procedure).

3. New cases — Type of action

Distribution in 2002



	1998	1999	2000	2001	2002
Actions for annulment	116	220	220	134	171
Actions for failure to act	2	15	6	17	12
Actions for damages	14	19	17	21	13
Arbitration clauses	3	1	-	8	2
Intellectual property	1	18	34	37	83
Staff cases	79	83	110	110	112
Special forms of procedure	23	28	11	18	18
Total	238	**384**	**398**	**345**	**411**

1999: The figures include 71 cases concerning State aid in the Netherlands for service-stations.

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

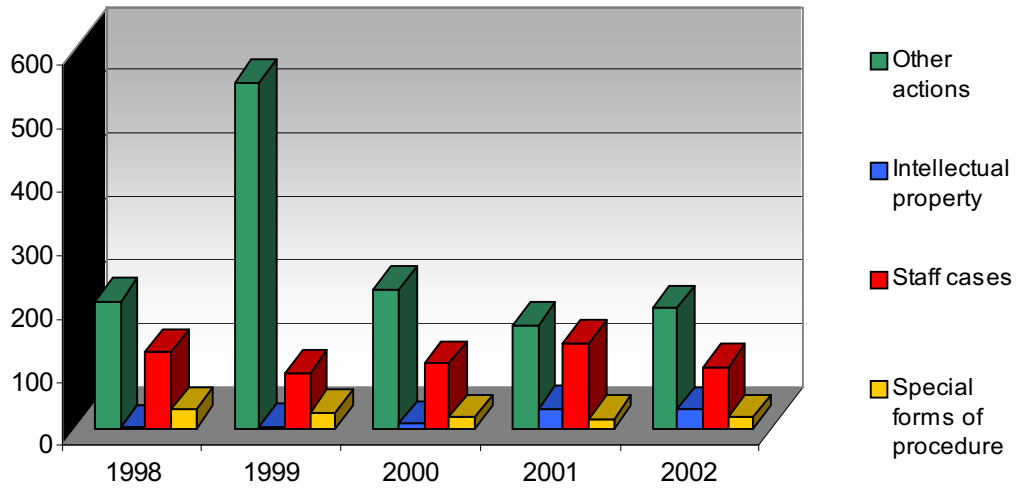
4. New cases — Subject-matter of the action (1998 – 2002) [1]

	1998	1999	2000	2001	2002
Agriculture	19	42	23	17	9
Approximation of laws				2	1
Arbitration clause	2			2	1
Association of the Overseas Countries and Territories	5	4	6	6	
Commercial policy	12	5	8	4	5
Common Customs Tariff				2	1
Company law	3	2	4	6	3
Competition	23	34	36	39	61
Culture			2	1	
Customs union				2	5
Energy				2	
Environment and consumers	4	5	14	2	8
European citizenship			2		
External relations	5	1	8	14	8
Fisheries policy				6	3
Foreign and security policy		2	1	3	6
Free movement of goods	7	10	17	1	
Freedom of establishment				1	
Freedom of movement for persons	2	2	8	3	2
Freedom to provide services		1			
Intellectual property	1	18	34	37	83
Justice and home affairs				1	1
Law governing the institutions	10	19	29	12	18
Regional policy	2	2		1	6
Research, information, education and statistics		1	1	3	1
Social policy	10	12	7	1	3
Staff Regulations				1	
State aid	16	100	80	42	51
Taxation					1
Transport	3	2		2	1
Total EC Treaty	**124**	**262**	**280**	**213**	**279**
Competition	8				1
Iron and steel		1		2	
State aid	3	6	1	2	1
Total CS Treaty	**11**	**7**	**1**	**4**	**2**
Law governing the institutions	1	1			
Nuclear energy					1
Total EA Treaty	**1**	**1**			**1**
Staff Regulations	79	86	106	110	112
OVERALL TOTAL	**215**	**356**	**387**	**327**	**393**

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

Completed cases

5. Nature of proceedings



	1998	1999	2000	2001	2002
Other actions	199	544	219	162	189
Intellectual property	1	2	7	30	29
Staff cases	120	88	101	133	96
Special forms of procedure	29	25	17	15	17
Total	**349**	**659**	**344**	**340**	**331**

1998: The figures include 64 cases concerning milk quotas and 163 cases concerning the regrading of officials.

