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COURT OF JUSTICE OF THE EUROPEAN UNION

# Annual Report 2009

COURT OF JUSTICE OF THE EUROPEAN UNION

# ANNUAL REPORT
# 2009

Synopsis of the work of the Court of Justice,
the General Court and the European Union Civil Service Tribunal

Luxembourg 2010

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# Foreword

The year which has just passed ended with a major event. On 1 December 2009 the Treaty of Lisbon entered into force after a long and complex ratification procedure. This Treaty, which is designed to endow the European Union with more effective legislative and administrative structures enhancing its ability to meet the challenges of the beginning of the 21st century, brings important changes to most of the fields of activity of the Court of Justice. Apart from the consequences resulting from the European Union's acquisition of legal personality and from the abandonment of its three-pillar structure, the Treaty of Lisbon introduces reforms relating both to the jurisdiction of the Court of Justice and to the procedures before the three courts of which it is composed.

The past year also saw a partial replacement of the membership of the Court, four of whose members departed. The governments of the Member States were again concerned, in this partial renewal, to make the appointments without delay and to safeguard the stability of the institution as far as possible, thereby enabling it to continue smoothly in the performance of its task. The Court cannot but welcome this.

Finally, 2009 was also marked by a very sad event, the death of Advocate General Dámaso Ruiz-Jarabo Colomer. The impact of his death continues to be strongly felt, if only because we are deliberating, and will continue to deliberate over the coming months, in cases which have had the benefit of his opinions. His thinking accompanies us in our work in a very concrete manner.

This Annual Report provides a full record of changes affecting the institution and its work in 2009. As is the case every year, a substantial part of the Annual Report is devoted to brief but exhaustive accounts of the main judicial activity of the Court of Justice, the General Court and the Civil Service Tribunal. Separate statistics for each court supplement and illustrate the analysis.

V. Skouris
President of the Court of Justice

# Chapter I

## The Court of Justice

# A — The Court of Justice in 2009: changes and proceedings

*By Mr Vassilios Skouris, President of the Court of Justice*

This first part of the Annual Report gives an overview of the activity of the Court of Justice of the European Union in 2009. It describes, first, how the institution evolved during the past year, with the emphasis on the institutional changes affecting the Court of Justice and developments relating to its internal organisation and working methods (section 1). It includes, second, an analysis of the statistics in relation to developments in the Court of Justice's workload and the average duration of proceedings (section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject matter (section 3).

**1.1.** The major event bringing change to the Court of Justice as an institution in 2009 was incontestably the entry into force of the Treaty of Lisbon. This Treaty has made a number of amendments to the provisions of the EU Treaty and the EC Treaty concerning the Court of Justice. Some of these amendments flow from the abandonment of the three-pillar structure of the European Union, from the resulting disappearance of the European Community and from the legal personality which the European Union henceforth enjoys. Other amendments are more specific and concern the Court of Justice directly.

Mentioning only the most important amendments, first, the judicial institution of the European Union has, since 1 December 2009, been called the Court of Justice of the European Union. As before, it is composed of three courts, but henceforth called: the Court of Justice, the General Court and the Civil Service Tribunal.

The creation of further specialised tribunals remains possible but, following the entry into force of the Treaty of Lisbon, any such tribunals would be created in accordance with the ordinary legislative procedure, that is to say by co-decision with a qualified majority rather than, as hitherto, by unanimity. The same is true of amendments to the Statute of the Court of Justice, with the exception of the rules on the judges and advocates general and those governing the language arrangements of the Court.

A significant amendment concerns the procedure for appointment of members of the Court of Justice and the General Court. Judges and advocates general are henceforth appointed by a conference of representatives of the governments of the Member States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court. This panel comprises seven persons chosen from among former members of the two Courts, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament.

So far as concerns the jurisdiction of the Court of Justice, it is to be noted that its jurisdiction extends to the law of the European Union, unless the Treaties provide otherwise. Thus, the Court of Justice is conferred general jurisdiction to give preliminary rulings in the area of freedom, security and justice, as a result of the disappearance of the pillars and the repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC which imposed restrictions on its jurisdiction.

First, as regards police and judicial cooperation in criminal matters, the jurisdiction of the Court of Justice to give preliminary rulings has become obligatory and is no longer subject to a declaration by each Member State recognising that jurisdiction and specifying the national courts that may request a preliminary ruling. Transitional provisions nevertheless provide that that full jurisdiction will not apply until five years after the entry into force of the Treaty of Lisbon.

Second, as regards visas, asylum, immigration and other policies related to free movement of persons (in particular, judicial cooperation in civil matters, recognition and enforcement of judgments), any national court or tribunal — no longer just the higher courts — can henceforth request preliminary rulings, and the Court henceforth has jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls.

Also, it is significant that, now that the Treaty of Lisbon has entered into force, the Charter of Fundamental Rights of the European Union has become a binding legislative instrument with the same legal value as the Treaties ([1]). Finally, in the sensitive area of the common foreign and security policy (CFSP), the Court, by way of exception, has jurisdiction (i) to monitor the delimitation of the Union's competences and of the CFSP, the implementation of which must not affect the exercise of the Union's competences or the powers of the institutions in respect of the exercise of the exclusive and shared competences of the Union, and (ii) over actions for annulment brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection, for example, with combating terrorism (freezing of assets).

The Treaty of Lisbon also contains significant amendments concerning proceedings before the Courts of the European Union. The most important of these include, first, the easing of the conditions for the admissibility of actions brought by individuals against regulatory acts of the institutions, bodies, offices and agencies of the European Union. In particular, natural or legal persons may henceforth bring proceedings against a regulatory act if they are directly affected by it and it does not entail implementing measures. Consequently, they no longer have to show that they are individually concerned by an act of this type.

Second, the Treaty of Lisbon strengthens the system of pecuniary sanctions (lump sum and/or penalty payment) in the event of non-compliance with a judgment establishing a failure to fulfil obligations. In particular, where a Member State fails to notify national measures transposing a directive to the Commission, it is henceforth possible for the Court to impose pecuniary sanctions at the stage of delivery of the initial judgment establishing a failure to fulfil obligations.

**1.2.** Apart from the reforms introduced by the Treaty of Lisbon, it is also worth noting the amendment of 13 January 2009 to the Rules of Procedure of the Court of Justice (OJ 2009 L 24, p. 8). This amendment concerns Article 7(3) of the Rules of Procedure which lays down the procedure for electing the President and the Presidents of the Chambers. The previous version of Article 7(3) provided for two ballots. If, in the second round, judges obtained an equal number of votes, the oldest of them was deemed elected. The new version provides that, if no judge obtains the votes of more than half the judges composing the Court, further ballots are to be held until that majority is attained.

**2.** The statistics concerning the Court's activity in 2009 show, overall, increased productivity and the maintenance of a satisfactory level of efficiency as regards the duration of proceedings. The constant upward trend in the number of references for a preliminary ruling submitted to the Court should also be noted.

([1]) Furthermore, Article 6(2) TEU provides that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. Protocol No 8 states that the accession agreement is to specify, in particular, 'the specific arrangements for the Union's possible participation in the control bodies of the European Convention [and] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. This accession 'shall not affect the competences of the Union or the powers of its institutions'.

The Court completed 543 cases in 2009 (net figures, that is to say, taking account of the joinder of cases), a very appreciable increase compared with the previous year (495 cases completed in 2008). Of those cases, 377 were dealt with by judgments and 165 gave rise to orders. The number of judgments delivered in 2009 is among the highest in the Court's history.

The Court had 561 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), representing a slight decrease compared with 2008 (592 new cases). It should, however, be pointed out that the number of references for a preliminary ruling submitted in 2009 is the highest ever reached (302 cases).

So far as concerns the duration of proceedings, the statistics are very positive. In the case of references for a preliminary ruling, the average duration amounted to 17.1 months, that is to say a duration practically identical to that in 2008 (16.8 months). The average time taken to deal with direct actions and appeals was 17.1 months and 15.4 months respectively (16.9 months and 18.4 months in 2008).

In addition to the reforms in its working methods that have been undertaken in recent years, the improvement in the Court's efficiency in dealing with cases is also due to the increased use of the various procedural instruments at its disposal to expedite the handling of certain cases (the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an opinion of the Advocate General).

In 2009, use of the urgent preliminary ruling procedure was requested in three cases and the designated chamber considered that the conditions under Article 104b of the Rules of Procedure were met in two of them. Those cases were completed in an average period of 2.5 months.

Use of the expedited or accelerated procedure was requested five times, but the conditions under the Rules of Procedure were not met in any of those cases. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court. Priority treatment, on the other hand, was granted in eight cases.

Also, the Court regularly used the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. A total of 22 cases were brought to a close by orders made on the basis of that provision.

Finally, the Court made more frequent use of the possibility offered by Article 20 of its Statute of determining cases without an opinion of the Advocate General where they do not raise any new point of law. About 52% of the judgments delivered in 2009 were delivered without an opinion (compared with 41% in 2008).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with roughly 8%, chambers of five judges with 57%, and chambers of three judges with approximately 34%, of the cases brought to a close by a judgment in 2009. Compared with the previous year, a decrease may be noted in the proportion of cases dealt with by the Grand Chamber (14% in 2008), while the proportion of cases dealt with by three-judge chambers increased (26% in 2008). As regards cases completed by orders involving a judicial determination, 84% of such cases were entrusted to three-judge chambers and 10% to five-judge chambers, while orders made by the President account for 6% of such cases.

Part C of this chapter should be consulted for more detailed information regarding the statistics for the 2009 judicial year.

## *Constitutional or institutional issues*

The recurring issue of the appropriate legal basis within the first pillar has given rise to a number of judgments worthy of mention. In Case C-166/07 *Parliament* v *Council* (judgment of 3 September 2009) the Court held that Community contributions to the International Fund for Ireland must have a dual legal basis, namely Articles 159 EC and 308 EC. The effect of using that dual basis is that the Community legislature is obliged to reconcile different legislative procedures in the adoption of a single measure.

The Court began by observing that, in the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review, including, in particular, the aim and the content of the measure. Article 308 EC may be used as the legal basis for a measure only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it. In addition, recourse to that provision demands that the action envisaged should relate to the 'operation of the common market'.

The Court went on to find, first, that the objectives of Regulation (EC) No 1968/2006 concerning Community financial contributions to the International Fund for Ireland (2007–10) [2] correspond to the objectives pursued by the Community policy on economic and social cohesion and, second, that the Community's financial contribution to the fund, leaving aside its legislative framework, forms part of the specific actions which, when they prove to be necessary outside the Structural Funds in order to realise the objectives referred to in Article 158 EC, may be adopted in accordance with the third paragraph of Article 159 EC. However, neither the arrangements governing cooperation between the Community and the fund nor the conditions and method of payment in respect of the Community's financial contribution allow the Community to prevent the use by the fund of that contribution to cover actions which, while complying with the objectives of the Agreement concerning the International Fund for Ireland, extend beyond the scope of the Community's policy on economic and social cohesion or, at least, are not managed in accordance with the criteria applied by the Community within the framework of that policy. The Community legislature was therefore entitled to take the view that the range of activities financed by that regulation would extend beyond the scope of the Community's policy on economic and social cohesion. Article 159 EC covers only independent action by the Community carried out in accordance with the Community regulatory framework, the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion. Consequently, the third paragraph of Article 159 EC does not by itself confer on the Community the necessary power to pursue the objectives of the Community's policy on economic and social cohesion by means of a financial contribution under the conditions provided for by Regulation No 1968/2006.

Nevertheless, the purpose of Regulation No 1968/2006 is to support the actions of an international organisation established by two Member States, the objective of which is to strengthen economic and social cohesion. As follows from Articles 2 EC and 3(1)(k) EC, the strengthening of economic and social cohesion constitutes, outside of Title XVII of the Treaty, an objective of the Community. Furthermore, the objective of that regulation falls within the framework of the common market, since it seeks to bring about economic improvements in disadvantaged areas of two Member States and thus relates to the functioning of the common market.

[2] Council Regulation (EC) No 1968/2006 of 21 December 2006 (OJ 2006 L 409, p. 81).

The Court concluded from this that, as Regulation No 1968/2006 pursues objectives set out in Articles 2 EC and 3(1)(k) EC and in Title XVII of the Treaty, without that title by itself conferring on the Community the power to realise those objectives, the Community legislature ought to have had recourse to both the third paragraph of Article 159 EC and Article 308 EC while complying with the legislative procedures laid down therein, that is to say, both the 'co-decision' procedure referred to in Article 251 EC and the requirement that the Council act unanimously.

In relation to the same issue of the determination of the appropriate legal basis within the first pillar, in Case C-411/06 *Commission* v *Parliament and Council* (judgment of 8 September 2009) the Court determined a dispute concerning the legal basis of Regulation (EC) No 1013/2006 on shipments of waste [3]. It held that that measure had to be based solely on Article 175(1) EC and not on Articles 133 EC and 175(1) EC since it had only a secondary effect on the common commercial policy.

Following the traditional case-law of the Court, it is only exceptionally — if an act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other — that such an act has to be founded on the various corresponding legal bases. In the present case, the Commission was of the opinion that a dual legal basis was called for because the regulation comprised two indissociable components, one relating to the common commercial policy and the other to protection of the environment, neither of which could be regarded as secondary or indirect as compared with the other.

The Court disagreed, taking the view that it is evident from the analysis of the contested regulation that, both by its objective and content, it is aimed primarily at protecting human health and the environment against the potentially adverse effects of cross-border shipments of waste. More specifically, in so far as the prior written notification and consent procedure clearly pursues an environmental protection purpose in the field of shipments of waste between the Member States and, consequently, was correctly based on Article 175(1) EC, it would not be coherent to consider that that same procedure, when it applies to shipments of waste between Member States and third countries with the same environmental protection objective, is in the nature of an instrument of common commercial policy and must, on that ground, be based on Article 133 EC. That conclusion is corroborated by an analysis of the legislative context of the contested regulation. A broad interpretation of the concept of common commercial policy is not such as to call into question the finding that Regulation No 1013/2006 is an instrument falling principally under environmental protection policy. A Community act may fall within that area even when the measures provided for by it are liable to affect trade. A Community act falls within the exclusive competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. That was clearly not the situation in the present case. The aim of Regulation No 1013/2006 is not to define those characteristics of waste which will enable it to circulate freely within the internal market or as part of commercial trade with third countries, but to provide a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment.

An inter-pillar dispute about legal basis was, in turn, the subject of Case C-301/06 *Ireland* v *Parliament and Council* (judgment of 10 February 2009), in which the Court held that Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of

[3] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 (OJ 2006 L 190, p. 1).

publicly available electronic communications services or of public communications networks [4] had to be adopted on the basis of the EC Treaty in so far as what is predominantly at issue is the functioning of the internal market.

The Community legislature may have recourse to Article 95 EC in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market. It was apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time. Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.

Furthermore, the Court observed that Directive 2006/24 amended the provisions of the directive on the protection of privacy in the electronic communications sector, itself based on Article 95 EC. In those circumstances, in so far as it amended an existing directive which formed part of the *acquis communautaire*, Directive 2006/24 could not be based on a provision of the EU Treaty without infringing Article 47 EU.

Lastly, the Court found that Directive 2006/24 regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that of the use and exchange of the data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive. It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty. In light of that substantive content, it must be concluded that that directive relates predominantly to the functioning of the internal market.

Although long since proclaimed by the Court, the general principles of Community law continue to provide a source of further case-law. In Case C-345/06 *Heinrich* (judgment of 10 March 2009) the Court underlined the significance of the requisite publicity in respect of legal acts and thus confirmed the importance of the principle of legal certainty as a general principle of Community law.

A traveller was refused boarding at Vienna–Schwechat Airport on the ground that his cabin baggage contained articles regarded as prohibited articles under Community rules. Regulation (EC) No 2320/2002 [5] prohibits, inter alia, the presence on board aircraft of certain articles which are defined in general terms in a list attached as an annex to the regulation. That regulation was

[4] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

[5] Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ 2002 L 355, p. 1).

implemented by Regulation (EC) No 622/2003 [6] and the annex thereto which was amended in 2004 by Regulation (EC) No 68/2004. [7] The annex to Regulation No 622/2003 was never published.

Following that refusal to allow him to board, the person concerned issued proceedings for a declaration that the measures taken against him were illegal. The national court asked the Court of Justice whether regulations or parts thereof may nevertheless have binding force if they are not published in the *Official Journal of the European Union*.

In its judgment, the Court first of all observed that it is evident from the very wording of Article 254(2) EC that a Community regulation cannot take effect in law unless it has been published in the Official Journal. It went on to state that an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have had the opportunity to make themselves acquainted with it by its proper publication in the Official Journal. The same principles must be observed in respect of national measures implementing Community legislation.

With regard to the case in point, the Court noted that Regulation (EC) No 2320/2002 seeks to impose obligations on individuals in so far as it prohibits on board aircraft certain articles defined in a list annexed to the regulation. Since the annex to Regulation (EC) No 622/2003 was not published, the Court was unable to consider whether the annex also relates to the list of prohibited articles and therefore seeks to impose obligations on individuals. The Court added that it cannot be ruled out, however, that that is the case. Furthermore, according to the Court, the list of prohibited articles does not fall within any of the categories of measures and information which are treated as confidential and which are therefore not published. It follows that, if Regulation (EC) No 622/2003 made adaptations to that list of prohibited articles, it would, by so doing, have to be held invalid. The Court concluded from this that the annex to Regulation (EC) No 622/2003 has no binding force in so far as it seeks to impose obligations on individuals.

In Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (judgment of 1 October 2009) the Court, ruling on an appeal, recalled the fundamental nature of respect for the rights of the defence and penalised their infringement in an antidumping proceeding.

At issue, inter alia, was the failure to comply with the 10-day period laid down under Article 20(5) of Regulation (EC) No 384/96 [8] for sending the Commission's definitive proposals to the Council. In its judgment, the Court began by explaining that the Commission is obliged to comply with that period in order to give undertakings which have been informed of its intention to increase the antidumping duty from that envisaged in its previous communication the opportunity to submit their observations. Next, the Court observed that the failure to comply with the period prescribed can result in annulment of the regulation adopted by the Council only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome, and therefore that the rights of the defence of the undertaking concerned were in fact adversely affected.

[6] Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2003 L 89, p. 9).

[7] Commission Regulation (EC) No 68/2004 of 15 January 2004 amending Commission Regulation (EC) No 622/2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2004 L 10, p. 14).

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

In order to secure the annulment of a Commission decision not to award market economy treatment that has been taken in breach of the 10-day period, the undertaking concerned is not, therefore, required to show that that decision would have been different in content but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error. As regards the application of that principle in this case, the Court took the view, contrary to the Court of First Instance (hereafter in this section 'the General Court'), that, in light of the fact that the Commission had already altered its position twice as a result of the observations submitted by the interested parties, it could not be ruled out that the Commission might once again have altered its position because of the arguments put forward by the undertaking concerned. Therefore, the Court not only set aside the judgment of the General Court but also annulled the contested Council regulation.

With regard, again, to the general principles of Community law, attention is drawn to the Court's refusal to regard the principle of equality of shareholders as a general principle of Community law. The Court held in Case C-101/08 *Audiolux and Others* (judgment of 15 October 2009) that Community law does not include any general principle of law under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when the shareholding conferring or strengthening the control of that dominant shareholder was acquired. According to the Court, the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain. Furthermore, the general principle of equal treatment cannot in itself either give rise to a particular obligation on the part of the dominant shareholder in favour of the other shareholders or determine the specific situation to which such an obligation relates. Nor can it determine the choice between various conceivable means of protection for minority shareholders. According to the Court, such treatment presupposes legislative choices, based on a weighing of the interests at issue and the fixing in advance of precise and detailed rules, and cannot be inferred from the general principle of equal treatment. The general principles of Community law have constitutional status while such treatment is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law.

The prohibition of any discrimination on the basis of nationality and its implications were considered in an unusual procedural context. In Case C-115/08 *ČEZ* (judgment of 27 October 2009) the Court was prompted to rule on that principle under the EAEC Treaty.

In an action for cessation of a nuisance that had been brought before it by property owners against the nuclear power plant at Temelín in the Czech Republic, an Austrian Regional Court asked the Court of Justice whether the authorisation given by the Czech authorities for the operation of the power plant was required to be recognised in Austria in the context of such judicial proceedings, there being no provision for such recognition under Austrian law.

The Court found, first of all, that the industrial activity carried out by the Temelín power plant falls within the scope of application of the Treaty establishing the European Atomic Energy Community (EAEC). It went on to state that undertakings which operate an installation situated in a Member State are usually established in accordance with the law of that State, and that their situation is comparable to that of nationals of that State. Therefore, the difference in treatment which works to the detriment of installations which have received official authorisation in a Member State other than the Republic of Austria must be regarded as a difference in treatment on grounds of nationality. The principle of prohibition of any discrimination on grounds of nationality is a general principle

of Community law which is also applicable under the EAEC Treaty. The difference in treatment applied by the Republic of Austria to the detriment of nuclear installations which have received official authorisation in another Member State must therefore be considered in relation to the EAEC Treaty. Next, the Court stated that discrimination on grounds of nationality cannot be justified by purely economic aims such as the protection of the interests of domestic economic operators. Nor can it be justified by the aim of protecting life, public health, the environment or property rights, since there is a Community legislative framework, of which that authorisation forms a part, which ensures such protection. It follows from this that the Republic of Austria cannot justify the discrimination applied in respect of the official authorisation issued in the Czech Republic for the operation of the nuclear power plant at Temelín.