1999: The figures include 102 cases concerning milk quotas, 284 cases concerning customs agents and six cases concerning the regrading of officials.

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

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

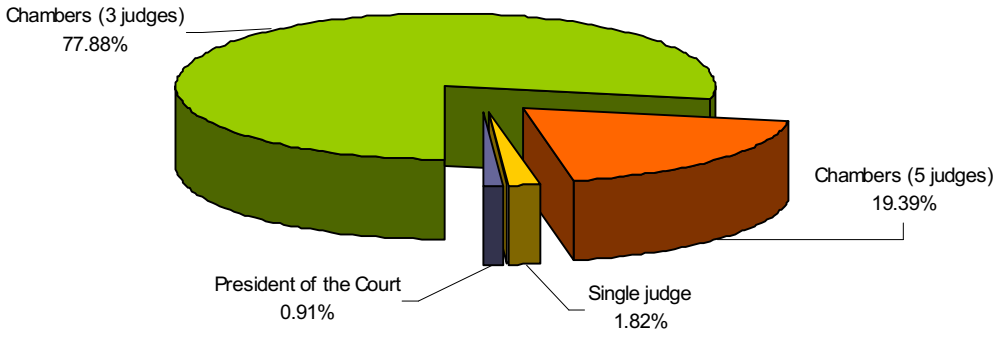
2002: The figures include seven cases concerning milk quotas and three cases concerning the regrading of officials.

6. Completed cases — Subject-matter of the action (2002) [1]

	Judgments	Orders	Total
Agriculture	13	15	28
Approximation of laws		2	2
Association of the Overseas Countries and Territories	6		6
Commercial policy	5	1	6
Common Customs Tariff			
Company law	3	1	4
Competition	28	12	40
Customs union	3	15	18
Environment and consumers	9	3	12
External relations	3	3	6
Fisheries policy	1	1	2
Foreign and security policy			
Free movement of goods	2		2
Freedom of establishment		2	2
Freedom of movement for persons			
Intellectual property	26	3	29
Justice and home affairs		1	1
Law governing the institutions	4	10	14
Regional policy		1	1
Research, information, education and statistics		2	2
Social policy	2		2
Staff Regulations		1	1
State aid	23	8	31
Transport		2	2
Total EC Treaty	**130**	**83**	**213**
Competition			
Iron and steel			
State aid		4	4
Total CS Treaty		**4**	**4**
Nuclear energy		1	1
Total EA Treaty		**1**	**1**
Staff Regulations	66	30	96
OVERALL TOTAL	**196**	**118**	**314**

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

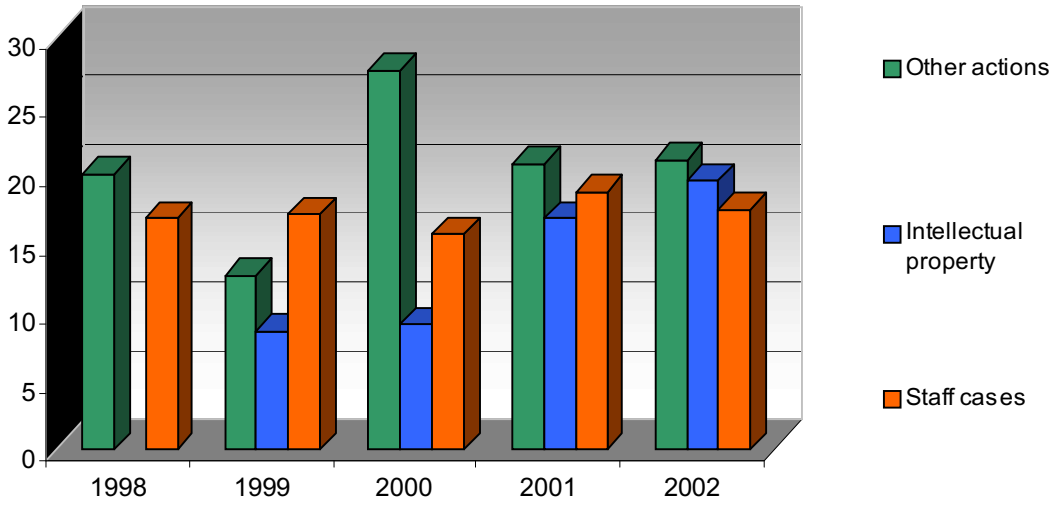
7. Completed cases — Bench hearing action (2002)