Although the conditions governing the admissibility of actions for annulment have been the subject of a considerable body of case-law, in Joined Cases C-445/07 P and C-455/07 P *Commission* v *Ente per le Ville Vesuviane* (judgment of 10 September 2009) the Court, ruling on an appeal, was required once again to address the conditions governing the admissibility of actions brought by authorities within a State which are affected by the grant of financial assistance.

After recalling that, under the fourth paragraph of Article 230 EC, a local or regional entity may, to the extent that it has legal personality under national law, institute proceedings against a decision addressed to it or which is of direct and individual concern to it, the Court explained that the condition of being directly concerned requires two cumulative criteria to be met, namely, the contested Community measure must, first, directly affect the legal situation of the individual and, second, leave no discretion to the addressees entrusted with the task of implementing it.

In that regard, unlike the General Court, the Court of Justice took the view that the designation of a regional or local entity in a decision to grant Community financial assistance as the authority responsible for the implementation of a European Regional Development Fund project does not imply that that entity is itself entitled to the assistance. Also, the very fact that the national authorities stated their intention to recover the sums wrongly received by that regional or local entity was, in the absence of obligations in that regard pursuant to Community law, an expression of an autonomous will on their part, which clearly demonstrated a discretion on the part of the Member State concerned. Therefore, the Court decided that the entity in question was not directly concerned by the Commission's decision and, as a result, could only turn to its national courts in order to challenge the legality of national measures relating to the application of a Community act.

The Court also had occasion to recall the requirements of the rule that the parties should be heard, which governs proceedings before the Community Courts.

In Case C-89/08 P *Commission* v *Ireland and Others* (judgment of 2 December 2009) it held that that principle does not, as a rule, merely confer on each party to proceedings the right to be apprised of the documents produced and observations made to the Community Courts by the other party and to discuss them, and does not merely prevent the Community Courts from basing their decision on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment, but also implies a right for the parties to be apprised of pleas in law raised by those Courts of their own motion, on which they intend basing their decisions, and to discuss them. In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings. Accordingly, except in particular cases such as, inter alia, those provided for by the rules of procedure of the Community Courts, those Courts cannot base their decisions on a plea raised of their own motion, even one involving a matter of public policy and — as in the present case — based

on the absence of a statement of reasons for the decision at issue, without first having invited the parties to submit their observations on that plea. The Court stated that, in the analogous context of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), it had already held that it is precisely in deference to that article and to the very purpose of every individual's right to adversarial proceedings and to a fair hearing within the meaning of that provision that the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraphs 8, 9 and 18, and Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30). In the present case, it was apparent from the file and from the hearing before the Court of Justice that, by the judgment under appeal, the General Court annulled the Commission's decision on the basis of a plea that it had raised of its own motion concerning an infringement of Article 253 EC without first having invited the parties, in the course of the written or oral procedures, to submit their observations on that plea. In so doing, the General Court failed to have regard to the rule that the parties should be heard, thereby adversely affecting the interests of the Commission. The Court of Justice explained that, as the Advocate General had noted, while an inadequate statement of reasons is a defect which, in principle, cannot be remedied, the finding of such a defect nevertheless follows from an assessment which, as has consistently been held, must take certain matters into consideration. Such an assessment may be open to debate, particularly where it relates to the reasons for a specific point of fact and of law rather than to the total absence of reasons. In the present case, if the Commission had been in a position to submit its observations, it could, inter alia, have put forward the same arguments as those advanced in relation to the fourth and fifth grounds of the appeal.

With regard to the obligations which Community law places on Member States, the Court had the opportunity, in Case C-445/06 *Danske Slagterier* (judgment of 24 March 2009), to recall the principles of the Member States' non-contractual liability for breach of Community law, while at the same time providing clarification and explanations in relation to their specific application.

As regards the enforcement of that liability, the Court observed that, in the absence of Community legislation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused to individuals by the breach of Community law, provided that the conditions, including time limits, for reparation of loss or damage laid down by national law accord with the principles of equivalence and effectiveness. The laying down in advance of reasonable time limits for bringing proceedings has already been held to be compatible with Community law. The Court added that such a time limit must also be sufficiently foreseeable for individuals. It is for the national court, taking account of all the features of the legal and factual situation at the material time, to determine whether that is the case. It is likewise for the national court to determine whether, as a result of the application by analogy of the time limit laid down in national legislation, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by the Member State concerned are less favourable than those applicable to the reparation of similar domestic loss or damage.

Next, ruling on the specific application of the limitation period, the Court held that Community law does not require the period to be interrupted or suspended where the European Commission has brought infringement proceedings under Article 226 EC. Likewise, in the case of an action for damages against the State for incorrect transposition of a directive, as in the case in point, Community law does not preclude the limitation period from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and on which the further

injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.

Finally, as regards the requisite attitude on the part of the injured party, the Court decided that national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy is compatible with Community law, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which was for the referring court to determine. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

With regard to the law governing the Community's external relations, an opinion and three cases are particularly noteworthy.

In Opinion 1/08 of 30 November 2009, the Court ruled pursuant to Article 300(6) EC, at the request of the Commission, on whether the European Community's competence to conclude with certain members of the World Trade Organisation (WTO) agreements modifying the Schedules of Specific Commitments of the Community and its Member States under the General Agreement on Trade in Services (GATS) is exclusive or merely shared with the Member States, and on what the appropriate legal basis is to which recourse must be had when concluding those agreements.

In this instance, the enlargements which took place in 1995 and 2004 made it necessary to draw up a new schedule, including the 13 new Member States which until then had had their own schedules of commitments in relation to GATS. In order to merge the schedules of commitments of the 13 new Member States with the existing schedule of the Community and of its Member States, the Commission notified the list of modifications and withdrawals of commitments on 28 May 2004. Under Article XXI of GATS, those modifications to the schedule of commitments resulted in requests for compensation for the WTO members affected by the various adjustments to the lists on account of the merger. The Court recalled, first of all, that the choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the agreement that it seeks to conclude to a Treaty provision which empowers it to approve such a measure. It therefore considered the Community's competence to conclude the agreements at issue and the possible legal bases for such a conclusion, the two questions being inextricably linked. Having analysed Article 133(1), (5) and (6) EC, the Court came to the conclusion that the agreements with the affected WTO members fall within the sphere of shared competence of the European Community and the Member States. With regard to the appropriate legal basis, it stated that the 'transport' aspect of the agreements at issue falls, in accordance with the third subparagraph of Article 133(6) EC, within the sphere of transport policy and not that of the common commercial policy. Finally, the Court's analysis led it to conclude that the Community act concluding the abovementioned agreements must be based both on Article 133(1), (5) and (6), second subparagraph, EC and on Articles 71 EC and 80(2) EC, in conjunction with Article 300(2) and (3), first subparagraph, EC.

In Case C-205/06 *Commission* v *Austria* and Case C-249/06 *Commission* v *Sweden* (judgments of 3 March 2009) the Court held, in infringement proceedings brought by the Commission, that, by not having taken appropriate steps to eliminate incompatibilities between their obligations under Community law and provisions on transfer of capital contained in investment agreements entered into with certain third countries, the Kingdom of Sweden and the Republic of Austria had failed to fulfil their obligations under the second paragraph of Article 307 EC. In the cases in point, the various investment agreements at issue contained provisions guaranteeing the free transfer,

in freely convertible currency, of payments connected with an investment. To that extent, those agreements were consistent with the wording of Article 56(1) EC which prohibits any restriction on the movement of capital and of payments between Member States and between Member States and third countries. However, the provisions of Articles 57(2) EC, 59 EC and 60(1) EC confer on the Council power to restrict, in certain specific circumstances, movements of capital and payments between Member States and third countries. The Court first of all observed that, in order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States party to one of the agreements at issue with the Kingdom of Sweden and the Republic of Austria. Those powers of the Council, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international law mechanism which makes that possible. The Court stated, moreover, that the periods of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue were inherently incompatible with the practical effectiveness of those measures. The possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, was too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.

In Case C-228/06 *Soysal and Savatli* (judgment of 19 February 2009) the Court ruled on the 'standstill' clause provided for in Article 41(1) of the Additional Protocol to the EEC–Turkey Association Agreement [9], according to which the contracting parties are to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services as from the date of entry into force of the protocol.

The case concerned two Turkish nationals wishing to make use in the territory of a Member State of the right to freedom to provide services under the Association Agreement. The Court observed, first of all, that that provision, which is laid down clearly, precisely and unconditionally, has direct effect. It went on to interpret the provision in question as prohibiting the introduction, as from the entry into force of the Additional Protocol to the EEC–Turkey Association Agreement in the Member State concerned, of a requirement that Turkish nationals must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

According to the Court, that conclusion cannot be called into question by the fact that the restriction arises from national legislation implementing a provision of secondary Community legislation, in view of the primacy of international agreements concluded by the Community over secondary Community legislation.

### *European citizenship*

Case C-544/07 *Rüffler* (judgment of 23 April 2009) is a good example of the application of European Union citizens' right of movement and right to reside.

[9] Additional Protocol signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60).

Mr Rüffler, a German worker who took up residence in Poland on his retirement, received two pensions which were paid in Germany, one of which was taxed in Germany and the other in Poland. Mr Rüffler applied to the Polish tax authorities for the income tax which he was liable to pay in Poland to be reduced by the amount of health insurance contributions paid in Germany. That application was rejected, however, on the ground that Polish law provides that only contributions paid to a Polish health insurance institution may be deducted from income tax. The case was brought before a national court, then before this Court.

Unlike the applicant and the national court, whose arguments were founded on Articles 12 EC and 39 EC, the Court began by ruling out the application of Article 39 EC since it relates only to workers in active employment or in search of employment. Nevertheless, Mr Rüffler could rely on his status as a citizen of the Union, and thus on the right conferred on him by Article 18 EC to move and reside freely within the territory of the Member States. Therefore, the Court analysed whether the Polish tax system is consistent with that article and decided that, to the extent to which it makes the granting of a tax advantage in connection with contributions conditional on those contributions having been paid to a Polish health insurance body and leads to that advantage being refused to taxpayers who have paid contributions to the body of another Member State, the Polish legislation disadvantages taxpayers who have exercised their freedom of movement by leaving the Member State in which they have carried out all their occupational activity in order to take up residence in Poland. Such a restriction of entitlement to a reduction of income tax amounts to a restriction on the freedom to move and reside within the territory of the Member States which is not objectively justified.

### *Free movement of goods*

In this area, three cases illustrate the difficulty of defining the parameters of a measure having equivalent effect.

In Case C-110/05 *Commission* v *Italy* (judgment of 10 February 2009), after reopening the oral procedure, the Court ruled on the Commission's application for a finding that, by maintaining rules which prohibit mopeds, motorcycles, tricycles and quadricycles from towing a trailer, the Italian Republic had failed to fulfil its obligations under Article 28 EC. According to the Court, a Member State which, for reasons of road safety, prohibits vehicles from towing a trailer specially designed for them and lawfully produced and marketed in other Member States has not failed to fulfil its obligations under that article. The Court stated that such a prohibition certainly constitutes a measure having equivalent effect to quantitative restrictions on imports prohibited by that article to the extent that its effect is to hinder access to the market at issue for trailers specifically designed for motorcycles inasmuch as it has a considerable influence on the behaviour of consumers and prevents a demand from existing in the market at issue for such trailers. However, that prohibition must, in this instance, be regarded as justified by reasons relating to the protection of road safety. Whilst it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions. Although it is possible to envisage that measures other than the prohibition at issue could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.

Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* (judgment of 30 April 2009) related to Austrian provisions on the obligation to sell German-language books at a fixed price, according to which the publisher or importer was required to fix and publish a retail price and an importer was required not to fix a price below the retail price fixed or recommended by the publisher for the State of publication, less any value added tax included in it. According to the Court, although the Austrian legislation concerned selling arrangements for books, by prohibiting importers from fixing a price below that charged in the State of publication, the legislation did not affect the marketing of domestic books and of books from other Member States in the same manner. The Court explained that the legislation in question provided for less favourable treatment for German-language books from other Member States than for domestic books, since it prevented Austrian importers and foreign publishers from fixing minimum retail prices according to the conditions of the import market, whereas the Austrian publishers were free to fix themselves, for their goods, such minimum retail prices for the national market. Such legislation therefore, according to the Court, constituted a restriction of the free movement of goods. The Court confirmed, moreover, that that restriction was not justified. It pointed out, in particular, that the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve them. In the present case, the objective of the protection of books as cultural objects could be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which took the conditions of that market into account. Consequently, the Court held that the Austrian provisions prohibiting importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication constituted an obstacle to the free movement of goods which could not be justified under Community law.

In Case C-142/05 *Mickelsson and Roos* (judgment of 4 June 2009) the Court was asked about the compatibility with, inter alia, Articles 28 EC and 30 EC of Swedish legislation prohibiting the use, except in certain waters, of certain types of jet-ski (personal watercraft), namely those 'of less than four metres in length … which … [have] an internal combustion engine with a water jet unit as [their] primary source of propulsion and … [are] designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, the hull'. According to the Court, Articles 28 EC and 30 EC do not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of such personal watercraft on waters other than designated waterways, provided that: (i) the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which those watercraft may be used; (ii) those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations; and (iii) such measures have been adopted within a reasonable period after the entry into force of those regulations. It is true that where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of such watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, a matter which was for the referring court to ascertain, such regulations may have a considerable influence on the behaviour of consumers who, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product. Such regulations therefore have the effect of hindering the access to the domestic market in question for those goods and therefore constitute measures having equivalent effect to quantitative restrictions on imports prohibited by Article 28 EC. Such regulations may, however, according to the Court, be justified by the aim of the protection of the environment provided that the above conditions are complied with. While a restriction or a prohibition on the use of personal watercraft is an appropriate means for the purpose of ensuring that the environment is

protected, it is also incumbent on the national authorities to show — for the national regulations to be capable of being regarded as justified — that their restrictive effects on the free movement of goods do not go beyond what is necessary to achieve that aim. In that regard, although it is possible to envisage that measures other than the prohibition in question could guarantee a certain level of protection of the environment, the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities. However, since the wording of the national regulations themselves suggests that, on waters which must be designated by implementing measures, personal watercraft may be used without giving rise to risks or pollution deemed unacceptable for the environment, it follows that a general prohibition on using such goods on waters other than general navigable waterways constitutes a measure going beyond what is necessary to achieve the aim of protection of the environment. Furthermore, if the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and in respect of which they consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of Community law of the retroactive application of the most favourable criminal law and the most lenient penalty.

## *Agriculture*

Disputes concerning agricultural matters have shown a marked decline for a number of years and that trend continued in 2009.

Reference is therefore made only to Case C-478/07 *Budějovický Budvar* (judgment of 8 September 2009), which relates to the question of the protection of the name 'BUD' as a designation of origin. The Council's regulation of 20 March 2006 on the protection of geographical indications and designations of origin [10] is intended to assure consumers that agricultural products bearing a geographical indication registered under that regulation have, because of their provenance from a particular geographical area, certain specific characteristics and, accordingly, offer a guarantee of quality due to their geographical provenance. Provided that they fulfil the conditions laid down by the regulation, 'qualified' designations of origin and geographical indications are protected. By contrast, the regulation does not apply to 'simple' geographical indications, that is to say, those which do not require that the goods have a special attribute or a certain reputation associated with their place of origin. However, the protection by a Member State of such simple geographical indications of provenance, which is likely to constitute a restriction on the free movement of goods, can, under certain conditions, be justified under Community law. In this case, proceedings had been brought before the Commercial Court, Vienna, by a Czech brewery with a view to prohibiting a Viennese beverage distributor from marketing under the mark 'American Bud' beer produced by a brewery established in the United States, on the ground that the use of that designation for a beer from a State other than the Czech Republic would be contrary to the provisions of a bilateral convention concluded in 1976 between Austria and the former Czechoslovak Socialist Republic. Pursuant to that convention, the designation 'Bud' was a protected designation and therefore reserved exclusively for Czech products. Having been asked by the Commercial Court under what

(10) Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12).

conditions the designation 'Bud' may be protected under that bilateral convention in respect of beer produced in the Czech Republic, the Court observed that the name 'Bud' could constitute a simple and indirect indication of geographical provenance, that is to say, a name in respect of which there is no direct link between a specific quality, reputation or other characteristic of the product and its specific geographical origin, and which, moreover, is not in itself a geographical name, but which is at least capable of informing the consumer that the product bearing that indication comes from a particular place, region or country. If the Commercial Court were to classify the designation 'Bud' as a simple indication of geographical provenance, it would have to ascertain that, according to factual circumstances and perceptions prevailing in the Czech Republic, the designation 'Bud' is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State and has not become generic in that Member State. In those circumstances, Community law does not preclude national protection of such a simple indication of geographical source, nor, moreover, the extension of that protection by way of a bilateral agreement to the territory of another Member State. Nevertheless, according to the Commercial Court, the designation 'Bud' is to be classified instead as a designation of origin describing products whose special features are attributable to natural or human factors inherent in their place of origin. On that basis, the Commercial Court queried whether the Community regulation on the protection of geographical indications precludes the protection of the designation of origin 'Bud', registration of which has not been sought in accordance with that regulation. On its accession to the European Union, the Czech Republic sought Community protection only in respect of three indications of provenance concerning beer produced in the town of Česke Budějovice, namely 'Budějovické pivo', 'Českobudějovické pivo' and 'Budějovický měšťanský', designating a strong beer called 'Bud Super Strong'. According to the Court, the regulation on the protection of geographical indications and designations of origin is exhaustive in nature, with the result that it precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with the regulation.

### *Free movement of persons, services and capital*

This year, the Court has again delivered numerous judgments relating, first, to the application of the principles of free movement in Community legislation and, second, to the restrictions imposed on the freedoms of movement by certain national rules. A number of cases relate simultaneously to the exercise of a number of freedoms, as a result of which it is more appropriate for the relevant decisions to be presented on the basis of the particular freedom concerned rather than on a judgment-by-judgment basis.

In relation to the freedom of establishment and the free movement of workers, reference must be made to Case C-311/06 *Consiglio Nazionale degli Ingegneri* (judgment of 29 January 2009), which concerns the interpretation of Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration ([11]). The questions referred to the Court for a preliminary ruling related, specifically, to whether the holder of a certificate, obtained by homologation of a diploma, which is issued by an authority of a Member State, does not attest any education and training covered by the education system of that State and is not based on either an examination or professional experience acquired in the latter, may rely on the provisions of that directive for the purpose of

([11]) Council Directive 89/48/EEC of 21 December 1988 (OJ 1989 L 19, p. 16).

gaining entry to a regulated profession in a host Member State. The Court replied in the negative, ruling that a certificate attesting professional qualifications cannot be treated in the same way as a 'diploma' for the purposes of that directive unless those qualifications were acquired, wholly or in part, under the education system of the Member State which issued the certificate in question. Furthermore, a diploma facilitates the taking-up of a profession in so far as it proves the possession of an additional qualification. According to the Court, allowing a person who has merely obtained a qualification awarded by the Member State of origin which does not in itself provide access to a regulated profession nevertheless to gain access to that profession, without the homologation certificate obtained in the other Member State providing evidence that the holder has acquired an additional qualification or professional experience, would be contrary to the principle according to which Member States reserve the option of fixing the minimum level of qualification necessary to guarantee the quality of services provided in their territory.

In relation to the freedom of establishment and, ancillary thereto, the freedom to provide services or the free movement of capital, the Court delivered several judgments regarding national legislation that has the objective of protecting public health.

They include two judgments concerning provisions under Italian and German legislation which stipulate that only pharmacists may own and operate pharmacies. In Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* (judgment of 19 May 2009) the Court held that Articles 43 EC and 48 EC do not preclude such legislation. It is true that such a rule excluding non-pharmacists constitutes a restriction within the meaning of Article 43 EC. However, according to the Court, it may be justified by the protection of public health, more specifically by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality. In view of the very particular nature of medicinal products, the therapeutic effects of which distinguish them substantially from other goods, and the risks to public health and to the financial balance of social security systems resulting from overconsumption or incorrect consumption of medicinal products, the Member States may make persons entrusted with the retail supply of medicinal products subject to strict requirements, including as regards the way in which the products are marketed and the pursuit of profit. In particular, the Member States may restrict the retail sale of medicinal products, in principle, to pharmacists alone, because of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to consumers. In Case C-531/06 *Commission* v *Italy* (judgment of 19 May 2009) the Court adopted similar reasoning in ruling that, by keeping in force legislation which restricts the right to operate a private retail pharmacy to natural persons who have graduated in pharmacy and to operating companies and firms composed exclusively of members who are pharmacists, the Italian Republic had not failed to fulfil its obligations under Articles 43 EC and 56 EC. The Court reached the same conclusion as regards the impossibility for undertakings engaged in the distribution of pharmaceutical products to acquire stakes in companies which operate municipal pharmacies.

By contrast, in Case C-169/07 *Hartlauer* (judgment of 10 March 2009) the Court held that Articles 43 EC and 48 EC preclude national legislation under which authorisation is necessary for the setting up of a private health institution in the form of an independent outpatient dental clinic and authorisation must be refused if there is no need for that outpatient clinic, having regard to the care already offered by contractual practitioners. According to the Court, such legislation is not appropriate for ensuring attainment of the objectives of maintaining a balanced high-quality medical service open to all and preventing the risk of serious harm to the financial balance of social security where it does not also subject group practices to such a system and is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion. If such a prior administrative authorisation scheme is to be justified, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to

circumscribe the exercise of the national authorities' discretion. However, according to the Court, that is not the case if the issue of authorisation to set up a new outpatient dental clinic is subject to the criterion of the number of patients per doctor, which is not fixed or brought in advance to the notice of the persons concerned in any way, or if the prior administrative authorisation scheme is based on a method which is liable to affect the objectivity and impartiality of the treatment of the application for authorisation.

As regards the freedom of establishment and the freedom to provide services, Case C-518/06 *Commission* v *Italy* (judgment of 28 April 2009) concerns Italian legislation requiring all insurance undertakings, including those which have their head office in another Member State but which pursue their business in Italy, to provide third-party liability motor insurance at the request of any potential customer. The Court held that, by maintaining such legislation in force, the Italian Republic had not failed to fulfil its obligations under Articles 43 EC and 49 EC. It is true that such an obligation to contract restricts the freedom of establishment and the freedom to provide services. However, according to the Court, that restriction is justified by a social protection objective, which amounts, essentially, to ensuring that victims of road traffic accidents will be adequately compensated. As regards, in particular, the proportionality of the legislation concerned, the Court noted that it is not essential that a restrictive measure laid down by the authorities of a Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue. Therefore, the fact that some Member States have chosen to establish a different system to ensure that every vehicle owner is able to take out third-party liability motor insurance for a premium that is not excessive does not indicate that the obligation to contract goes beyond what is necessary to attain the objective pursued.

It will be noted that, in the same judgment, the Court also examined Article 9 of Directive 92/49/EEC [12], finding that it defines the scope of home Member State supervision in a non-exhaustive way by providing that financial supervision is to 'include' the state of solvency and the establishment of technical provisions. Nevertheless, that provision cannot be interpreted as meaning that the home Member State should have exclusive supervisory competence extending to the commercial conduct of insurance undertakings. It follows that that provision does not preclude the possibility of controls being exercised by the host Member State over the detailed rules according to which insurance undertakings, operating in that Member State under the freedom of establishment or the freedom to provide services, calculate their insurance premiums, together with the imposition of penalties.

As regards the freedom to provide services, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Baw International* (judgment of 8 September 2009) gave the Court an opportunity to clarify its case-law concerning gaming and betting legislation in the Member States. In that judgment, the Court held that Article 49 EC does not preclude legislation of a Member State which prohibits private operators which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the Internet within the territory of that Member State. According to the Court, while such legislation gives rise to a restriction of the freedom to provide services, in the light of the specific features associated with the provision of games of chance via the Internet that restriction may, however, be regarded as justified by the objective of combating tax evasion and crime. As to whether the system concerned is necessary, the Court observed that the sector involving games of chance offered via the Internet has not been the subject

(12) Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (OJ 1992 L 228, p. 1).

of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that a private operator lawfully offers services in that sector via the Internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the Internet involve different and more substantial risks of fraud by operators to the detriment of consumers compared with the traditional markets for such games. Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.

With regard to the freedom to provide services and the free movement of capital, attention should be drawn to Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* (judgment of 11 June 2009) concerning the recovery period provided for under Netherlands legislation where savings balances and income from those balances are concealed from the national tax authorities. The Court held that Articles 49 EC and 56 EC do not preclude the application by a Member State, where the tax authorities of that Member State have no evidence of the existence of such assets which would enable an investigation to be initiated, of a longer recovery period when the balances are held in another Member State than when they are held in the first Member State. The fact that that other Member State applies banking secrecy is not relevant in that regard. Nor, according to the Court, do Articles 49 EC and 56 EC preclude in such cases the fine imposed for concealment of the foreign assets and income from being calculated as a proportion of the amount to be recovered and over that longer period. The Court found that, while such legislation constitutes a restriction both of the freedom to provide services and of the free movement of capital, it may nevertheless be justified by the need to ensure effective fiscal supervision and to prevent tax evasion, subject to compliance with the principle of proportionality. In relation to that last point, the Court noted that, in the absence of evidence of the existence of items which would enable the tax authorities of a Member State to initiate an investigation, that Member State is unable to request the competent authorities of the other Member State to communicate to it the information necessary to establish correctly the amount of tax due. By contrast, where the tax authorities of a Member State had evidence enabling them to turn to the competent authorities of other Member States, the mere fact that the taxable items concerned are located in another Member State does not justify the general application of an additional recovery period which is in no way based on the time needed to have effective recourse to those mechanisms of mutual assistance.

With regard, finally, to the principle of the free movement of capital, the Court delivered two judgments which are particularly noteworthy.

The cases concerned are, first of all, Case C-318/07 *Persche* (judgment of 27 January 2009), which relates to the delicate issue of gifts to charitable bodies. Having stated that such gifts come within the compass of the provisions of the Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods, the Court held that Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only for gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit. According to the Court, it is indeed permissible for a Member State, as part of its legislation relating to the deduction for tax purposes

of gifts, to apply a difference in treatment between national bodies recognised as charitable and those established in other Member States if the latter bodies pursue objectives other than those advocated by its own legislation. However, a body which is established in one Member State but satisfies the requirements imposed for that purpose by another Member State for the grant of tax advantages is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State. According to the Court, the difference in treatment introduced by the aforementioned legislation constitutes, therefore, a restriction on the free movement of capital. That restriction cannot be justified by the need to safeguard the effectiveness of fiscal supervision or by the fight against tax evasion. In respect of that last point, the Court nevertheless stated that, as regards charitable bodies in a non-member country, it is, as a rule, legitimate for the Member State of taxation to refuse to grant such deductibility if, in particular because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country.

The second case is Case C-567/07 *Woningstichting Sint Servatius* (judgment of 1 October 2009), which arose from a request for interpretation of the Treaty provisions relating to the free movement of capital with a view to assessing whether Netherlands legislation to promote adequate housing is compatible with them. Under that legislation, Netherlands approved housing institutions are required to submit their cross-border property investment projects to a prior administrative authorisation procedure and to demonstrate that the investments concerned are in the interests of housing in the Netherlands. According to the Court, such an obligation constitutes a restriction on the free movement of capital. The Court accepted that requirements related to public housing policy in a Member State and to the financing of that policy can constitute overriding reasons in the public interest and therefore justify such a restriction. The Court stated, however, that a scheme of prior administrative authorisation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law. Therefore, if such a scheme is to be justified, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion, a matter which falls to be determined by the national court.

### *Transport*

In Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* (judgment of 19 November 2009) the Court was called upon to rule on the concept of a delayed flight in connection with Regulation (EC) No 261/2004 ([13]). This regulation provides for flat-rate compensation in the event of cancellation of a flight, but not in the case of a flight delay. Actions were brought before the national courts by passengers claiming such flat-rate compensation on the ground that they had arrived at their airports of destination 22 and 25 hours after the scheduled arrival times.

The Court observed, first of all, that the duration of a delay, even if it is long, is not sufficient for a flight to be regarded as cancelled. A flight which is delayed, irrespective of the duration of the delay, cannot be regarded as cancelled where, apart from the departure time, all the other elements of the flight as originally planned, including in particular the itinerary, remain unchanged.

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

With regard to the right to compensation, the Court went on to find that passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, namely a loss of time, and thus find themselves in a comparable situation which does not justify different treatment. The Court concluded from this that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled, which means that they too can claim flat-rate compensation from the airline where they reach their final destination three hours or more after the scheduled arrival time, unless the delay was caused by extraordinary circumstances. The Court noted that a technical problem in an aircraft cannot be regarded as an extraordinary circumstance unless the problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the airline concerned and are beyond its actual control.

### *Competition rules*

On a very general level, in Case C-429/07 *X BV* (judgment of 11 June 2009) the Court held that the Commission may submit on its own initiative written observations to a national court of a Member State in proceedings relating to the tax deductibility of a fine imposed by the Commission for infringement of Article 81 EC or 82 EC. Article 15 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([14]), entitled 'Cooperation with national courts', provides, in specific circumstances, for the possibility of intervention by the Commission in proceedings pending before national courts. The Court stated that the option for the Commission, acting on its own initiative, to submit written observations to national courts is subject to the sole condition that the coherent application of Article 81 EC or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 EC or 82 EC. In addition, given that there is an intrinsic link between fines and the application of Article 81 EC and 82 EC, the effectiveness of the penalties imposed by the national or Community competition authorities on the basis of Article 83(2)(a) EC is a condition for the coherent application of Articles 81 EC and 82 EC. Consequently, the decision that the court of a Member State must give in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof is capable of impairing the effectiveness of penalties in respect of anti-competitive practices and, therefore, might compromise the coherent application of Article 81 EC or 82 EC. The Court thus found that, in such a situation, Article 15 of Regulation No 1/2003 permits the Commission to submit observations to a national court.

With regard to agreements and concerted practices, the Court was given the opportunity in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline* v *Commission* (judgment of 6 October 2009) to rule on the compatibility with Article 81 EC of agreements aimed at restricting parallel trade in medicinal products ([15]). The Court held that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition. That principle applies to the pharmaceuticals sector. It cannot be a requirement for finding that an agreement has an anti-competitive object that there be proof that the agreement entails disadvantages for final consumers. In addition, the Court noted that, in order to be capable of being exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is not identified with all the advantages which the undertakings participating in the agreement derive from it for their activities, but with appreciable objective advantages of such a kind as to compensate for the

([14]) Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ 2003 L 1, p. 1).

([15]) On the assessment, in relation to Article 82 EC, of unilateral measures restricting parallel trade in pharmaceutical products, see Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia* [2008] ECR I-7139.

resulting disadvantages for competition. The Commission may therefore carry out a prospective analysis. It is sufficient for the Commission to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage. The Court also stated that the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, which must be undertaken in the light of the factual arguments and evidence provided in connection with the request for exemption, may require the nature and specific features of the sector concerned by the agreement to be taken into account if its nature and specific features are decisive for the outcome of the analysis. Taking those matters into account does not mean that the burden of proof is reversed, but merely ensures that the examination of the request for exemption is conducted in the light of the appropriate factual arguments and evidence provided by the party requesting the exemption.

In Case C-511/06 P *Archer Daniels Midland* v *Commission* (judgment of 9 July 2009), concerning an unlawful cartel in the citric acid sector, the Court dealt with the consequences of the classification as leader of a cartel for the rights of defence. Such a classification has significant repercussions on the amount of the fine to be imposed on an undertaking. It constitutes, first, an aggravating circumstance and, second, a circumstance which, where the undertaking cooperates, excludes from the outset the granting of a very substantial reduction of the fine. The Court held that, although the Commission is not required to state in the statement of objections the manner in which it intends to take account of the facts when setting the level of the fine or, in particular, whether it intends, on the basis of those facts, to classify an undertaking as a leader of the cartel, it is required, at the very least, to state those facts. Where the documents and items of evidence which are the source of the facts used as a basis for the classification as a leader of the cartel consist of testimonies of persons involved in the infringement procedure and therefore have a subjective aspect, the fact that those documents are annexed to the statement of objections, without those facts being expressly referred to in the wording itself of the statement, does not enable the undertaking either to assess the credence which the Commission gives to each of the items of evidence or to contest them, or consequently usefully to exercise its rights. In proceeding in that manner, the Commission infringes the rights of defence of the undertaking concerned. The Commission cannot therefore rely on those items of evidence in order to classify the undertaking as a leader of the cartel. In addition, in the absence of other evidence in the statement of objections which makes it possible to arrive at such a classification, the Commission cannot rule out, from the outset, a significant reduction in the fine where the undertaking cooperates. Furthermore, in that same case, the Court confirmed that actual termination of the infringement as soon as the Commission intervenes does not automatically entail a reduction of the fine. It also noted that the actual impact of an infringement on the market is a factor, among others, which must be taken into account in assessing the gravity of the infringement.

By its judgment of 24 September 2009 in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Bank der österreichischen Sparkassen* v *Commission*, which was delivered on the appeal in the '*Lombard Club*' case, the Court held that the fact that an arrangement relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. Since such an arrangement has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about, there is a strong presumption that trade between Member States is affected, which can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

In addition, the Court stated that the Commission is in no way obliged, where the subsidiary has committed an infringement, to verify as a matter of priority whether the conditions for attribution of the infringement to the parent company have been fulfilled. The Commission has the option of penalising either the subsidiary which participated in the infringement or the parent company which controlled it during that period.

As regards the determination of the amount of the fines, the Court held, first of all, that a horizontal price cartel in an economic sector as important as the banking industry cannot, in principle, escape the classification of a very serious infringement, whatever its context. It then stated that, contrary to what the applicants claimed, the General Court did not base its findings in relation to the assessment of the gravity of the infringement merely on the implementation of the cartel, but determined its actual impact on the market. Furthermore, the Court considered that, in the context of the determination of the amount of the fines, the taking into account by the Commission, in order to divide into different categories the companies which assumed the role of lead institutions within a banking group, of the market shares of the members of the group did not constitute imputation of the unlawful conduct of the latter to the lead institutions. It was a step designed to ensure that the level of the fines imposed on the lead institutions adequately reflected the gravity of their unlawful conduct. Finally, the Court noted that, as far as concerns the extent of the reduction of the fine, it is not for the Court to substitute its own assessment for that of the General Court when it exercises its unlimited jurisdiction.

With regard to abuse of a dominant position, the Court delivered two important judgments.

Following the appeal brought by France Télécom against the judgment in Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, the Court upheld that judgment, which had dismissed the action brought against the Commission's decision imposing on France Télécom a fine of EUR 10.35 million for abuse of a dominant position on the French market for high-speed Internet access for residential customers. In response to that company's argument that the General Court infringed Article 82 EC in finding that demonstration of the possibility of recouping losses was not a precondition to making a finding of predatory pricing, the Court stated that that possibility does not constitute a necessary precondition to establishing that such a pricing policy is abusive. Such a possibility constitutes merely a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists. Moreover, in the Court's view, the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them.

In Case C-385/07 P *Der Grüne Punkt — Duales System Deutschland* v *Commission* (judgment of 16 July 2009), after noting that the reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties, the Court stated that, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved. In the case in point relating to the abuse of a dominant position by an

undertaking demanding a fee for the extremely widespread use of its logo, and having regard to the possible effects of the outcome of that dispute, proceedings before the General Court which lasted approximately five years and 10 months, where that could not be justified by any of the particular circumstances of the case, whether it be the complexity of the dispute, the conduct of the parties or by supervening procedural matters raised by the parties, or the adoption by the General Court of measures of organisation of procedure, failed to have regard to the requirement that the case be dealt with within a reasonable time. However, the Court stated that, although it is true that failure on the part of the General Court to adjudicate within a reasonable time constitutes a procedural irregularity, the first paragraph of Article 61 of the Statute of the Court must be interpreted and applied purposively. Since there was nothing to suggest that the failure to adjudicate within a reasonable time may have had an effect on the outcome of the dispute, the setting aside of the judgment under appeal would not have remedied the infringement of the principle of effective legal protection committed by the General Court. In addition, having regard to the need to ensure that Community competition law is complied with, an appellant cannot be permitted to reopen the question of the existence of an infringement, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the General Court concerning that infringement and the administrative procedure relating to it have been rejected as unfounded. Conversely, failure on the part of the General Court to adjudicate within a reasonable time can give rise to a claim for damages brought against the Community under Article 235 EC and the second paragraph of Article 288 EC.

The case-law on State aid was also supplemented by various judgments. In Case C-319/07 P *3F* v *Commission* (judgment of 9 July 2009), the Court, on appeal, had the opportunity to develop its case-law on actions for annulment in State aid cases where the action is brought by a third party who is not the recipient of the aid. The proceedings at first instance concerned an action brought by the main Danish trade union for annulment of a Commission decision declaring compatible with the common market aid granted in the form of an exemption from income tax for seafarers employed on board vessels registered in the Danish International Register for vessels, the register having the aim of keeping under the national flag vessels which were likely to be transferred to flags of convenience. The Commission did so without initiating the formal review procedure under Article 88(2) EC. The General Court dismissed the action as inadmissible, considering that neither the trade union nor its members were individually concerned by the contested decision.

In its judgment, the Court of Justice noted, first of all, that an action brought against a decision not to initiate the formal review procedure is admissible where the applicant has to be regarded as a party concerned, within the meaning of Article 88(2) EC, whose action seeks to safeguard procedural interests. Consequently, it is not excluded that a trade union may be regarded as 'concerned' within the meaning of Article 88(2) EC if it shows that its interests or those of its members might be affected by the granting of aid.

In that regard, the Court pointed out that the question was whether the appellant's competitive position in relation to other trade unions had been affected by the granting of that aid. It cannot be inferred from the fact that an agreement between trade unions and employers could be excluded, by reason of its nature and purpose and the social policy objectives pursued by it, from the scope of the provisions of Article 81(1) EC that collective negotiations or the parties involved in them are likewise, entirely and automatically, excluded from the Treaty rules on State aid, or that an action for annulment which might be brought by those parties would, almost automatically, be regarded as inadmissible because of their involvement in those negotiations. To exclude a priori the possibility that a trade union could show that it is a party concerned within the meaning of Article 88(2) EC, by relying on its role in collective negotiations and the effects on that role of national tax measures regarded by the Commission as aid compatible with the common market, would be

liable to undermine the same social policy objectives, laid down in particular in the first paragraph of Article 136 EC and Article 138(1) EC.

In addition, the Court found that, since it cannot be ruled out that organisations representing the workers of the undertakings benefiting from aid may, as parties concerned within the meaning of Article 88(2) EC, submit observations to the Commission on considerations of a social nature which it can take into account if appropriate, in the present case the Community judicature must, in order to assess whether the appellant's arguments based on the Community guidelines on State aid to maritime transport suffice to establish its status of a party concerned within the meaning of Article 88(2) EC, examine the social aspects of the measure at issue with regard to those guidelines, which contain the legal conditions for assessing the compatibility of the State aid in question.

On appeal against a judgment of the General Court which annulled a Commission decision for failure to state reasons, the Court held, in Case C-494/06 P *Commission* v *Italy and Wam* (judgment of 30 April 2009), that the General Court had rightly found that general reasoning based on the reaffirmation of the principles flowing from the *Tubemeuse* judgment (C-142/87 [1990] ECR I-959) could not, by itself, be considered to satisfy the requirements arising under Article 253 EC, in the light of the case at hand. In the Court of Justice's view, as the aid was intended to finance, by means of loans at reduced rates, expenses for market penetration programmes in non-member States and the grant equivalent was relatively small in amount, the effect of the aid on trade and on intra-Community competition was difficult to discern, and this required a greater effort to state reasons on the part of the Commission. Thus, the mere fact that the recipient undertaking took part in intra-Community trade by exporting a large part of its production within the Union was not sufficient, in respect of such aid, to demonstrate those effects.

In Case C-222/07 *UTECA* (judgment of 5 March 2009), the Court held that Article 87 EC must be interpreted as meaning that a measure adopted by a Member State requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State does not constitute State aid in favour of the cinematographic industry of that Member State. The Court explained that it is not apparent that the advantage given by way of such a measure to the cinematographic industry of the Member State concerned constitutes an advantage granted directly by the State or by a public or private body designated or established by the State. The advantage is the result of general legislation requiring television operators, whether public or private, to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television. In addition, in the Court's view, it does not appear, in the present instance, that the advantage in question is dependent on the control exercised by the public authorities over such operators or on instructions given by those authorities to such operators.

### *Taxation*

Worthy of mention in this field is Case C-357/07 *TNT Post UK* (judgment of 23 April 2009) which, in the context of value added tax, provided the Court with the opportunity to specify the scope of the exemption of 'public postal services', laid down in Article 13A(1)(a) of Sixth Directive 77/388/EEC ([16]). In the main proceedings, the company TNT Post, which offers 'upstream services' for business mail

([16]) 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 1997 L 145, p. 1).

subject to value added tax, challenged the legality of the exemption from tax of postal services supplied by Royal Mail, which is the sole universal postal service provider in the United Kingdom and whose status and obligations were not amended following the liberalisation of the postal market in the United Kingdom in 2006. Giving judgment on a reference for a preliminary ruling, the Court held that the term 'public postal services' in Article 13A(1)(a) of the Sixth Directive covers operators, whether they are public or private, who undertake to provide, in a Member State, all or part of the universal postal service, as defined in Article 3 of Directive 97/67/EC ([17]). In that regard, the exemption provided for in Article 13A(1)(a) has been maintained in the form in which it was originally enacted, notwithstanding the liberalisation of the postal sector. The Court also stated that that exemption applies to the supply by the public postal services acting as such — that is, in their capacity as an — operator who undertakes to provide all or part of the universal postal service in a Member State of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

### *Approximation and harmonisation of laws*

Once again, the case-law in this field has been plentiful. Reference will first be made to two judgments relating to the award of public contracts.

In Case C-573/07 *Sea* (judgment of 10 September 2009) relating to the award of a service of collecting, transporting and disposing of urban waste, the Court noted that it is not contrary to Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Consequently, without prejudice to the determination by the national court of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments, when, first, that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit and, second, through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

The Court also noted that, although it is not inconceivable that shares in a company may be sold to private investors, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty. Opening of the capital to private investors may not be taken into consideration unless there exists, at the time of the award of the public contract, a real prospect in the short term of such an opening.

([17]) Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176, p. 21).

In Case C-480/06 *Commission* v *Germany* (judgment of 9 June 2009) concerning a contract relating to the disposal of waste in a new incineration facility concluded between four Landkreise (administrative districts) and the City of Hamburg Cleansing Department without a tendering procedure, the Court held that a contract which forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste, in so far as it has been concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility, does not fall within the scope of Directive 92/50/EEC [18].

A public authority has the possibility of performing the public interest tasks conferred on it either by using its own resources or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments. In that connection, first, Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

Reference will now be made to a series of judgments in which the Court was required to interpret Community legislation which seeks to supervise commercial practices with a view to consumer protection.