	Judgments and Orders
Chambers (3 judges)	257
Chambers (5 judges)	64
Single judge	6
President of the Court	4
Total	**331**

8. Completed cases — Duration of proceedings in months (1998 – 2002)

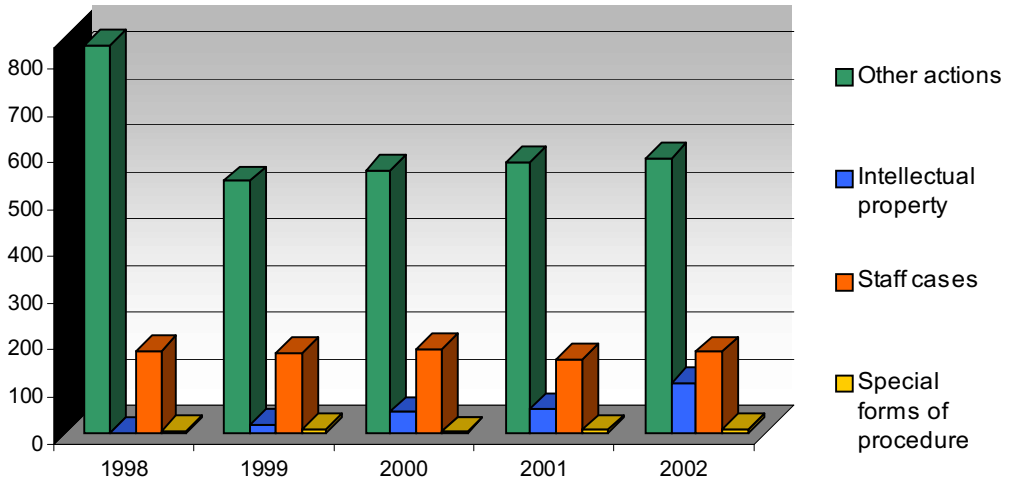
(judgments and orders)



	1998	1999	2000	2001	2002
Other actions	20	12.6	27.5	20.7	21
Intellectual property		8.6	9.1	16.4	19.5
Staff cases	16.7	17	15.6	18.7	17.4

Cases pending as at 31 December of each year

9. Nature of proceedings (1998 – 2002)



	1998	1999	2000	2001	2002
Other actions	829	538	561	579	588
Intellectual property	1	17	44	51	105
Staff cases	173	169	179	156	172
Special forms of procedure	5	8	2	6	7
Total	1008	732	786	792	872

1998: The figures include 190 cases concerning milk quotas, 297 actions brought by customs agents and 65 cases concerning the regrading of officials.

1999: The figures include 88 cases concerning milk quotas, 13 actions brought by customs agents, 71 cases concerning State aid in the Netherlands for service-stations and 59 cases concerning the regrading of officials.

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

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

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

10. Cases pending as at 31 December of each year — Subject-matter of the action (1998 – 2002) [1]

	1998	1999	2000	2001	2002
Agriculture	231	140	144	114	95
Approximation of laws				2	1
Arbitration clause	3	2		2	3
Association of the Overseas Countries and Territories	5	6	11	15	9
Commercial policy	27	25	16	15	14
Common Customs Tariff		2	3	2	3
Company law	4	4	4	6	5
Competition	114	104	79	96	114
Culture			2	3	1
Customs union		24	33	20	7
Energy				2	2
Environment and consumers	6	8	15	17	13
European citizenship			1		
External relations	10	7	9	21	23
Fisheries policy		4	8	7	8
Foreign and security policy		2	3	3	9
Free movement of goods	20		2	3	1
Freedom of establishment		1	5	2	
Freedom of movement for persons				1	3
Freedom to provide services					
Intellectual property	1	17	44	51	105
Justice and home affairs				1	1
Law governing the institutions	309	34	27	20	27
Regional policy	3	5		1	6
Research, information, education and statistics	1	1	1	4	3
Social policy	10	15	4	3	4
Staff Regulations			2	2	1
State aid	46	131	176	207	227
Taxation					1
Transport	3	3	1	3	2
Total EC Treaty	**793**	**536**	**590**	**623**	**688**
Competition	7	6	6		1
Iron and steel	11	1	1	2	2
State aid	17	9	7	6	3
Total CS Treaty	**35**	**16**	**14**	**8**	**6**
Law governing the institutions	1	1	1		
Total EA Treaty	**1**	**1**	**1**		
Staff Regulations	173	171	179	155	171
OVERALL TOTAL	**1002**	**724**	**784**	**786**	**865**

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

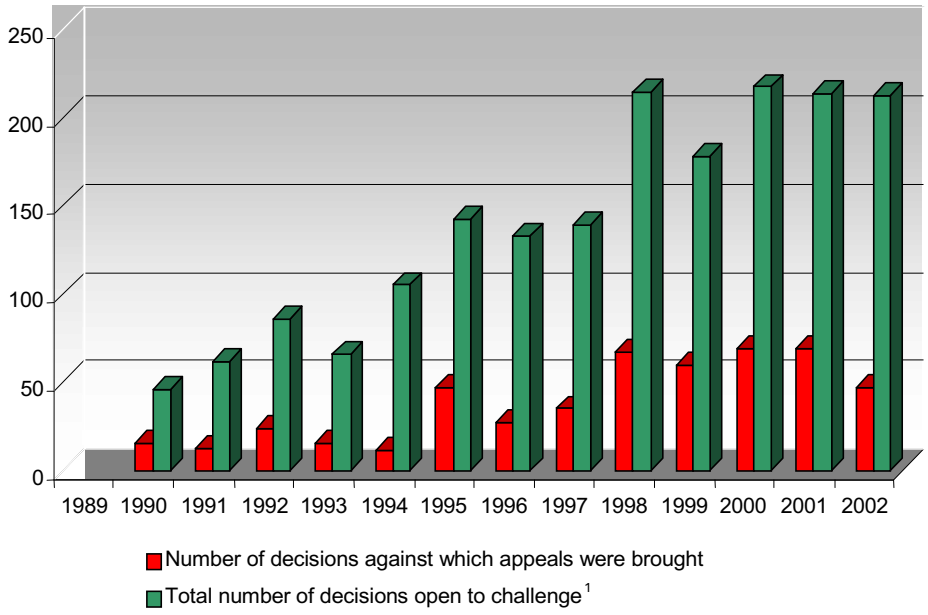
Miscellaneous

11. Decisions in proceedings for interim measures: outcome (2002) [1]

	Number of applications for interim measures	Outcome	
		Dismissed	Granted
Commercial policy	3	3	
Foreign and security policy	1	1	
Iron and steel	1	1	
State aid	5	4	1
Total EC Treaty	10	9	1
Staff Regulations	10	10	
OVERALL TOTAL	**20**	**19**	**1**

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

12. Miscellaneous — Appeals against decisions of the Court of First Instance



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

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

13. Miscellaneous — Results of appeals

(judgments and orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Agriculture	4	3			7
Competition	2	8	1	2	13
Environment and consumers	1	1			2
External relations	2				2
Intellectual property	1				1
Law governing the institutions	4			1	5
Social policy	1				1
Staff Regulations	10	1			11
State aid	4	2		4	10
Transport	1				1
Total	**30**	**15**	**1**	**7**	**53**