In Case C-489/07 *Messner* (judgment of 3 September 2009) concerning the protection of consumers in respect of distance contracts, the Court dealt with the possibility of claiming compensation from a consumer who, after signing, withdraws from such a contract. The Court held that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC [19] must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation from him for the value of the use of the consumer goods acquired under a distance contract. If the consumer were required to pay such compensation merely because he had the possibility of using the goods whilst they were in his possession, he would be able to exercise his right of withdrawal only against payment of that compensation. That would be clearly at variance with the wording and purpose of Directive 97/7 and would, in particular, deprive the consumer of the possibility of making completely free and independent use of the period for reflection granted to him by that directive. Likewise, the functionality and efficacy of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply as a result of having examined and tested the goods. Since the right of withdrawal is intended precisely to give the consumer that possibility, the fact of having made use thereof cannot have the consequence that the consumer is able to exercise that right only if he pays compensation.

(18) 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).

(19) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of them in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the functionality and efficacy of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

In Case C-243/08 *Pannon GSM* (judgment of 4 June 2009), the Court noted that the consumer protection provided by Directive 93/13/EEC [20] extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfairness of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve. The role of the national court in the area of consumer protection is thus not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction. Where the national court considers such a term to be unfair, it must not apply it, except if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.

Likewise, a national rule if it is not compatible with the directive provides that it is only where the consumer has successfully challenged an unfair contract term before a national court that he is not bound by it. Such a rule excludes the possibility for the national court to assess of its own motion whether a contractual term is unfair.

The Court also stated that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.

Similarly, in Case C-40/08 *Asturcom Telecomunicaciones* (judgment of 6 October 2009), the Court held that a national court hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.

In reaching this conclusion, the Court stated, first, that Article 6(1) of Directive 93/13 is a mandatory provision and, second, that, in view of the nature and importance of the public interest underlying the protection which that directive confers on consumers, Article 6 must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.

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

In Case C-358/08 *Aventis Pasteur* (judgment of 2 December 2009), the Court, after recalling the judgment in *O'Byrne* [21], stated that Article 11 of Directive 85/374/EEC [22] must be interpreted as precluding national legislation which allows the substitution of one defendant for another during proceedings from being applied in a way which permits a 'producer', within the meaning of Article 3 of that directive, to be sued, after the expiry of the period prescribed by that article, as a defendant in proceedings brought within that period against another person.

However, first, Article 11 must be interpreted as not precluding a national court from holding that, in proceedings instituted within the period prescribed by that article against the wholly-owned subsidiary of the 'producer', within the meaning of Article 3(1) of Directive 85/374, that producer can be substituted for that subsidiary if that court finds that the putting into circulation of the product in question was, in fact, determined by that producer.

Second, Article 3(3) of Directive 85/374 must be interpreted as meaning that, where the person injured by an allegedly defective product was not reasonably able to identify the producer of that product before exercising his rights against the supplier of that product, that supplier must be treated as a 'producer' for the purposes, in particular, of the application of Article 11 of that directive, if it did not inform the injured person, on its own initiative and promptly, of the identity of the producer or its own supplier, which it is for the national court to determine in the light of the circumstances of the case.

In relation to unfair commercial practices, the Court was required to interpret Directive 2005/29/EC [23] in Joined Cases C-261/07 and C-299/07 *VTB–VAB* (judgment of 23 April 2009). It held that that directive precludes national legislation which with certain exceptions and without taking account of the specific circumstances — therefore generally and as a preventative measure — imposes a general prohibition of combined offers made by a vendor to a consumer.

The legislation in question laid down the principle that combined offers are prohibited, notwithstanding the fact that such practices are not referred to in Annex I to the directive which exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis.

The Court noted that that directive fully harmonises, at the Community level, the rules on unfair commercial practices. Therefore, Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection.

By establishing a presumption of unlawfulness of combined offers, even though a certain number of exceptions to that prohibition are laid down, national legislation does not meet the requirements of the directive.

In the field of intellectual property rights, two judgments are worthy of note.

[21] Case C-127/04 *O'Byrne* [2006] ECR I-1313.

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

[23] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

First, in Case C-32/08 *FEIA* (judgment of 2 July 2009) the Court held that Article 14(3) of Regulation (EC) No 6/2002 [24], which provides that the right to the Community design vests in the employer where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, unless otherwise agreed or specified under national law, does not apply to a Community design that has been produced as a result of a commission. The Community legislature intended to define the special system set out in Article 14(3) of the regulation by reference to a specific type of contractual relationship, namely that of an employment relationship, which precludes the application of Article 14(3) to other contractual relationships, such as that relating to a Community design that has been produced as a result of a commission.

Where, first, there are unregistered Community designs produced as a result of a commission, second, the national legislation does not deem such designs to be the same as designs developed in the context of an employment relationship, Article 14(1) of Regulation No 6/2002 must be interpreted as meaning that the right to the Community design vests in the designer, unless it has been assigning by way of contract to his successor in title. The possibility of assignment by way of contract of the right to the Community design from the designer to his successor in title within the meaning of Article 14(1) of the regulation both stems from the wording of that article and is consistent with the aims of the regulation. Adapting the protection of Community designs to the needs of all sectors of industry in the Community by means of a contractual assignment of the right to the Community design is likely to help to achieve the essential objective of the enforcement of the rights conferred by a Community design in an efficient manner throughout the territory of the Community. Moreover, enhanced protection for industrial design not only promotes the contribution of individual designers to the sum of Community excellence in the field, but also encourages innovation and development of new products and investment in their production. It is, however, for the national court to ascertain the contents of such a contract and in that regard to determine whether the right to the unregistered Community design has in fact been transferred from the designer to his successor in title, applying, in the context of that assessment, the law on contracts in order to determine who owns the right to the unregistered Community design, in accordance with Article 14(1) of the regulation.

Second, in Case C-240/07 *Sony Music Entertainment* (judgment of 20 January 2009), the Court held that the term of protection of copyright and certain related rights, in this case rights concerning the reproduction of phonograms, laid down by Directive 2006/116/EC [25], is also applicable, pursuant to Article 10(2) thereof, where the subject matter at issue has at no time been protected in the Member State in which the protection is sought. According to the wording of that provision, the first alternative requirement concerns the prior existence of protection for the subject matter at issue in at least one Member State. That provision does not require that Member State to be the State in which the protection for which the directive provides is sought. Moreover, that directive is intended to harmonise the laws of the Member States so as to make terms of protection identical throughout the Community, and to interpret Article 10(2) of Directive 2006/116 as meaning that the application of that requirement is conditional on the prior existence of protection under the national legislation of the Member State in which the protection for which the directive provides is sought, even though such prior protection has been granted in another Member State, would comply neither with the terms of the provision at issue nor with the purpose of the directive.

[24] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

[25] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12)

The Court added that Article 10(2) of Directive 2006/116 is also to be interpreted as meaning that the terms of protection provided for by that directive apply in a situation where the work or subject matter at issue was, on 1 July 1995, protected as such in at least one Member State under that Member State's national legislation on copyright and related rights and where the holder of such rights in respect of that work or subject matter, who is a national of a non-Member State, benefited, at that date, from the protection provided for by those national provisions. The question whether, in the context of the provision, a holder of copyright-related rights in a work or subject matter who is a national of a non-Member State was protected on 1 July 1995 in at least one Member State must be assessed in the light of the national provisions of that Member State and not in the light of the national provisions of the Member State in which the protection for which that directive provides is sought. Such a conclusion is, moreover, supported by the objectives of harmonisation pursued by that directive and, in particular, that of providing for the same starting point for the calculation of the term of protection for copyright-related rights as well as the same term of protection for those rights throughout the Community. It follows that, in respect of a work or subject matter protected on 1 July 1995 in at least one Member State according to the national provisions of that Member State, the fact that the rightholder thus protected is a national of a non-Member State and is not entitled, in the Member State in which the term of protection provided for by Directive 2006/116 is sought, to protection under the national law of that Member State is not decisive for the application of Article 10(2) of that directive. What matters is whether the work or the subject matter at issue was covered by protection on 1 July 1995, under the national provisions of at least one Member State.

Other sectors which have been harmonised at Community level have also given rise to litigation.

In Case C-421/07 *Damgaard* (judgment of 2 April 2009), the Court was required to define more precisely the notion of advertising in the field of medicinal products for human use. A journalist had been charged with having publicly disseminated information about the properties and availability of a medicinal product the marketing of which is not authorised in all of the Member States. Directive 2001/83/EC ([26]) provides for a high degree of consumer protection in the area of information and advertising relating to medicinal products. The Court was therefore asked how Article 86 of Directive 2001/83, as amended by Directive 2004/27/EC ([27]), should be interpreted. It held that dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independently, *de jure* and de facto, of the manufacturer and the seller of such a medicinal product. The Court added that it is for the national court to determine whether that dissemination constitutes a form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products.

In *UTECA,* the Court held that Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC ([28]), more particularly Article 3

([26]) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

([27]) Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use (OJ 2004 L 136, p. 34).

([28]) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

thereof, and Article 12 EC must be interpreted as meaning that they do not preclude Spanish legislation which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State. In the Court's view, irrespective of whether such a measure is in an area covered by that directive, the Member States retain, in principle, jurisdiction to adopt it, provided that they respect the fundamental freedoms guaranteed by the Treaty. Although such a measure — in so far as it relates to the obligation to reserve, for the production of films of which the original language is one of the official languages of the Member State in question, 60% of the 5% of operating revenue reserved for the pre-funding of European cinematographic films and films made for television — constitutes a restriction on several fundamental freedoms, that is to say on the freedom to provide services, freedom of establishment, the free movement of capital and freedom of movement for workers, it may be justified by the objective of defending and promoting one or several of the official languages of the Member State concerned. In that regard, such a measure, in so far as it introduces an obligation to invest in cinematographic films and films made for television the original language of which is one of the official languages of that Member State, appears appropriate to ensure that such an objective is achieved. In addition, it does not appear, in the Court's view, that such a measure goes beyond what is necessary to achieve that objective. Since that measure affects, first of all, only 3% of the operating revenue of the operators, the percentage cannot be considered disproportionate in relation to the objective pursued. Furthermore, such a measure does not go beyond what is necessary to achieve the objective pursued by reason of the mere fact that it does not lay down criteria which would allow the works concerned to be classified as 'cultural productions'. Since language and culture are intrinsically linked, the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty. Nor does such a measure go beyond what is necessary to achieve the objective pursued by reason of the mere fact that the beneficiaries of the financing concerned are mostly cinema production undertakings in that Member State. The fact that the criterion on which that measure is based, namely the linguistic criterion, may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language appears inherent to the objective pursued. Such a situation cannot, of itself, constitute proof of the disproportionate nature of that measure without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages. The Court noted, with regard to Article 12 EC, that that provision applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination. However, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination was implemented by Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively. Since it follows from the foregoing that the measure at issue does not appear contrary to those provisions of the Treaty, it cannot be considered contrary to Article 12 EC either.

### *Trade marks*

In this field, Case C-301/07 *PAGO International* (judgment of 6 October 2009) merits consideration. Here, the Court clarified the conditions which a trade mark needs to satisfy to benefit from

a 'reputation' for the purposes of Article 9(1)(c) of Regulation (EC) No 40/94 [29]. Drawing an analogy with Case C-292/00 *Davidoff* [2003] ECR I-389, the Court held, first, that, notwithstanding the wording of Article 9(1)(c) and in the light of the overall scheme and objectives of the system of which Article 9(1)(c) of the regulation is part, the protection accorded to Community trade marks with a reputation cannot be less where a sign is used for identical goods and services than where a sign is used for non-similar goods or services. Therefore, in the Court's view, that article also benefits a Community trade mark with a reputation in the case of goods or services similar to those for which that mark is registered. The Court then held that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the reputation of the mark PAGO International throughout the territory of a Member State, namely Austria, that territory could be considered to constitute a substantial part of the territory of the Community.

## *Social policy*

In this field the Court has been faced with novel issues. Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK and Others* (judgment of 10 September 2009) provided the Court with the opportunity to give judgment, for the first time, on the obligation to provide information and hold consultations laid down in Article 2 of Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies [30].

As regards the time at which the obligation to hold consultations arises, the Court considered that it is the adoption, within a group of undertakings, of strategic decisions or of changes in activities which compel the employer to contemplate or to plan for collective redundancies that gives rise to an obligation on that employer to consult with workers' representatives. In addition, it noted that the time at which that obligation arises does not depend on whether the employer is already able to supply to the workers' representatives all the information required in Article 2(3)(b) of Directive 98/59.

So far as concerns designation of the person responsible for the obligation to hold consultations, the Court stated that the only party on whom the obligations to inform, consult and notify are imposed is the employer. An undertaking which controls the employer, even if it can take decisions which are binding on the latter, does not have the status of employer. In the case of a group of undertakings consisting of a parent company and one or more subsidiaries, the obligation to hold consultations with the workers' representatives falls on the subsidiary which has the status of employer only once that subsidiary, within which collective redundancies may be made, has been identified.

As regards the conclusion of the consultation procedure, the Court stated that, in the case of a group of undertakings, the consultation procedure must be concluded by the subsidiary affected by the collective redundancies before that subsidiary, on the direct instructions of its parent company or otherwise, terminates the contracts of the employees who are to be affected by those redundancies.

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

[30] Council Directive 98/59/EC of 20 July 1998 (OJ 1998 L 225, p. 16).

In Case C-12/08 *Mono Car Styling* (judgment of 16 July 2009), the Court ruled, here too for the first time, on the question whether Directive 98/59 [31] grants an individual right to employees who wish to query whether the information and consultation procedure has been complied with.

In its view, the right to information and consultation provided for in Directive 98/59, in particular in Article 2, is intended to benefit workers as a collective group and is therefore collective in nature. The level of protection of that collective right required by Article 6 of the directive is reached where the applicable national rules give workers' representatives a right to act which is not limited by specific conditions. Article 6 of Directive 98/59, read in conjunction with Article 2, is to be interpreted, therefore, as not precluding national rules which introduce procedures intended to permit both workers' representatives and the workers themselves as individuals to ensure compliance with the obligations laid down in that directive, but which limit the individual right of action of workers in regard to the complaints which may be raised and make that right subject to the requirement that workers' representatives should first have raised objections with the employer and that the worker concerned has informed the employer in advance of his intention to query whether the information and consultation procedure has been complied with.

The Court also noted that, in applying domestic law, the national court is required, applying the principle of interpreting national law in conformity with Community law, to consider all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of a directive in order to achieve an outcome consistent with the objective pursued by the directive. Accordingly, since Article 2 of Directive 98/59 precludes national rules which reduce the obligations of an employer who intends to proceed with collective redundancies below those laid down in that article, it is the task of the national court to ensure, within the limits of its jurisdiction, that the obligations binding such an employer are not reduced below those laid down in Article 2 of that directive.

In Case C-116/08 *Meerts* (judgment of 22 October 2009), the Court was presented with the opportunity to define more precisely the rights of an employee who has been dismissed while on part-time parental leave, as set out in Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [32].

On the basis of the fact that Clause 2.6 of the framework agreement states that rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are to be maintained as they stand until the end of parental leave, the Court held that it is apparent from both the wording of that provision and its context that that provision is intended to avoid the loss of or reduction in rights derived from an employment relationship, acquired or being acquired, to which the worker is entitled when he starts parental leave, and to ensure that, at the end of that leave, with regard to those rights, he will find himself in the same situation as that in which he was before the leave. Having regard to the objective of equal treatment between men and women which is pursued by the framework agreement on parental leave, the obligation to respect rights acquired or being acquired must be interpreted as articulating a particularly important principle of Community social law which cannot be interpreted restrictively. It is clear from the objectives of the framework agreement on parental leave that the concept of 'rights acquired or in the process of being acquired' in the framework agreement covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is

(31) See preceding footnote.

(32) Council Directive 96/34/EC of 3 June 1996 (OJ 1996 L 145, p. 4), as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24).

entitled to claim from the employer at the date on which parental leave starts. Such rights and benefits include all those relating to employment conditions, such as the right of a full-time worker on part-time parental leave to a period of notice in the event of the employer's unilateral termination of a contract of indefinite duration, the length of which depends on the worker's length of service in the company and the aim of which is to facilitate the search for a new job. That body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract. National legislation which would result in the rights flowing from the employment relationship being reduced in the event of parental leave could discourage workers from taking such leave and could encourage employers to dismiss workers who are on parental leave rather than other workers. This would run directly counter to the aim of the framework agreement on parental leave, one of the objectives of which is to make it easier to reconcile working and family life.

The Court came to the conclusion that the framework agreement on parental leave precludes, where an employer unilaterally terminates a worker's full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place.

In Case C-88/08 *Hütter* (judgment of 18 June 2009), the Court held that national law which excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded amounts to discrimination on the grounds of age which cannot legitimately be justified and which is, therefore, contrary to Community law.

In its judgment, it found that such legislation, which establishes a difference in treatment between persons based on the age at which they acquired their professional experience, establishes a difference in treatment directly based on the criterion of age, within the meaning of Article 2(1) and (2)(a) of Directive 2000/78/EC ([33]).

The Court then noted that the objectives pursued by the legislation at issue, namely to not treat a general secondary education less favourably than a vocational education and to promote integration into the labour market of young people who have pursued a vocational education, are legitimate objectives for the purposes of Article 6(1) of Directive 2000/78.

None the less, the Court found that those two objectives appeared contradictory in so far as the contested measure could not promote them both at the same time. In addition, as regards the aim of not treating a general secondary education less favourably than a vocational education, the Court pointed out that the criterion of the age at which previous experience was acquired applied irrespective of the type of education pursued. In those circumstances, that criterion did not appear appropriate for achieving the aim. As regards the aim of promoting integration into the labour market of young people who have pursued a vocational education, the Court pointed out that non-accreditation of experience acquired before the age of 18 applied without distinction to all contractual public servants, whatever the age at which they were recruited. Since it did not take into account people's age at the time of their recruitment, that rule was not therefore appropriate

([33]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

for the purposes of promoting the entry into the labour market of a category of workers defined by their youth.

The Court came to the conclusion that the discrimination brought about by the legislation at issue could not be regarded as justified and was, therefore, contrary to Articles 1, 2 and 6 of Directive 2000/78.

### *Environment*

As in previous years, disputes relating to environmental law have been very prominent before the Court.

In Case C-76/08 *Commission* v *Malta* (judgment of 10 September 2009), the Court was required to examine whether, as submitted by the Commission, the Republic of Malta had failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [34], by authorising the opening of the spring hunting season for quails and turtle doves from 2004 to 2007.

Under Article 7(1) and (4) of that directive, those two species must not be hunted during their return to their rearing grounds. However, Article 9(1) provides for a system of exemptions to those prohibitions where there is no other satisfactory solution.

The Court stated that, even though the two species at issue are actually present in autumn in Malta, in the years in question hunters were able to capture only an inconsiderable number of birds during that period. Moreover, in autumn, only a restricted part of Malta is visited by those birds. Finally, the population of those two species of bird is not below a satisfactory level. It is apparent, in particular, from the International Union for Conservation of Nature and Natural Resources' Red List of Threatened Species that the species in question are listed in the 'least concern' category. The Court considered that, in those very specific circumstances, the hunting of those two species during the autumn season could not be regarded as constituting, in Malta, a satisfactory alternative solution to the opening of the spring hunting season.

However, that finding, far from opening up, without limit, the possibility of authorising hunting in spring, does so only so far as it is strictly necessary and provided that the other objectives pursued by the directive are not jeopardised. Thus, the Court considered that the opening of a spring hunting season — during which the two hunted species are returning to their rearing grounds — which resulted in a mortality rate three times higher for quails and eight times higher for turtle doves than for the autumn hunting season did not constitute an adequate solution that was strictly proportionate to the directive's objective of conservation of the species.

In those circumstances, the Court found that the Republic of Malta had failed to comply with the conditions for a derogation and, therefore, had failed to fulfil its obligations under the directive.

In Case C-165/08 *Commission* v *Poland* (judgment of 16 July 2009), the Court was required to examine whether, as claimed by the Commission, the Republic of Poland had failed to fulfil its obli-

[34] OJ 1979 L 103, p. 1.

gations under Directives 2001/18/EC [35] and 2002/53/EC [36] by imposing a general prohibition on the marketing of genetically modified seed varieties and their inclusion in the national catalogue of varieties.

The Republic of Poland submitted, in an original manner, that Directives 2001/18 and 2002/53 could not be applied in the case in point because they pursued the objectives of freedom of movement, protection of the environment and public health, whereas the national legislation pursued ethical or religious objectives. In other words, the contested national provisions were actually outside the scope of those directives, which meant that the obstacles to the free circulation of GMOs to which they gave rise, potentially in breach of Article 28 EC, could in some circumstances be justified under Article 30 EC.

The Court considered that, for the purposes of deciding the case, it was not necessary to rule on the question whether the Member States retained an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which derogated from the provisions of Directives 2001/18 or 2002/53. It was sufficient to hold that the Republic of Poland had failed to establish that the true purpose of the contested national provisions was in fact to pursue the objectives relied upon. In those circumstances, general prohibitions such as those laid down in the contested national provisions infringed the obligations of the Republic of Poland under Articles 22 and 23 of Directive 2001/18 and Articles 4(4) and 16 of Directive 2002/53. The Court concluded that a Member State which prohibited the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties failed to fulfil its obligations under Articles 22 and 23 of Directive 2001/18 and under Articles 4(4) and 16 of Directive 2002/53.

In Case C-254/08 *Futura Imobiliare and Others* (judgment of 16 July 2009) which concerned the calculation of waste tax, giving rise to the application of the 'polluter pays' principle, the Court interpreted Article 15(a) of Directive 2006/12/EC [37] as meaning that, as Community law currently stands, that provision does not preclude national legislation which, for the purposes of financing an urban waste management and disposal service, provides for a tax or charge calculated on the basis of an estimate of the volume of waste generated by users of that service and not on the basis of the quantity of waste which they have actually produced and presented for collection.

The national court based its reasoning on the fact that, in a situation where holders of waste have it handled by a collector, Article 15(a) of Directive 2006/12 provides that, in accordance with the 'polluter pays' principle, the cost of disposing of the waste must be borne by those holders. It is often difficult, indeed onerous, to determine the precise volume of urban waste presented for collection by each 'holder'. Accordingly, recourse to criteria founded, first, on the waste-production capacity of the 'holders', calculated on the basis of the surface area of the property which they occupy and of its use, and/or, second, on the nature of the waste produced can provide a means of calculating the costs of disposing of that waste and allocating them among the various 'holders', since those two parameters are such as to have a direct impact on the amount of the costs.

(35) Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

(36) Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species (OJ 2002 L 193, p. 1).

(37) Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

However, the Court stated that it was incumbent upon the national court to review, on the basis of the matters of fact and law placed before it, whether the tax for the disposal of private solid urban waste resulted in the allocation to certain 'holders', in the case in point hotel establishments, of costs which were manifestly disproportionate to the volumes or nature of the waste that they were liable to produce.

### *Visas, asylum and immigration*

Cases in the field of asylum are increasing in number and the Court has had the opportunity to interpret several directives in this field for the first time.

Thus, in Case C-19/08 *Petrosian and Others* (judgment of 29 January 2009), the Court dealt with the procedure for transferring an application for asylum and had the opportunity, in that regard, to interpret Regulation (EC) No 343/2003 [38]. The Petrosian family, of Armenian origin, had applied for asylum in France, then in Sweden. The Swedish national authorities wanted to send the family back to France. However, that decision was challenged several times by the Petrosian family, with the result that the six-month period laid down in Article 20(1)(d) of the regulation had expired. That period, which 'runs as from the time of the decision on an appeal or review', is intended to enable the Member State in which the application for asylum was made to transfer that application, whereas the expiry of that period makes that Member State responsible. The main issue in the case was the determination of the event which could trigger the six-month period.

In its answer the Court made a distinction between two hypotheses, namely where national legislation provides for an appeal with suspensive effect and where it does not. Thus, it decided that, where there is no provision for an appeal to have suspensive effect, the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the Member State requested to agree to the transfer agrees to take back the person concerned. By contrast, if the legislation of the Member State requesting the transfer provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation. In the light of the objective pursued by setting a period for the Member States, the start of that period should be determined in such a manner as to allow the Member States a six-month period which they are deemed to require in full in order to determine the practical details for carrying out the transfer. In addition, the Court took account of the observance of judicial protection and of the principle of procedural autonomy of the Member States.

Then, in Case C-465/07 *Elgafaji* (judgment of 17 February 2009), the Court had to give judgment on the extent of the subsidiary protection granted by Article 15 of Directive 2004/83/EC [39] on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees. The question referred asked whether the condition that there be a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' laid down in Article 15(c) must, as required by the European Court of Hu-

[38] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

[39] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

man Rights, be understood as meaning that the applicant for subsidiary protection has to adduce evidence that he is specifically targeted by reason of factors particular to his circumstances.

The Court answered that question in the negative. First of all, it affirmed the autonomy of Article 15 by stating that its content is different from that of Article 3 of the European Convention of Human Rights (ECHR) and must therefore be interpreted independently. Then, it held that the harm defined in Article 15(c) as consisting of a 'serious and individual threat to the applicant's life or person' covers a more general risk of harm than the other two types of harm defined in that article, such as the death penalty, which cover situations in which the applicant is specifically exposed to the risk of a particular type of harm. In addition, the threats referred to are inherent in a general situation of 'international or internal armed conflict'.

Lastly, the violence in question which gives rise to those threats is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances. In that regard, the Court stated that the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. The Court concluded by noting that the interpretation given of Article 15(c) was fully compatible with the European Convention of Human Rights and in particular with the case-law relating to Article 3 thereof.

Finally, the question referred in Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* (judgment of 22 October 2009) concerned the issue whether the Convention implementing the Schengen Agreement ('the CISA') and the Schengen Borders Code require the competent authorities in the Member States to adopt a decision to expel any third-country national who has been determined to be unlawfully present on the territory of a Member State. In that case, two expulsion orders were adopted against Mrs Garcia and Mr Cabrera because they were unlawfully present on Spanish territory. According to Spanish law and the interpretation thereof, the penalty imposed in such an instance is to be restricted to a fine, except where there is an additional factor which would justify replacing the fine with expulsion. Mrs Garcia and Mr Cabrera brought an action before the relevant national court, which, in turn, made a reference to the Court.

In its response, the Court noted, first of all, that there was a discrepancy between the wording of the Spanish-language version and the other language versions of the provision concerned. However, given that the Spanish version appeared to be the only language version in which expulsion appeared as an obligation and not an option for the authorities, the Court concluded that the real intention of the legislature was not to impose an obligation on the Member States to expel. In addition, the Court noted that the CISA favours the voluntary departure of a third-country national who is in a Member State unlawfully. Furthermore, although the CISA provides that, in certain circumstances, a third-country national must be expelled from a Member State on the territory of which he was apprehended, that consequence is, however, subordinate to the conditions laid down in the national law of the Member State concerned. Consequently, the Court considered that it is for the national law of each Member State to adopt, particularly with regard to the conditions under which expulsion may take place, the means for applying the basic rules established in the CISA relating to third-country nationals who do not fulfil, or no longer fulfil, the short-stay conditions for its territory. The Court concluded that neither the CISA nor the Schengen Borders Code obliges the Member States to adopt a decision to expel a third-country national who is unlawfully present on the territory of a Member State.

## *Judicial cooperation in civil matters and private international law*

A number of important judgments were delivered in 2009 in the field of private international law. Worthy of mention, first of all, is Case C-133/08 *ICF* (judgment of 6 October 2009) in which the Court was required to interpret, for the first time, the Rome Convention on the law applicable to contractual obligations [40]. Several questions relating to Article 4 of the Convention were referred to the Court, which began by noting that the Convention was concluded in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention on jurisdiction and the enforcement of judgments [41]. According to the Rome Convention, the parties are free to choose the law applicable to the contract which they enter into. If no choice is made, the contract is to be governed by the law of the country with which it is most closely connected. The Convention also provides for a presumption in favour of the place of residence of the party who effects the performance characteristic of that contract and for special connecting criteria, in particular as regards contracts for the carriage of goods. In that regard, the Court held that the connecting criterion provided for in Article 4(4) of the Convention applies to a charter-party, other than a 'single voyage charter-party', only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods. In addition, the Court held that Article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected. Finally, the Court held that a part of a contract may exceptionally be governed by a law other than that which applies to the rest of the contract where the object of that part is independent.

The interpretation of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [42] and of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) has also given rise to several judgments which are worthy of mention. Case C-420/07 *Apostolides* (judgment of 28 April 2009) originated in the partition of Cyprus following the intervention of Turkish troops in 1974. The Republic of Cyprus, which joined the European Union in 2004, has control of only the southern part of the island, whereas the northern part became the Turkish Republic of Northern Cyprus, which is recognised only by Turkey. In those circumstances, a protocol annexed to the Act of Accession of the Republic of Cyprus suspends the application of Community law in the areas over which the government of that Member State does not exercise effective control. A Cypriot national applied for the recognition and enforcement of two judgments delivered by a court established in the southern part of the island, ordering two British citizens to vacate a property situated in the northern part. The referring court, a court in the United Kingdom, referred several questions to the Court of Justice concerning the interpretation and application of Regulation No 44/2001. The Court held, first of all, that the derogation laid down in the protocol does not preclude the application of Regulation No 44/2001 to a judgment which is given by a Cypriot court sitting in the government-controlled area, but concerns land situated in the northern area. The Court then noted that the fact that the property is situated in an area over which the government does not exercise effective control and, therefore,

[40] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

[41] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32).

[42] Council Regulation (EC) No 44/2001 of 22 December 2000 (OJ 2001 L 12, p. 1).

that the judgments at issue cannot, as a practical matter, be enforced where the land is situated does not constitute a ground for refusal of recognition and enforcement of judgments in another Member State. Article 22(1) of Regulation No 44/2001 concerns the international jurisdiction of the courts of the Member States and not their domestic jurisdiction. The Court also noted, in relation to the exception of public policy of the Member State in which recognition is sought, that a court cannot, without undermining the aim of Regulation No 44/2001, refuse recognition of a judgment emanating from a court in another Member State solely on the ground that it considers that national or Community law was misapplied in that judgment. In such a situation, the exception applies only where the error of law means that the recognition or enforcement of the judgment constitutes a manifest breach of an essential rule of law in the national legal order of the Member State concerned. Finally, the Court held that the recognition or enforcement of a default judgment cannot be refused where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

In Case C-185/07 *Allianz (formerly Riunione Adriatica di Sicurta)* (judgment of 10 February 2009), the Court held that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State (anti-suit injunction) ([43]) on the ground that such proceedings would be contrary to an arbitration agreement. The Court noted that proceedings which lead to the making of an anti-suit injunction cannot come within the scope of Regulation No 44/2001 but may have consequences which undermine its effectiveness. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001. The Court thus held that, if, because of the subject matter of the dispute, that is, the nature of the rights to be protected in proceedings, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement also comes within its scope of application. It follows that the objection of lack of jurisdiction on the basis of the existence of an arbitration agreement comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on the objection and on its own jurisdiction, pursuant to the regulation. The use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Regulation No 44/2001, from ruling on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction. An anti-suit injunction is therefore contrary to the general principle that every court seised itself determines, under the rules which it must apply, whether it has jurisdiction to resolve the dispute before it. In addition, it runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions. It is therefore not compatible with Regulation No 44/2001.

The scope of Regulation No 44/2001 was also at the centre of Case C-111/08 *SCT Industri* (judgment of 2 July 2009). The Court held that that regulation was not applicable to an action to recover ownership brought in the context of insolvency proceedings. More specifically, taking into account the close link which it has with bankruptcy proceedings, an action seeking the annulment of a transfer of shares effected by a liquidator in the context of insolvency proceedings falls under the exception to the application of Regulation No 44/2001 concerning bankruptcy.

After having considered, in Case C-386/05 *Color Drack* [2007] ECR I-3699, contracts for the sale of goods providing for several places of delivery, in Case C-204/08 *Rehder* (judgment of 9 July 2009)

([43]) See also Case C-159/02 *Turner* [2004] ECR I-3565.

the Court was faced with contracts for the provision of services providing for several places at which services are provided, and more specifically, air transport contracts. It held, in this case, that the application of the rule of special jurisdiction in matters relating to a contract, laid down in Article 5(1) of Regulation No 44/2001, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case. In the light of the objectives of proximity and foreseeability, it is therefore necessary, where there are several places at which services are provided in different Member States, to identify the place with the closest linking factor between the contract in question and the court having jurisdiction, in particular the place where, under the contract, the main provision of services is to be carried out. In the case of air transport of passengers from one Member State to another, carried out on the basis of a contract with only one airline, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 establishing common rules on compensation to passengers (44) is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft.

In Case C-394/07 *Gambazzi* (judgment of 2 April 2009), the Court ruled on the notion of 'judgment' for the purposes of the provisions on recognition and execution in the Brussels Convention and on the scope of the ground for refusal of recognition and enforcement based on an infringement of the public policy of the State in which enforcement is sought. First, it held that judgments and orders given in default of appearance are 'judgments' where they are given in civil proceedings which, as a rule, adhere to the adversarial principle. Article 25 of the Brussels Convention refers, without distinction, to all judgments given by a court or tribunal of a Contracting State. For such decisions to fall within the scope of the Convention, it is sufficient that, before their recognition and enforcement are sought, they have been, or have been capable of being, the subject in the State of origin of an inquiry in adversarial proceedings. The Court stated that the fact that the court has entered judgment as if the defendant, who entered appearance, was in default, is not sufficient to call into question categorisation as a 'judgment'. Second, the Court held that the court of the State in which enforcement is sought may take into account, with regard to the exception of public policy, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by other orders made earlier in the same proceedings. The exception of public policy may be used if it appears to it that the exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard. Review by the national court must relate not only to the circumstances in which the decisions were taken, but also to the circumstances in which the injunctive orders were adopted, and in particular to verifying the legal remedies made available to the defendant and the possibility for him to be heard.

The Court was also required to interpret certain provisions of Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 (45). First of all, reference shall be made to Case C-168/08 *Hadadi* (judgment of 16 July 2009), in which the Court gave judgment on the nationality criterion of couples in choosing the court which has jurisdiction in divorce matters. In that case, two spouses, both of Franco-Hungarian nationality, had both applied for a divorce in one of those countries. The Court noted, first of all, that Regulation No 2201/2003 does not make

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

(45) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

a distinction according to whether a person holds one or several nationalities. Consequently, the provision of that regulation under which the courts of the Member State of which the spouses hold the nationality are to have jurisdiction cannot be interpreted in one way where the two spouses have the same dual nationality and another way where they have only the same, single, nationality. Where the spouses hold both the nationality of the Member State of the court seised and that of another Member State, the court seised must take into account the fact that the spouses both have the nationality of the other Member State and that the courts of that other Member State could properly have been seised of the case under that regulation. The Court then stated that the rules governing jurisdiction in divorce matters laid down in that regulation are based on a number of alternative objective grounds with no hierarchy being established between them. Therefore, the coexistence of several courts having jurisdiction is permitted, without any hierarchy being established between them. The Court concluded that, where spouses each hold the nationality of the same two Member States, the regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. It continued by stating that the courts of the Member States of which the spouses hold the nationality have jurisdiction under that regulation and the spouses may seise the court of the Member State of their choice.

Second, in Case C-523/07 *A* (judgment of 2 April 2009), the Court interpreted, for the first time, the concept of 'habitual residence' of the child as a criterion for the jurisdiction of the courts in matters of parental responsibility. Since Regulation No 2201/2003 makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of the notion of 'habitual residence', the Court held that it is an autonomous concept. Having regard to the context and the objective of that regulation, the habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. In particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. The Court then noted that it is for the national court to determine the habitual residence of the child, taking account of all the circumstances specific to each individual case. In addition, the Court explained the system of urgent or protective measures within the meaning of Article 20 of Regulation No 2201/2003. Such measures may be decided by a national court if they are urgent. They must be taken in respect of persons in the Member State concerned and must be provisional. The taking of those measures, adopted in the best interests of the child, and their binding nature are determined in accordance with national law. Once the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, if the protection of the best interests of the child so requires, the national court which declared that it did not have jurisdiction must inform the court of another Member State having jurisdiction that such a measure has been taken.

The service of notarial acts in the absence of legal proceedings was at issue in Case C-14/08 *Roda Golf & Beach Resort* (judgment of 25 June 2009). The Court held in that case that the term 'extrajudicial document', within the meaning of Article 16 of Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [46], is a Community law concept. The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice and the transfer, from the EU Treaty to the EC Treaty, of the body of rules enabling measures in the field of judicial cooperation in civil matters having cross-border implications to be adopted testifies to the will of the Member States to anchor such measures firmly

(46) Council Regulation (EC) No 1348/2000 of 29 May 2000 (OJ 2000 L 160, p. 37).

in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously. The Court held that the service of notarial acts in the absence of legal proceedings falls within the scope of Regulation No 1348/2000. Given that the system for intra-Community service seeks to ensure the proper functioning of the internal market, the judicial cooperation referred to in Article 65 EC and Regulation No 1348/2000 cannot be limited to legal proceedings alone. That cooperation may also manifest itself in the absence of legal proceedings if it has cross-border implications and is necessary for the proper functioning of the internal market. The Court noted that the broad definition of the concept of extrajudicial document is unlikely to place an excessive burden on the resources of the national courts since, first, the Member States may also designate as transmitting agencies and receiving agencies for the purpose of service bodies other than those courts and, second, the Member States may provide for the option of effecting service directly by post to persons residing in another Member State.

### *Police and judicial cooperation in criminal matters*

In Case C-123/08 *Wolzenburg* (judgment of 6 October 2009), the Court was asked to give a ruling on the issue of the compatibility with European Union law of national legislation providing for differential treatment of nationals of one Member State and those from other Member States in relation to the refusal to execute a European arrest warrant. Contrary to the system in place for Netherlands nationals, the Netherlands legislation implementing Framework Decision 2002/584/JAI on the European arrest warrant (47) provides an exception to such execution for nationals of other Member States only if they have lawfully resided in the Netherlands for a continuous period of five years and they are in possession of a residence permit of indefinite duration. The Court began by noting that the first paragraph of Article 12 EC is applicable since the Member States cannot, in the context of the implementation of a framework decision adopted on the basis of the EU Treaty, infringe Community law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States. The Court then stated that Article 4(6) of Framework Decision 2002/584 is to be interpreted as meaning that, where a citizen of the Union is at issue, the Member State of execution of the warrant cannot, in addition to a condition as to the duration, make application of the ground for non-execution of the warrant subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration. Finally, the Court came to the conclusion that the principle of non-discrimination laid down in Article 12 EC does not preclude legislation of a Member State of execution under which the competent judicial authority of that State is to refuse to execute a European arrest warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence as a citizen of the Union, subject to the condition that that person has lawfully resided for a continuous period of five years in that Member State of execution. The Court justified that solution by stating that that condition, first, aims to ensure that nationals of another Member State are sufficiently integrated in the Member State of execution and, second, does not go beyond what is necessary to attain that objective.

(47) Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

# B — Composition of the Court of Justice

(Order of precedence as at 14 December 2009)

*First row, from left to right:*

C. Toader, President of Chamber; E. Levits, President of Chamber; P. Mengozzi, First Advocate General; K. Lenaerts, President of Chamber; A. Tizzano, President of Chamber; V. Skouris, President of the Court; J. N. Cunha Rodrigues, President of Chamber; J.-C. Bonichot, President of Chamber; R. Silva de Lapuerta, President of Chamber; P. Lindh, President of Chamber; C. W. A. Timmermans, Judge.

*Second row, from left to right:*

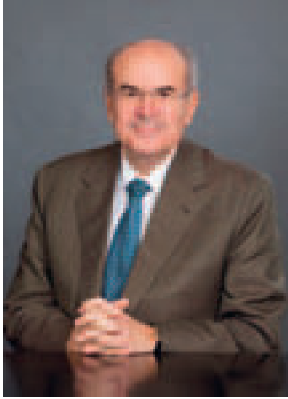
L. Bay Larsen, Judge; U. Lõhmus, Judge; M. Ilešič, Judge; G. Arestis, Judge; P. Kūris, Judge; J. Kokott, Advocate General; A. Rosas, Judge; K. Schiemann, Judge; E. Juhász, Judge; A. Borg Barthet, Judge; J. Malenovský, Judge; A. Ó Caoimh, Judge.

*Third row, from left to right:*

P. Cruz Villalón, Advocate General; M. Berger, Judge; M. Safjan, Judge; A. Arabadjiev, Judge; T. von Danwitz, Judge; Y. Bot, Advocate General; E. Sharpston, Advocate General; J. Mazák, Advocate General; V. Trstenjak, Advocate General; J.-J. Kasel, Judge; D. Šváby, Judge; N. Jääskinen, Advocate General; R. Grass, Registrar.

## 1. Members of the Court of Justice

*(in order of their entry into office)*

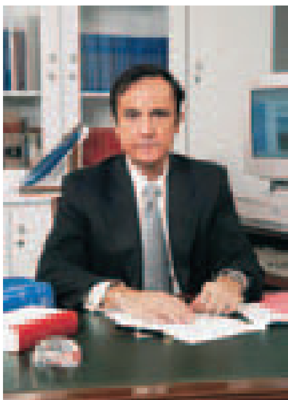


**Vassilios Skouris**

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

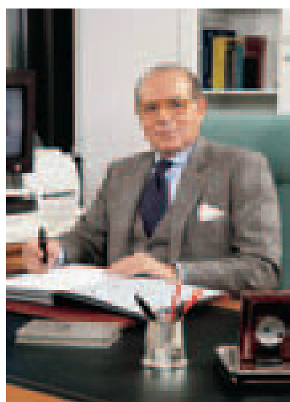
**Peter Jann**

Born 1935; Doctor of Law of the University of Vienna (1957); appointed Judge and assigned to the Federal Ministry of Justice (1961); Judge in press matters at the Straf-Bezirksgericht, Vienna (1963–66); spokesman of the Federal Ministry of Justice (1966–70) and subsequently appointed to the international affairs department of that ministry; Adviser to the Justice Committee and spokesman at the Parliament (1973–78); appointed as Member of the Constitutional Court (1978); permanent Judge-Rapporteur at that court until the end of 1994; Judge at the Court of Justice from 19 January 1995 to 6 October 2009.



**Dámaso Ruiz-Jarabo Colomer**

Born 1949; Judge; Member of the Consejo General del Poder Judicial (General Council of the Judiciary); Professor; Head of the Private Office of the President of the Consejo General del Poder Judicial; ad hoc Judge at the European Court of Human Rights; Judge at the Tribunal Supremo (Supreme Court) from 1996; Advocate General at the Court of Justice from 19 January 1995 to 12 November 2009, the date of his death.



**Antonio Tizzano**
Born 1940; Professor of European Union Law at La Sapienza University, Rome; Professor at the Istituto Universitario Orientale, Naples (1969–79), Federico II University, Naples (1979–1992), the University of Catania (1969–77) and the University of Mogadishu (1967–72); Member of the Bar at the Italian Court of Cassation; Legal Adviser to the Permanent Representation of the Italian Republic to the European Communities (1984–92); member of the Italian delegation at the negotiations for the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, for the Single European Act and for the Treaty on European Union; author of numerous publications, including commentaries on the European Treaties and collections of European Union legal texts; founder and director since 1996 of the journal *Il Diritto dell'Unione Europea*; member of the managing or editorial board of a number of legal journals; rapporteur at numerous international congresses; conferences and courses at various international institutions, including The Hague Academy of International Law (1987); member of the independent group of experts appointed to examine the finances of the Commission of the European Communities (1999); Advocate General at the Court of Justice from 7 October 2000 to 3 May 2006; Judge at the Court of Justice since 4 May 2006.