14. Miscellaneous — General trend (1989 – 2002) – New cases, completed cases, cases pending [1]

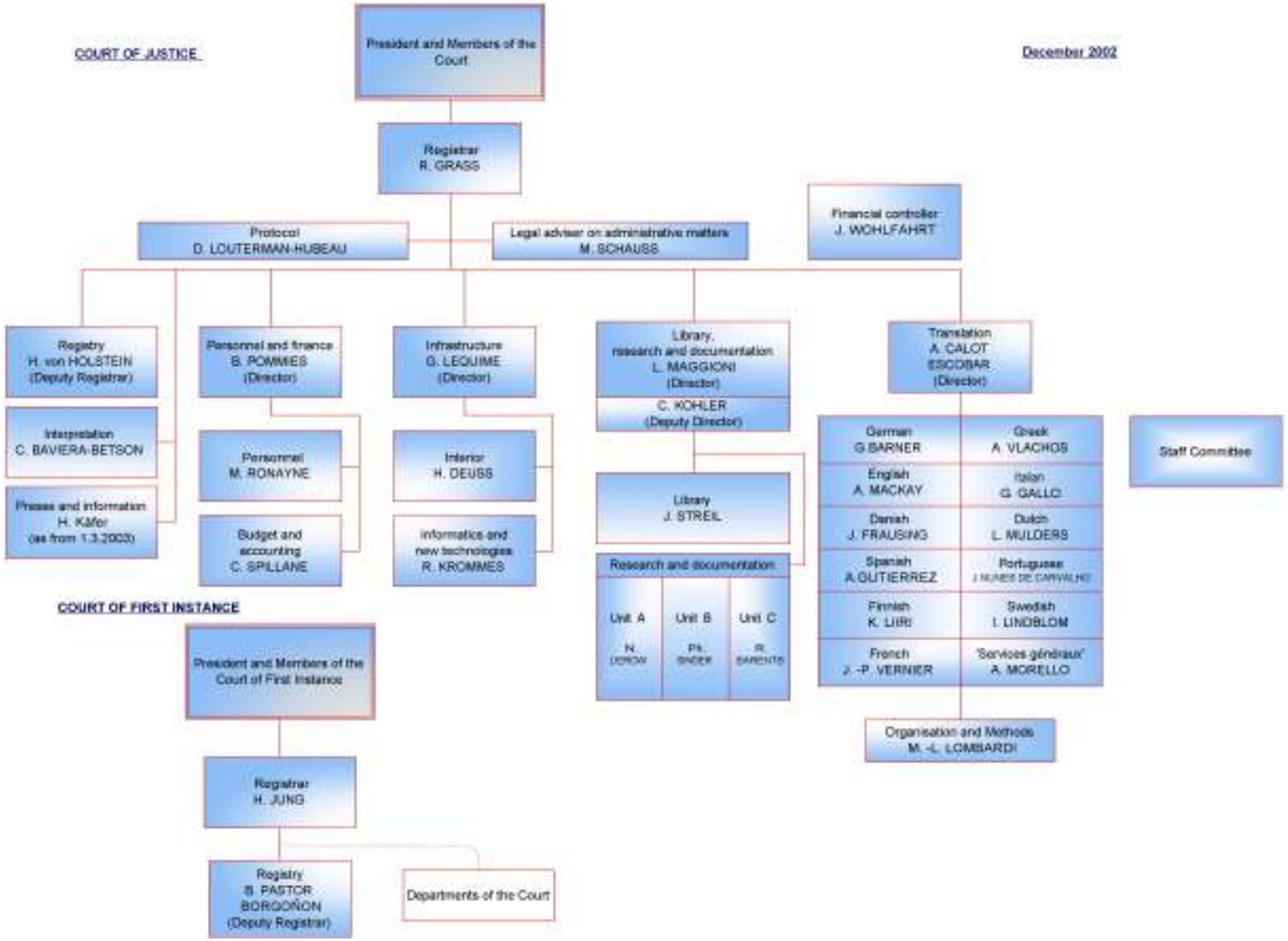
	New cases	Completed cases	Cases pending as at 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1117
1998	238	348	1008
1999	384	659	732
2000	398	344	786
2001	345	340	792
2002	411	331	872
Total	**4353**	**3482**	

If the groups of *identical or related* cases are excluded (*see '1. New cases, completed cases, cases pending (1995-2002)'*), the following figures are obtained:

	New cases	Completed cases	Cases pending
1993	201	106	266
1994	236	128	374
1995	221	210	385
1996	217	178	424
1997	246	178	492
1998	231	268	455
1999	313	267	501
2000	336	318	519
2001	345	275	589
2002	411	320	680

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

Abridged Organisational Chart



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