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

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

**Allan Rosas**

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

**Rosario Silva de Lapuerta**

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

**Koen Lenaerts**

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

**Juliane Kokott**

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

**Luís Miguel Poiares Pessoa Maduro**

Born 1967; degree in law (University of Lisbon, 1990); assistant lecturer (European University Institute, 1991); Doctor of Laws (European University Institute, Florence, 1996); visiting professor (London School of Economics; College of Europe, Natolin; Ortega y Gasset Institute, Madrid; Catholic University, Portugal; Institute of European Studies, Macao); Professor (Universidade Nova, Lisbon, 1997); Fulbright Visiting Research Fellow (Harvard University, 1998); co-director of the Academy of International Trade Law; co-editor (Hart Series on European Law and Integration, *European Law Journal*) and member of the editorial board of several law journals; Advocate General at the Court of Justice from 7 October 2003 to 6 October 2009.

**Konrad Hermann Theodor Schiemann**

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

**Jerzy Makarczyk**

Born 1938; Doctor of Laws (1966); Professor of Public International Law (1974); Senior Visiting Fellow at the University of Oxford (1985); Professor at the International Christian University, Tokyo (1988); author of several works on public international law, European Community law and human rights law; member of several learned societies in the field of international law, European law and human rights law; negotiator for the Polish Government for the withdrawal of Russian troops from Poland; Under-Secretary of State, then Secretary of State for Foreign Affairs (1989–92); Chairman of the Polish delegation to the General Assembly of the United Nations; Judge at the European Court of Human Rights (1992–2002); President of the Institut de droit international (2003); Adviser to the President of the Republic of Poland on foreign policy and human rights (2002–04); Judge at the Court of Justice from 11 May 2004 to 6 October 2009.

**Pranas Kūris**

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

**Endre Juhász**

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

**George Arestis**

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

**Anthony Borg Barthet UOM**

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

**Marko Ilešič**

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

**Jiří Malenovský**

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

**Ján Klučka**

Born 1951; Doctor of Law from the University of Bratislava (1974); Professor of International Law at Košice University (since 1975); Judge at the Constitutional Court (1993); Member of the Permanent Court of Arbitration at The Hague (1994); Member of the Venice Commission (1994); Chairman of the Slovakian Association of International Law (2002); Judge at the Court of Justice from 11 May 2004 to 6 October 2009.

**Uno Lõhmus**

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

**Egils Levits**

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

**Aindrias Ó Caoimh**

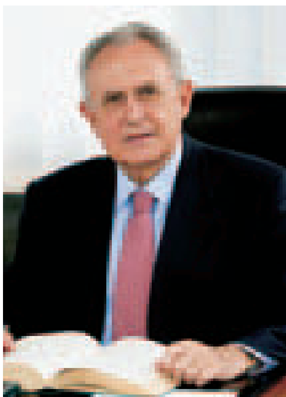
Born 1950; Bachelor in Civil Law (National University of Ireland, University College Dublin, 1971); Barrister (King's Inns, 1972); Diploma in European Law (University College Dublin, 1977); Barrister (Bar of Ireland, 1972–99); Lecturer in European Law (King's Inns, Dublin); Senior Counsel (1994–99);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

**Lars Bay Larsen**

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

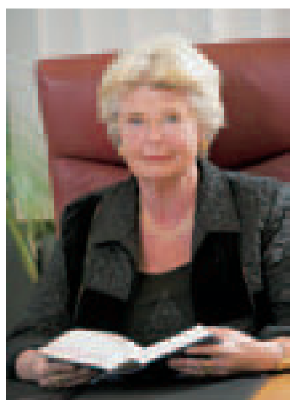
**Eleanor Sharpston**

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



**Paolo Mengozzi**

Born 1938; Professor of International Law and holder of the Jean Monnet Chair of European Community law at the University of Bologna; Doctor honoris causa of the Carlos III University, Madrid; visiting professor at the Johns Hopkins University (Bologna Center), the Universities of St. Johns (New York), Georgetown, Paris II and Georgia (Athens) and the Institut universitaire international (Luxembourg); coordinator of the European Business Law Pallas Program of the University of Nijmegen; member of the consultative committee of the Commission of the European Communities on public procurement; Under-Secretary of State for Trade and Industry during the Italian tenure of the Presidency of the Council; member of the working group of the European Community on the World Trade Organisation (WTO) and director of the 1997 session of the research centre of The Hague Academy of International Law, devoted to the WTO; Judge at the Court of First Instance from 4 March 1998 to 3 May 2006; Advocate General at the Court of Justice since 4 May 2006.

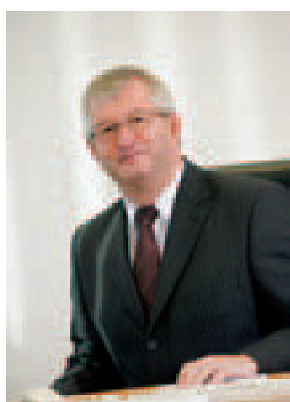


## Pernilla Lindh

Born 1945; Law graduate of the University of Lund; Legal Secretary and Judge at the District Court, Trollhättan (1971–74); Legal Secretary at the Court of Appeal, Stockholm (1974–75); Judge at the District Court, Stockholm (1975); Adviser on legal and administrative matters to the President of the Court of Appeal, Stockholm (1975–78); Special adviser at the Domstolverket (National Courts' Administration) (1977); Adviser in the office of the Chancellor of Justice (1979–80); Associate Judge at the Court of Appeal, Stockholm (1980–81); Legal Adviser at the Ministry of Trade (1981–82); Legal adviser, and subsequently Director and Director-General for Legal Affairs, at the Ministry of Foreign Affairs (1982–95); title of Ambassador in 1992; Vice-President at the Swedish Market Court; responsible for legal and institutional issues at the time of the EEA negotiations (Deputy Chairperson, then Chairperson, of the EFTA Group) and at the time of the negotiations for the accession of the Kingdom of Sweden to the European Union; Judge at the Court of First Instance from 18 January 1995 to 6 October 2006; Judge at the Court of Justice since 7 October 2006.

## Yves Bot

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



## Ján Mazák

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

**Jean-Claude Bonichot**

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

**Thomas von Danwitz**

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

## Verica Trstenjak

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

## Alexander Arabadjiev

Born 1949; legal studies (St Kliment Ohridski University, Sofia); Judge at the District Court, Blagoevgrad (1975–83); Judge at the Regional Court, Blagoevgrad (1983–86); Judge at the Supreme Court (1986–91); Judge at the Constitutional Court (1991–2000); Member of the European Commission of Human Rights (1997–99); Member of the European Convention on the Future of Europe (2002–03); Member of the National Assembly (2001–06); Observer at the European Parliament; Judge at the Court of Justice since 12 January 2007.

## Camelia Toader

Born 1963; Degree in law (1986), doctorate in law (1997), University of Bucharest; Trainee judge at the Court of First Instance, Buftea (1986–88); Judge at the Court of First Instance, Sector 5, Bucharest (1988–92); Lecturer (1992–2005), then professor (2005–06), in civil law and European contract law at the University of Bucharest; Doctoral studies and research at the Max Planck Institute for Private International Law, Hamburg (between 1992 and 2004); Head of the European Integration Unit at the Ministry of Justice (1997–99); Judge at the High Court of Cassation and Justice (1999–2006); Visiting professor at the Vienna University of Economics (2000); taught Community law at the National Institute for Magistrates (2003 and 2005–06); Member of the editorial board of several legal journals; Judge at the Court of Justice since 12 January 2007.

**Jean-Jacques Kasel**

Born 1946; Doctor of Laws; special degree in administrative law (Université libre de Bruxelles, 1970); graduated from the Institut d'études politiques, Paris (Ecofin, 1972); trainee lawyer; Legal Adviser of the Banque de Paris et des Pays-Bas (1972–73); Attaché, then Legation Secretary at the Ministry of Foreign Affairs (1973–76); Chairman of the working groups of the Council of Ministers (1976); First Embassy Secretary, Deputy Permanent Representative to the OECD (Paris, 1976–79); Head of the Office of the Vice-President of the Government (1979–80); Chairman, European Political Cooperation (1980); Adviser, then Deputy Head of the Cabinet, of the President of the Commission of the European Communities (1981); Director, Budget and Staff Matters, at the General Secretariat of the Council of Ministers (1981–84); Special Adviser at the Permanent Representation to the European Communities (1984–85); Chairman of the Budgetary Committee; Minister Plenipotentiary, Director of Political and Cultural Affairs (1986–91); Diplomatic Adviser of the Prime Minister (1986–91); Ambassador to Greece (1989–91, non-resident); Chairman of the Policy Committee (1991); Ambassador, Permanent Representative to the European Communities (1991–98); Chairman of Coreper (first half of 1997); Ambassador (Brussels, 1998–2002); Permanent Representative to NATO (1998–2002); Marshal of the Court and Head of the Office of HRH the Grand Duke (2002–07); Judge at the Court of Justice since 15 January 2008.

**Marek Safjan**

Born 1949; Doctor of Law (University of Warsaw, 1980); habilitated Doctor in Legal Science (University of Warsaw, 1990); Professor of Law (1998–2009); Director of the Civil Law Institute of the University of Warsaw (1992–96); Vice-Rector of the University of Warsaw (1994–97); Secretary-General of the Polish Section of the Henri Capitant Association of Friends of French Legal Culture (1994–98); representative of the Republic of Poland on the Bioethics Committee of the Council of Europe (1991–97); Chairman of the Scientific Council of the Institute of Justice (1998); Judge (1997–98), then President (1998–2006), of the Constitutional Court; member of the International Academy of Comparative Law (since 1994), member of the International Association of Law, Ethics and Science (since 1995), member of the Helsinki Committee in Poland; member of the Polish Academy of Arts and Sciences; Pro Merito Medal conferred by the Secretary-General of the Council of Europe (2007); author of a very large number of publications in the fields of civil law, medical law and European law; Judge at the Court of Justice since 7 October 2009.

**Daniel Šváby**

Born 1951; Doctor of Laws (University of Bratislava); Judge at District Court, Bratislava; Judge, Appeal Court, responsible for civil law cases, and Vice-President, Appeal Court, Bratislava; member of the civil and family law section at the Ministry of Justice Law Institute; acting Judge responsible for commercial law cases at the Supreme Court; Member of the European Commission of Human Rights (Strasbourg); Judge at the Constitutional Court (2000–04); Judge at the Court of First Instance from 12 May 2004 to 6 October 2009; Judge at the Court of Justice since 7 October 2009.

**Maria Berger**

Born 1956; studied law and economics (1975–79), Doctor of Law; Assistant Lecturer and Lecturer at the Institute of Public Law and Political Sciences of the University of Innsbruck (1979–84); Administrator at the Federal Ministry for Science and Research, ultimately Deputy Head of Unit (1984–88); official responsible for questions relating to the European Union at the Federal Chancellery (1988–89); Head of the European Integration Section of the Federal Chancellery (preparation for the Republic of Austria's accession to the European Union) (1989–92); Director at the EFTA Surveillance Authority, in Geneva and Brussels (1993–94); Vice-President of Danube University, Krems (1995–96); Member of the European Parliament (November 1996 to January 2007 and December 2008 to July 2009) and member of the Committee on Legal Affairs; substitute member of the European Convention on the Future of Europe (February 2002 to July 2003); councillor of the municipality of Perg (September 1997 to September 2009); Federal Minister of Justice (January 2007 to December 2008); Judge at the Court of Justice since 7 October 2009.

**Niilo Jääskinen**

Born 1958; law degree (1980), postgraduate law degree (1982), doctorate (2008) at the University of Helsinki; Lecturer at the University of Helsinki (1980–86); Legal Secretary and acting Judge at the District Court, Rovaniemi (1983–84); Legal Adviser (1987–89), and subsequently head of the European Law Section (1990–95), at the Ministry of Justice; Legal Adviser at the Ministry for Foreign Affairs (1989–1990); Adviser, and Clerk for European affairs, of the Grand Committee of the Finnish Parliament (1995–2000); acting Judge (July 2000 to December 2002), then Judge (January 2003 to September 2009), at the Supreme Administrative Court; responsible for legal and institutional questions during the negotiations for the accession of the Republic of Finland to the European Union; Advocate General at the Court of Justice since 7 October 2009.

**Pedro Cruz Villalón**

Born 1946; law degree (1963–68) and awarded doctorate (1975) at the University of Seville; postgraduate studies at the University of Freiburg im Breisgau (1969–71); Assistant Professor of Political Law at the University of Seville (1978–86); Professor of Constitutional Law at the University of Seville (1986–92); Legal Secretary at the Constitutional Court (1986–87); Judge at the Constitutional Court (1992–98); President of the Constitutional Court (1998–2001); Fellow of the Wissenschaftskolleg zu Berlin (2001–02); Professor of Constitutional Law at the Autonomous University of Madrid (2002–09); elected member of the Council of State (2004–09); author of numerous publications; Advocate General at the Court of Justice since 14 December 2009.

**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. Change in the composition of the Court of Justice in 2009

*Formal sitting on 6 October 2009*

By decisions of 25 February 2009 and 25 March 2009, the representatives of the governments of the Member States renewed, for the period from 7 October 2009 to 6 October 2015, the terms of office as Judges at the Court of Justice of Mr Vassilios Skouris, Mr Allan Rosas, Mr Koen Lenaerts, Mr Marko Ilešič, Mr Aindrias Ó Caoimh, Ms Rosario Silva de Lapuerta, Mr Endre Juhász, Mr Uno Lõhmus, Mr Lars Bay Larsen, Ms Camelia Toader and Mr Jean-Jacques Kasel.

By decisions of 25 February 2009 and 8 July 2009, Mr Marek Safjan and Mr Daniel Šváby were appointed as Judges at the Court of Justice for the period from 7 October 2009 to 6 October 2015, respectively replacing Mr Jerzy Makarczyk and Mr Jan Klučka, while Ms Maria Berger was appointed as a Judge at the Court of Justice for the period from 7 October 2009 to 6 October 2012, replacing Mr Peter Jann.

By decision of 25 February 2009, the representatives of the Governments of the Member States renewed, for the period from 7 October 2009 to 6 October 2015, the terms of office as Advocates General at the Court of Justice of Ms Eleanor Sharpston, Mrs Juliane Kokott and Mr Dámaso Ruiz-Jarabo Colomer. By the same decision, Mr Niilo Jääskinen was appointed as an Advocate General at the Court of Justice for the period from 7 October 2009 to 6 October 2015, replacing Mr Luís Miguel Poiares Pessoa Maduro.

*Formal sitting on 14 December 2009*

Following the death of Advocate General Dámaso Ruiz-Jarabo Colomer, the representatives of the governments of the Member States, by decision of 30 November 2009, appointed Mr Pedro Cruz Villalón as an Advocate General at the Court of Justice of the European Union for the remainder of the term of office of Advocate General Ruiz-Jarabo Colomer, namely for the period from 30 November 2009 to 6 October 2015.

## 3. Order of precedence

**from 1 January to 7 October 2009**

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

R. GRASS, Registrar

**from 8 October to 13 December 2009**

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

R. GRASS, Registrar

## from 14 December to 31 December 2009

V. SKOURIS, President of the Court
A. TIZZANO, President of the First Chamber
J. N. CUNHA RODRIGUES, President of the Second Chamber
K. LENAERTS, President of the Third Chamber
J.-C. BONICHOT, President of the Fourth Chamber
P. MENGOZZI, First Advocate General
R. SILVA de LAPUERTA, President of the Seventh Chamber
E. LEVITS, President of the Fifth Chamber
P. LINDH, President of the Sixth Chamber
C. TOADER, President of the Eighth Chamber
C. W. A. TIMMERMANS, Judge
A. ROSAS, Judge
J. KOKOTT, Advocate General
K. SCHIEMANN, Judge
P. KŪRIS, Judge
E. JUHÁSZ, Judge
G. ARESTIS, Judge
A. BORG BARTHET, Judge
M. ILEŠIČ, Judge
J. MALENOVSKÝ, Judge
U. LÕHMUS, Judge
A. Ó CAOIMH, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
Y. BOT, Advocate General
J. MAZÁK, Advocate General
T. von DANWITZ, Judge
V. TRSTENJAK, Advocate General
A. ARABADJIEV, Judge
J.-J. KASEL, Judge
M. SAFJAN, Judge
D. ŠVÁBY, Judge
M. BERGER, Judge
N. JÄÄSKINEN, Advocate General
P. CRUZ VILLALÓN, Advocate General

R. GRASS, Registrar

## 4. Former Members of the Court of Justice

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

René Joliet, Judge (1984–95)
Carl Otto Lenz, Advocate General (1984–97)
Thomas Francis O'Higgins, Judge (1985–91)
Fernand Schockweiler, Judge (1985–96)
José Luís Da Cruz Vilaça, Advocate General (1986–88)
José Carlos De Carvalho Moithinho de Almeida, Judge (1986–2000)
Jean Mischo, Advocate General (1986–91 and 1997–2003)
Gil Carlos Rodríguez Iglesias, Judge (1986–2003), President from 1994 to 2003
Manuel Diez de Velasco, Judge (1988–94)
Manfred Zuleeg, Judge (1988–94)
Walter Van Gerven, Advocate General (1988–94)
Giuseppe Tesauro, Advocate General (1988–98)
Francis Geoffrey Jacobs, Advocate General (1988–2006)
Paul Joan George Kapteyn, Judge (1990–2000)
John L. Murray, Judge (1991–99)
Claus Christian Gulmann, Advocate General (1991–94), then Judge (1994–2006)
David Alexander Ogilvy Edward, Judge (1992–2004)
Michael Bendik Elmer, Advocate General (1994–97)
Georges Cosmas, Advocate General (1994–2000)
Günter Hirsch, Judge (1994–2000)
Antonio Mario La Pergola, Judge (1994 and 1999–2006), Advocate General (1995–99)
Jean-Pierre Puissochet, Judge (1994–2006)
Philippe Léger, Advocate General (1994–2006)
Hans Ragnemalm, Judge (1995–2000)
Nial Fennelly, Advocate General (1995–2000)
Leif Sevón, Judge (1995–2002)
Melchior Wathelet, Judge (1995–2003)
Peter Jann, Judge (1995–2009)
Dámaso Ruiz-Jarabo Colomer, Advocate General (1995–2009)
Romain Schintgen, Judge (1996–2008)
Krateros Ioannou, Judge (1997–99)
Siegbert Alber, Advocate General (1997–2003)
Antonio Saggio, Advocate General (1998–2000)
Fidelma O'Kelly Macken, Judge (1999–2004)
Stig Von Bahr, Judge (2000–06)
Leendert A. Geelhoed, Advocate General (2000–06)
Ninon Colneric, Judge (2000–06)
Christine Stix-Hackl, Advocate General (2000–06)
Luís Miguel Poiares Pessoa Maduro, Advocate General (2003–09)
Jerzy Makarczyk, Judge (2004–09)
Ján Klučka, Judge (2004–09)

## Presidents

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

## Registrars

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

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

***General activity of the Court of Justice***

1. New cases, completed cases, cases pending (2005–09)

***New cases***

2. Nature of proceedings (2005–09)
3. Subject matter of the action (2009)
4. Actions for failure of a Member State to fulfil its obligations (2005–09)

***Completed cases***

5. Nature of proceedings (2005–09)
6. Judgments, orders, opinions (2009)
7. Bench hearing action (2005–09)
8. Cases completed by judgments, by opinions or by orders involving a judicial determination (2005–09)
9. Subject matter of the action (2005–09)
10. Subject matter of the action (2009)
11. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2005–09)
12. Duration of proceedings (judgments and orders involving a judicial determination) (2005–09)

***Cases pending as at 31 December***

13. Nature of proceedings (2005–09)
14. Bench hearing action (2005–09)

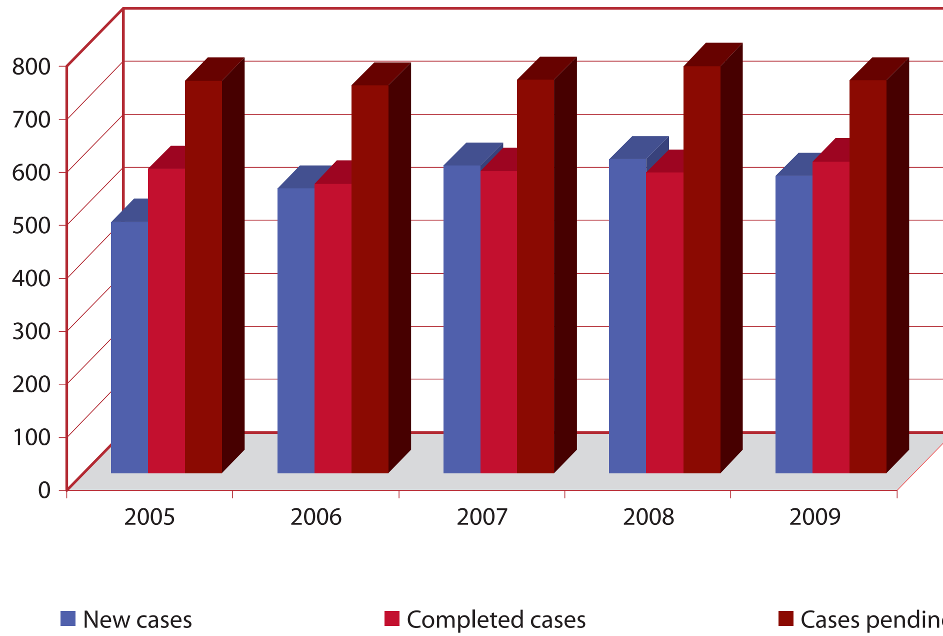
***Miscellaneous***

15. Expedited and accelerated procedures (2005–09)
16. Urgent preliminary ruling procedure (2008–09)
17. Proceedings for interim measures (2009)

***General trend in the work of the Court (1952–2009)***

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

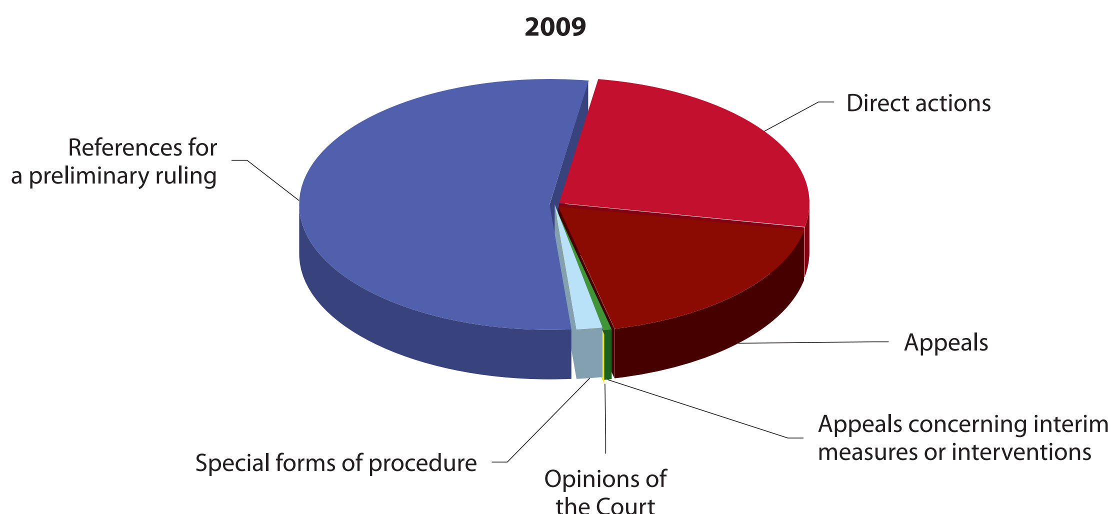
# 1. *General activity of the Court of Justice* New cases, completed cases, cases pending (2005–09) ([1])




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| New cases | 474 | 537 | 580 | 592 | 561 |
| Completed cases | 574 | 546 | 570 | 567 | 588 |
| Cases pending | 740 | 731 | 742 | 768 | 741 |

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

## 2. New cases — Nature of proceedings (2005–09) [1] [2]




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| References for a preliminary ruling | 221 | 251 | 265 | 288 | 302 |
| Direct actions | 179 | 201 | 222 | 210 | 143 [3] |
| Appeals | 66 | 80 | 79 | 78 | 104 |
| Appeals concerning interim measures or interventions | 1 | 3 | 8 | 8 | 2 |
| Opinions of the Court | | | | 1 | 1 |
| Special forms of procedure | 7 | 2 | 7 | 8 | 9 |
| **Total** | **474** | **537** | **581** | **593** | **561** |
| Applications for interim measures | 2 | 1 | 3 | 3 | 1 |

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

[2] The following are considered to be 'special forms of procedure': rectification (Article 66 of the Rules of Procedure); taxation of costs (Article 74 of the Rules of Procedure); legal aid (Article 76 of the Rules of Procedure); application to set aside a judgment given by default (Article 94 of the Rules of Procedure); third-party proceedings (Article 97 of the Rules of Procedure); revision (Article 98 of the Rules of Procedure); interpretation of a judgment (Article 102 of the Rules of Procedure); examination of a proposal by the First Advocate General to review a decision of the General Court (Article 62 of the Statute of the Court of Justice); attachment procedure (Protocol on Privileges and Immunities); cases concerning immunity (Protocol on Privileges and Immunities).

[3] Direct actions comprised 142 actions for failure to fulfil an obligation and 1 action for annulment.

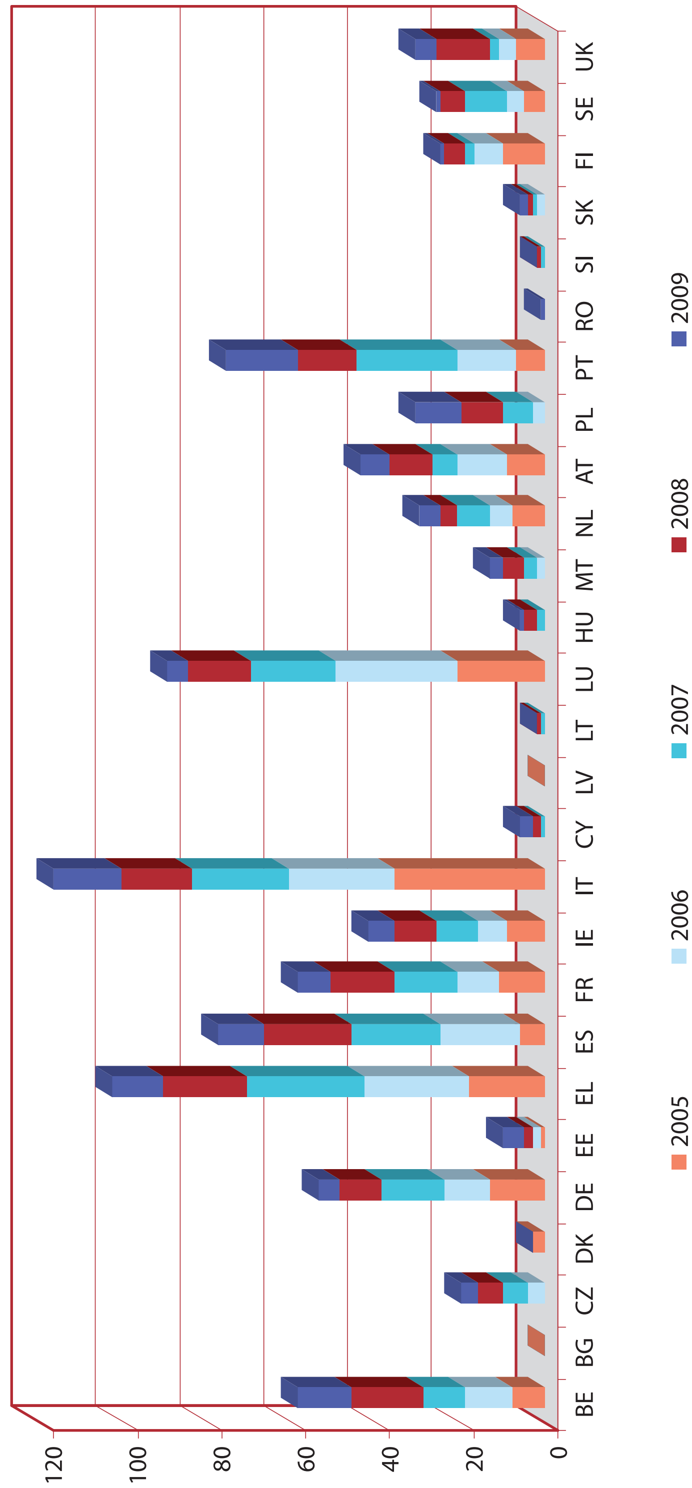
## 3. *New cases* — Subject matter of the action (2009) (1)

| | Direct actions | References for a preliminary ruling | Appeals | Appeals concerning interim measures or interventions | Total | Special forms of procedure |
|---|---|---|---|---|---|---|
| Accession of new States | | 1 | | | 1 | |
| Agriculture | 2 | 23 | 7 | | 32 | |
| Approximation of laws | 9 | 12 | | | 21 | |
| Area of freedom, security and justice | 2 | 17 | | | 19 | |
| Budget of the Communities | 1 | | | | 1 | |
| Commercial policy | | 2 | 4 | | 6 | |
| Common Customs Tariff | | 9 | | | 9 | |
| Common foreign and security policy | | 1 | 3 | | 4 | |
| Community own resources | 2 | 1 | | | 3 | |
| Company law | 11 | 3 | 1 | | 15 | |
| Competition | | 5 | 10 | 2 | 17 | |
| Customs union | | 9 | 3 | | 12 | |
| Energy | 5 | 1 | | | 6 | |
| Environment and consumers | 45 | 33 | 2 | | 80 | |
| European citizenship | | 8 | | | 8 | |
| External relations | | 6 | | | 6 | 1 |
| Fisheries policy | | 1 | 1 | | 2 | |
| Free movement of capital | 6 | 6 | | | 12 | |
| Free movement of goods | 2 | 10 | 2 | | 14 | |
| Freedom of establishment | 8 | 9 | | | 17 | |
| Freedom of movement for persons | 5 | 6 | | | 11 | |
| Freedom to provide services | 7 | 16 | | | 23 | |
| Industrial policy | 4 | 7 | | | 11 | |
| Intellectual property | | 14 | 25 | | 39 | |
| Law governing the institutions | 2 | 3 | 9 | | 14 | 4 |
| Principles of Community law | | 4 | | | 4 | |
| Regional policy | | | 1 | | 1 | |
| Social policy | 5 | 26 | 1 | | 32 | |
| Social security for migrant workers | | 12 | | | 12 | |
| State aid | 10 | 5 | 32 | | 47 | |
| Taxation | 13 | 44 | | | 57 | |
| Transport | 4 | 4 | | | 8 | |
| **EC Treaty/TFEU (2)** | **143** | **298** | **101** | **2** | **544** | **5** |
| **EU Treaty** | | **4** | | | **4** | |
| **CS Treaty** | | | **1** | | **1** | |
| Procedure | | | | | | 5 |
| Staff Regulations | | | 2 | | 2 | |
| **Others** | | | **2** | | **2** | **5** |
| **OVERALL TOTAL** | **143** | **302** | **104** | **2** | **551** | **10** |

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

(2) On 1 December 2009, the date of entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union (TFEU) replaced the Treaty establishing the European Community (EC Treaty).

## 4. *New cases* — Actions for failure of a Member State to fulfil its obligations (2005–09) [1]

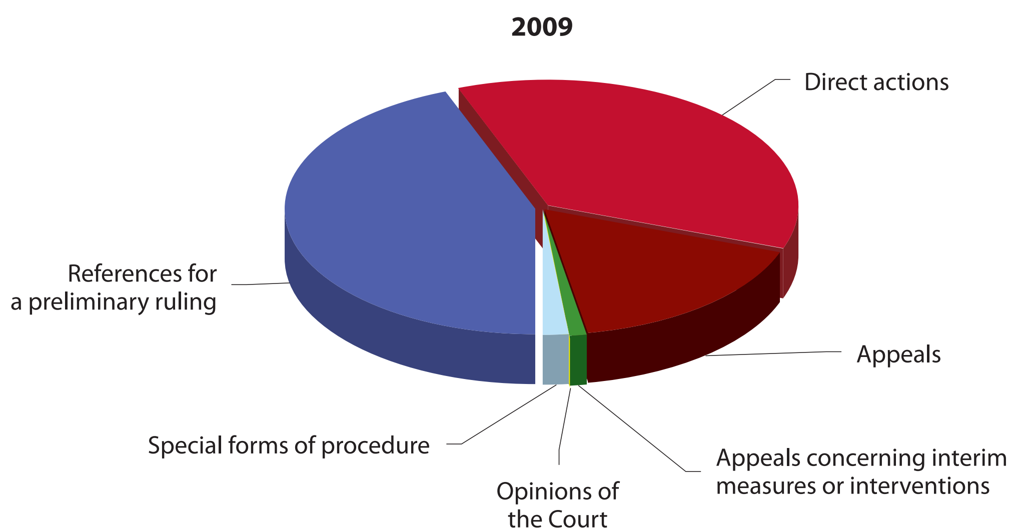


| | 2005 | | 2006 | | 2007 | | 2008 | | 2009 [2] | |
|---|---|---|---|---|---|---|---|---|---|---|
| | **Art. 226** | **Art. 228** | **Art. 226** | **Art. 228** | **Art. 226** | **Art. 228** | **Art. 226** | **Art. 228** | **Art. 226** | **Art. 228** |
| **BE** | 8 | | 11 | | 10 | | 17 | | 13 | |
| **BG** | | | | | | | | | | |
| **CZ** | | | 4 | | 6 | | 6 | | 4 | |
| **DK** | 3 | | | | | | | | | |
| **DE** | 13 | | 11 | | 15 | | 10 | | 5 | |
| **EE** | 1 | | 2 | | | | 2 | | 5 | |
| **EL** | 18 | | 25 | | 26 | 2 | 19 | 1 | 11 | 1 |
| **ES** | 6 | | 19 | | 21 | | 21 | | 11 | |
| **FR** | 11 | | 9 | 1 | 14 | 1 | 15 | | 8 | |
| **IE** | 9 | | 7 | | 10 | | 10 | | 6 | |
| **IT** | 36 | | 25 | | 23 | | 17 | | 15 | 1 |
| **CY** | | | | | 1 | | 2 | | 3 | |
| **LV** | | | | | | | | | | |
| **LT** | | | | | 1 | | 1 | | | |
| **LU** | 19 | 2 | 28 | 1 | 20 | | 15 | | 5 | |
| **HU** | | | | | 2 | | 3 | | 1 | |
| **MT** | | | 2 | | 3 | | 5 | | 3 | |
| **NL** | 8 | | 5 | | 8 | | 4 | | 5 | |
| **AT** | 9 | | 12 | | 6 | | 10 | | 7 | |
| **PL** | | | 3 | | 7 | | 10 | | 11 | |
| **PT** | 7 | | 13 | 1 | 23 | 1 | 14 | | 17 | |
| **RO** | | | | | | | | | 1 | |
| **SI** | | | | | 1 | | 1 | | | |
| **SK** | | | 2 | | 1 | | 1 | | 2 | |
| **FI** | 10 | | 7 | | 2 | | 5 | | 1 | |
| **SE** | 5 | | 4 | | 10 | | 6 | | 1 | |
| **UK** | 7 | | 4 | | 2 | | 13 | | 5 | |
| **Total** | **170** | **2** | **193** | **3** | **212** | **4** | **207** | **1** | **140** | **2** |

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

[2] Following the entry into force of the Lisbon Treaty on 1 December 2009, Articles 258 TFEU, 259 TFEU and 260 TFEU have replaced Articles 226 EC, 227 EC and 228 EC.

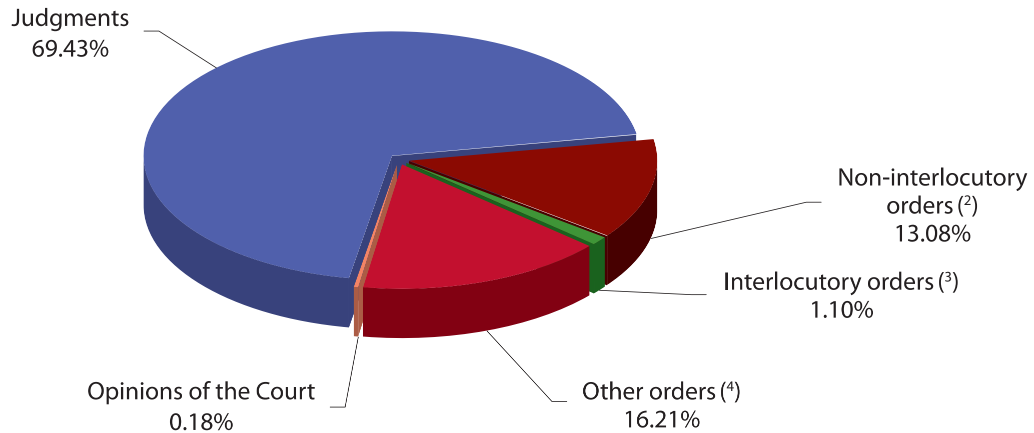
## 5. *Completed cases* — Nature of proceedings (2005–09) ([1])




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| References for a preliminary ruling | 254 | 266 | 235 | 301 | 259 |
| Direct actions | 263 | 212 | 241 | 181 | 215 |
| Appeals | 48 | 63 | 88 | 69 | 97 |
| Appeals concerning interim measures or interventions | 2 | 2 | 2 | 8 | 7 |
| Opinions of the Court | | 1 | | | 1 |
| Special forms of procedure | 7 | 2 | 4 | 8 | 9 |
| **Total** | **574** | **546** | **570** | **567** | **588** |

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

# 6. *Completed cases* — Judgments, orders, opinions (2009) [1]




| | Judgments | Non-interlocutory orders [2] | Interlocutory orders [3] | Other orders [4] | Opinions of the Court | Total |
|---|---|---|---|---|---|---|
| References for a preliminary ruling | 188 | 22 | | 18 | | 228 |
| Direct actions | 149 | | 1 | 65 | | 215 |
| Appeals | 38 | 45 | 2 | 2 | | 87 |
| Appeals concerning interim measures or interventions | | | 3 | 3 | | 6 |
| Opinions of the Court | | | | | 1 | 1 |
| Special forms of procedure | 2 | 4 | | | | 6 |
| **Total** | **377** | **71** | **6** | **88** | **1** | **543** |

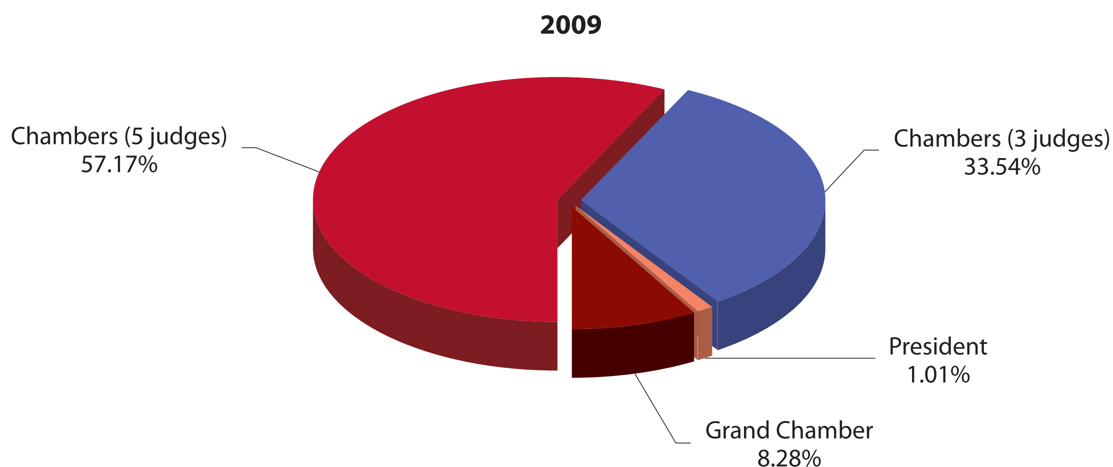
[1] The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

[2] Orders terminating proceedings by judicial determination (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 General Court).

[3] Orders made following an application on the basis of Article 242 or 243 of the EC Treaty (now, following the entry into force of the Lisbon Treaty, Articles 278 TFEU and 279 TFEU), Article 244 EC (now Article 280 TFEU) or the corresponding provisions of the EA and CS Treaties, or following an appeal against an order concerning interim measures or intervention.

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

# 7. *Completed cases* — Bench hearing action (2005–09) ([1])

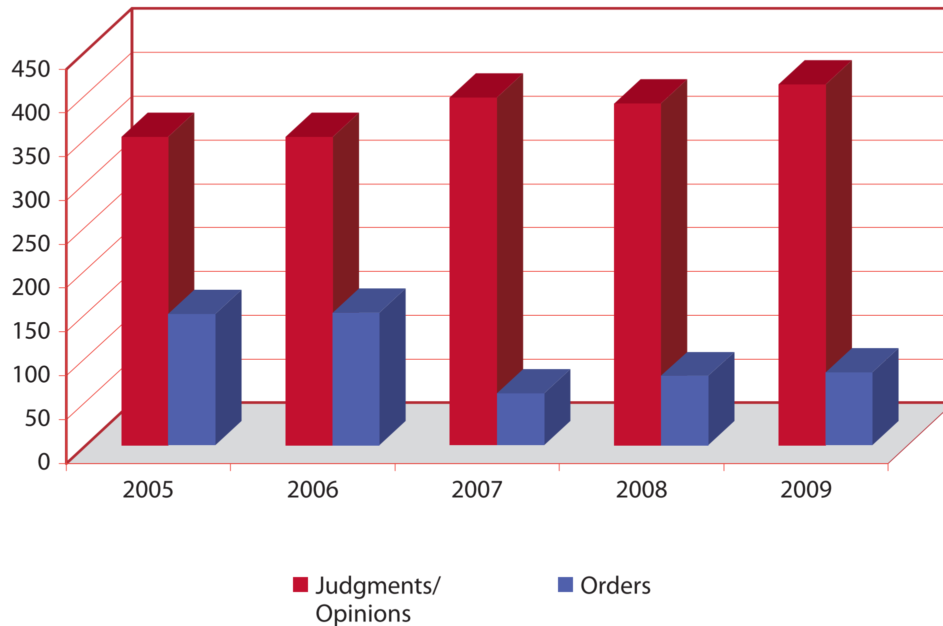



| | 2005 | | | 2006 | | | 2007 | | | 2008 | | | 2009 | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Judgments/ Opinions | Orders ([2]) | Total | Judgments/ Opinions | Orders ([2]) | Total | Judgments/ Opinions | Orders ([2]) | Total | Judgments/ Opinions | Orders ([2]) | Total | Judgments/ Opinions | Orders ([2]) | Total |
| Full Court | 1 | | 1 | 2 | | 2 | | | | | | | | | |
| Grand Chamber | 59 | | 59 | 55 | | 55 | 51 | | 51 | 66 | | 66 | 41 | | 41 |
| Chambers (5 judges) | 245 | 5 | 250 | 265 | 13 | 278 | 242 | 9 | 251 | 259 | 13 | 272 | 275 | 8 | 283 |
| Chambers (3 judges) | 103 | 51 | 154 | 67 | 41 | 108 | 104 | 48 | 152 | 65 | 59 | 124 | 96 | 70 | 166 |
| President | | 2 | 2 | | 1 | 1 | | 2 | 2 | | 7 | 7 | | 5 | 5 |
| **Total** | **408** | **58** | **466** | **389** | **55** | **444** | **397** | **59** | **456** | **390** | **79** | **469** | **412** | **83** | **495** |

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

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

## 8. *Cases completed by judgments, by opinions or by orders involving a judicial determination* (2005–09) (1) (2)




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Judgments/Opinions | 352 | 352 | 397 | 390 | 412 |
| Orders | 150 | 151 | 59 | 79 | 83 |
| **Total** | **502** | **503** | **456** | **469** | **495** |

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

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

# 9. *Cases completed by judgments, by opinions or by orders involving a judicial determination* — Subject matter of the action (2005–09) ([1])

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Accession of new States | 1 | | 1 | | 1 |
| Agriculture | 63 | 30 | 23 | 54 | 18 |
| Approximation of laws | 41 | 19 | 21 | 21 | 32 |
| Area of freedom, security and justice | 5 | 9 | 17 | 4 | 26 |
| Association of the Overseas Countries and Territories | 2 | | | | |
| Brussels Convention | 8 | 4 | 2 | 1 | 2 |
| Commercial policy | 4 | 1 | 1 | 1 | 5 |
| Common Customs Tariff | 7 | 7 | 10 | 5 | 13 |
| Common foreign and security policy | | | 4 | 2 | 2 |
| Community own resources | 2 | 6 | 3 | | 10 |
| Company law | 24 | 10 | 16 | 17 | 17 |
| Competition | 17 | 30 | 17 | 23 | 28 |
| Customs union | 9 | 9 | 12 | 8 | 5 |
| Economic and monetary policy | | | 1 | 1 | 1 |
| Energy | 3 | 6 | 4 | 4 | 4 |
| Environment and consumers | 44 | 40 | 50 | 43 | 60 |
| European citizenship | 2 | 4 | 2 | 6 | 3 |
| External relations | 8 | 11 | 9 | 8 | 8 |
| Fisheries policy | 11 | 7 | 6 | 6 | 4 |
| Free movement of capital | 5 | 4 | 13 | 9 | 8 |
| Free movement of goods | 11 | 8 | 14 | 12 | 12 |
| Freedom of establishment | 5 | 21 | 19 | 29 | 13 |
| Freedom of movement for persons | 17 | 20 | 19 | 27 | 19 |
| Freedom to provide services | 11 | 17 | 24 | 8 | 17 |
| Industrial policy | 11 | | 11 | 12 | 6 |
| Intellectual property | 5 | 19 | 21 | 22 | 31 |
| Justice and home affairs | | 2 | | 1 | |
| Law governing the institutions | 16 | 15 | 6 | 16 | 29 |
| Principles of Community law | 2 | 1 | 4 | 4 | 4 |
| Privileges and immunities | 1 | 1 | 1 | 2 | |
| Regional policy | 5 | | 7 | 1 | 3 |
| Rome Convention | | | | | 1 |
| Social policy | 29 | 29 | 26 | 25 | 33 |
| Social security for migrant workers | 10 | 7 | 7 | 5 | 3 |
| State aid | 23 | 23 | 9 | 26 | 10 |
| Taxation | 34 | 55 | 44 | 38 | 44 |
| Transport | 16 | 9 | 6 | 4 | 9 |
| **EC Treaty** | 452 | 424 | 430 | 445 | 481 |
| **EU Treaty** | 3 | 3 | 4 | 6 | 1 |
| **CS Treaty** | 3 | | 1 | 2 | |
| **EA Treaty** | 1 | 4 | 1 | | |
| Procedure | 1 | 2 | 3 | 5 | 5 |
| Staff Regulations | 6 | 9 | 17 | 11 | 8 |
| **Others** | 7 | 11 | 20 | 16 | 13 |
| **OVERALL TOTAL** | **466** | **442** | **456** | **469** | **495** |

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

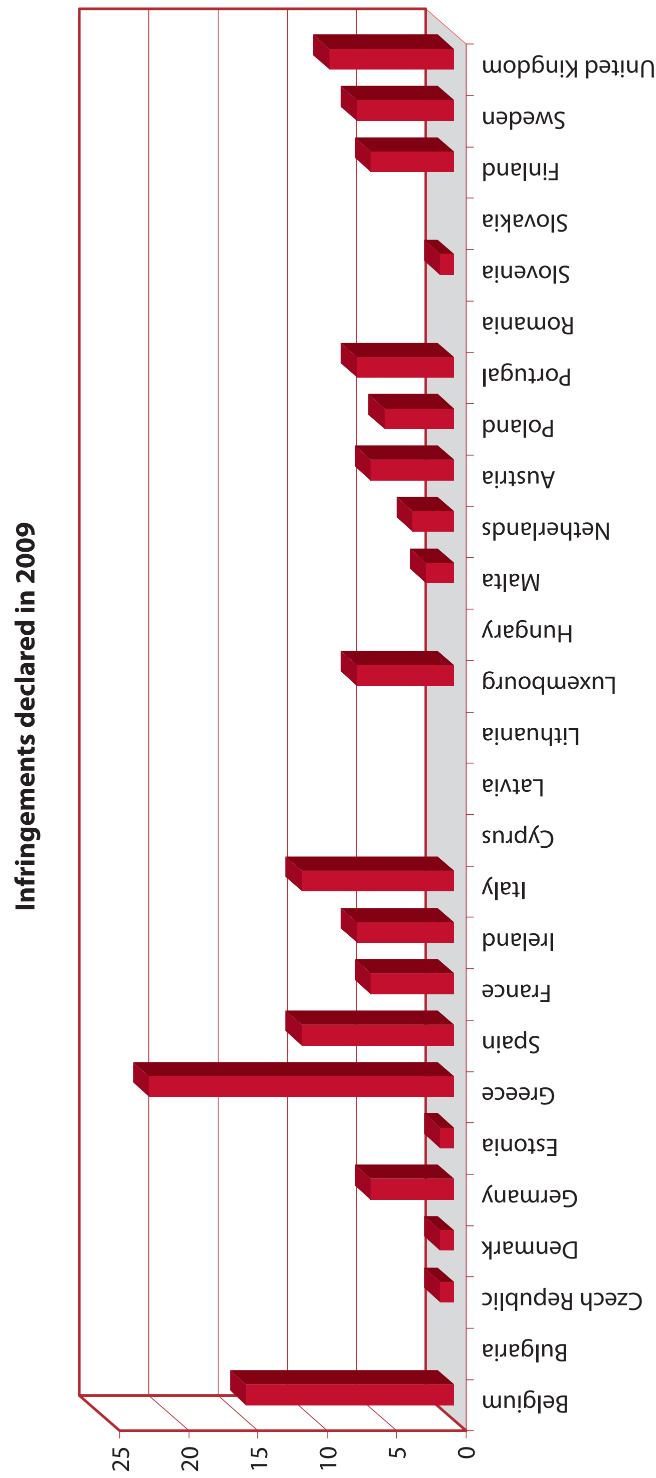
# 10. *Cases completed by judgments, by opinions or by orders involving a judicial determination* — Subject matter of the action (2009) (1)

| | Judgments/Opinions | Orders (2) | Total |
|---|---|---|---|
| Accession of new States | 1 | | 1 |
| Agriculture | 18 | | 18 |
| Approximation of laws | 31 | 1 | 32 |
| Area of freedom, security and justice | 25 | 1 | 26 |
| Brussels Convention | 2 | | 2 |
| Commercial policy | 5 | | 5 |
| Common Customs Tariff | 13 | | 13 |
| Common foreign and security policy | 2 | | 2 |
| Community own resources | 9 | 1 | 10 |
| Company law | 16 | 1 | 17 |
| Competition | 26 | 2 | 28 |
| Customs union | 5 | | 5 |
| Economic and monetary policy | 1 | | 1 |
| Energy | 4 | | 4 |
| Environment and consumers | 55 | 5 | 60 |
| European citizenship | 2 | 1 | 3 |
| External relations | 8 | | 8 |
| Fisheries policy | 4 | | 4 |
| Free movement of capital | 8 | | 8 |
| Free movement of goods | 11 | 1 | 12 |
| Freedom of establishment | 13 | | 13 |
| Freedom of movement for persons | 19 | | 19 |
| Freedom to provide services | 17 | | 17 |
| Industrial policy | 5 | 1 | 6 |
| Intellectual property | 12 | 19 | 31 |
| Law governing the institutions | 12 | 17 | 29 |
| Principles of Community law | 2 | 2 | 4 |
| Regional policy | 2 | 1 | 3 |
| Rome Convention | 1 | | 1 |
| Social policy | 24 | 9 | 33 |
| Social security for migrant workers | 3 | | 3 |
| State aid | 8 | 2 | 10 |
| Taxation | 40 | 4 | 44 |
| Transport | 8 | 1 | 9 |
| **EC Treaty** | **412** | **69** | **481** |
| **EU Treaty** | **1** | | **1** |
| Procedure | 1 | 4 | 5 |
| Staff Regulations | | 8 | 8 |
| **Others** | **1** | **12** | **13** |
| **OVERALL TOTAL** | **414** | **81** | **495** |

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

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

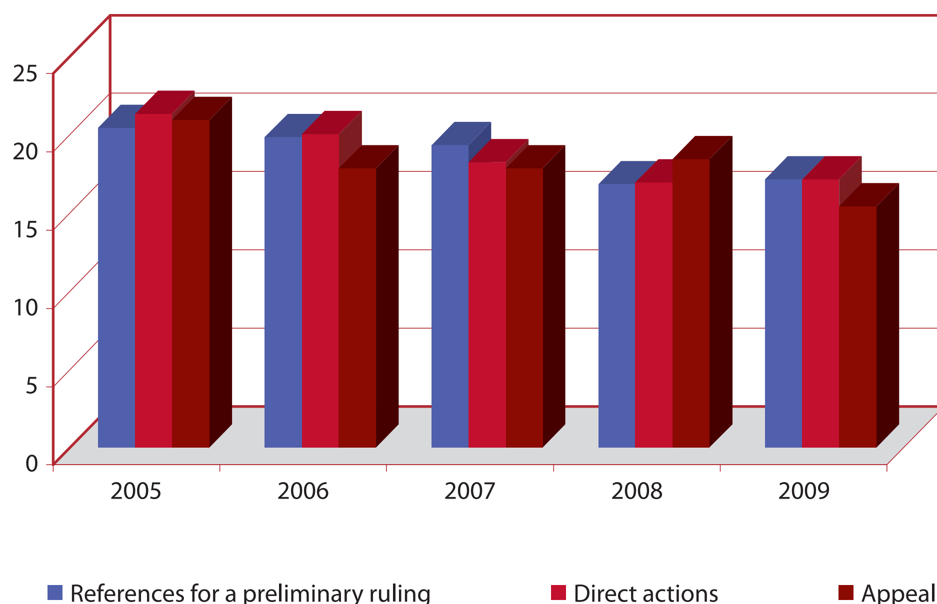
## 11. *Completed cases* — Judgments concerning failure of a Member State to fulfil its obligations: outcome (2005–09) [1]



| | 2005 | | 2006 | | 2007 | | 2008 | | 2009 | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Infringement declared | Dismissed | Infringement declared | Dismissed | Infringement declared | Dismissed | Infringement declared | Dismissed | Infringement declared | Dismissed |
| Belgium | 10 | 1 | 7 | | 9 | 1 | 7 | | 15 | 1 |
| Bulgaria | | | | | | | | | | |
| Czech Republic | | | | | 6 | | 2 | | 1 | |
| Denmark | 3 | 1 | | | 3 | | | | 1 | |
| Germany | 12 | | 7 | | 7 | 1 | 3 | 3 | 6 | 2 |
| Estonia | | | | | | | | | 1 | |
| Greece | 20 | | 6 | | 10 | 3 | 8 | 1 | 22 | |
| Spain | 10 | 1 | 10 | 1 | 13 | 1 | 15 | 1 | 11 | |
| France | 13 | | 5 | | 7 | | 9 | 1 | 6 | |
| Ireland | 3 | | 2 | 1 | 7 | 2 | 4 | | 7 | |
| Italy | 11 | 1 | 13 | 1 | 23 | 2 | 14 | 1 | 11 | 4 |
| Cyprus | | | | | | | | | | |
| Latvia | | | | | | | | | | |
| Lithuania | | | | | | | 1 | | | |
| Luxembourg | 16 | | 19 | | 12 | | 12 | | 7 | |
| Hungary | | | | | | | | | | |
| Malta | | | | | 1 | | | | 2 | |
| Netherlands | 4 | | 1 | 1 | 3 | 1 | 3 | | 3 | |
| Austria | 10 | | 10 | | 6 | | 3 | | 6 | |
| Poland | | | | | | | 2 | | 5 | |
| Portugal | 6 | | 7 | | 9 | | 6 | | 7 | 1 |
| Romania | | | | | | | | | | |
| Slovenia | | | | | | | | | 1 | |
| Slovakia | | | | | 1 | | 1 | | | |
| Finland | 5 | | 7 | | 3 | 1 | 1 | 1 | 6 | 1 |
| Sweden | 2 | | 2 | 1 | 5 | | 2 | 1 | 7 | |
| United Kingdom | 6 | 1 | 7 | 3 | 2 | 4 | 1 | | 9 | |
| **Total** | **131** | **5** | **103** | **8** | **127** | **16** | **94** | **9** | **134** | **9** |

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

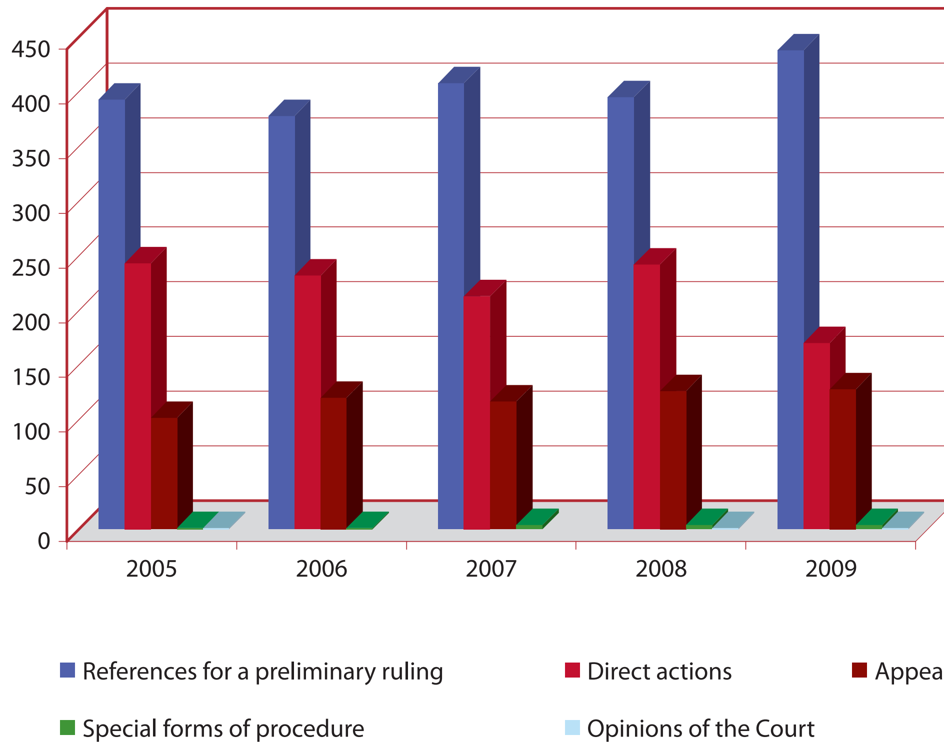
# 12. *Completed cases* — Duration of proceedings (2005–09) [1] (judgments and orders involving a judicial determination)




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| References for a preliminary ruling | 20.4 | 19.8 | 19.3 | 16.8 | 17.1 |
| Urgent preliminary ruling procedure | | | | 2.1 | 2.5 |
| Direct actions | 21.3 | 20 | 18.2 | 16.9 | 17.1 |
| Appeals | 20.9 | 17.8 | 17.8 | 18.4 | 15.4 |

[1] The duration of proceedings is expressed in months and tenths of months. 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; special forms of procedure (namely taxation of costs, legal aid, application to set aside, third-party proceedings, interpretation, revision, rectification, attachment procedure); cases terminated by an order removing the case from the register, declaring that there is no need to give a decision or referring the case to the General Court; proceedings for interim measures and appeals concerning interim measures and interventions.

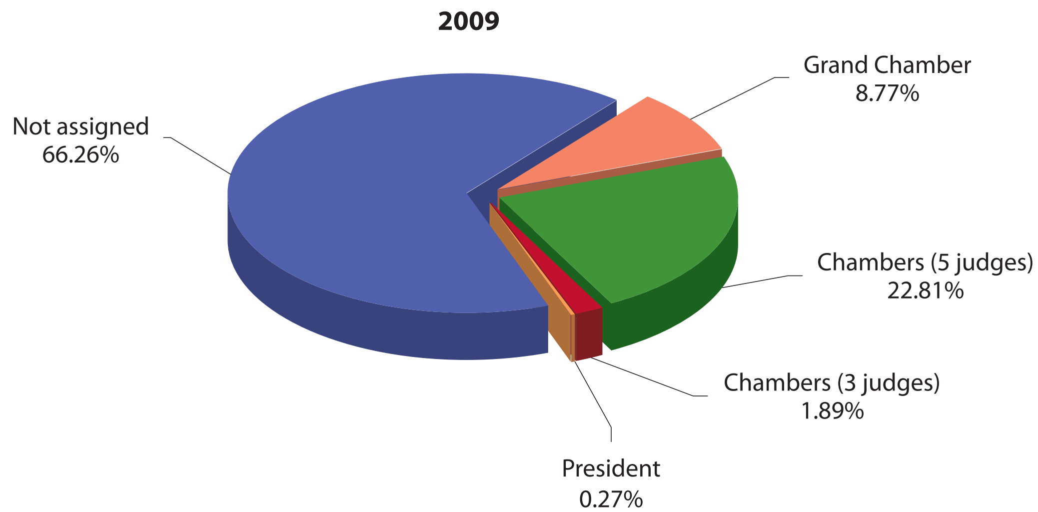
# 13. *Cases pending as at 31 December* — Nature of proceedings (2005–09) ([1])




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| References for a preliminary ruling | 393 | 378 | 408 | 395 | 438 |
| Direct actions | 243 | 232 | 213 | 242 | 170 |
| Appeals | 102 | 120 | 117 | 126 | 128 |
| Special forms of procedure | 1 | 1 | 4 | 4 | 4 |
| Opinions of the Court | 1 | | | 1 | 1 |
| **Total** | **740** | **731** | **742** | **768** | **741** |

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

# 14. *Cases pending as at 31 December* — Bench hearing action (2005–09) ([1])




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Not assigned | 437 | 490 | 481 | 524 | 491 |
| Full Court | 2 | | | | |
| Grand Chamber | 60 | 44 | 59 | 40 | 65 |
| Chambers (5 judges) | 212 | 171 | 170 | 177 | 169 |
| Chambers (3 judges) | 29 | 26 | 24 | 19 | 14 |
| President | | | 8 | 8 | 2 |
| **Total** | **740** | **731** | **742** | **768** | **741** |

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

## 15. *Miscellaneous* — Expedited and accelerated procedures (2005–09) [1]

| | 2005 | | 2006 | | 2007 | | 2008 | | 2009 | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Granted | Not granted | Granted | Not granted | Granted | Not granted | Granted | Not granted | Granted | Not granted |
| Direct actions | | | | | | 1 | | | | |
| References for a preliminary ruling | | 5 | | 5 | | 6 | 2 | 6 | | 3 |
| Appeals | | | | | | 1 | | | | 1 |
| Special forms of procedure | | | | | | | | | | 1 |
| **Total** | | **5** | | **5** | | **8** | **2** | **6** | | **5** |

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

## 16. *Miscellaneous* — Urgent preliminary ruling procedure (2008–09) ([1])

| | 2008 | | | 2009 | | |
|---|---|---|---|---|---|---|
| | Granted | Not granted | **Total** | Granted | Not granted | **Total** |
| Urgent preliminary ruling procedure | 3 | 3 | **6** | 2 | 1 | **3** |

([1]) Since 1 March 2008, pursuant to the provisions of Article 104b of the Rules of Procedure, an urgent preliminary ruling procedure has been available for cases falling within the area of freedom, security and justice.

## 17. *Miscellaneous* — Proceedings for interim measures (2009) (1)

| | New applications for interim measures | New appeals concerning interim measures and interventions | Outcome | | |
|---|---|---|---|---|---|
| | | | Not granted | Granted | Removed from the register or no need to give a decision |
| Competition | | 2 | | | |
| Law governing the institutions | | | 1 | | 2 |
| Environment and consumers | 1 | | 2 | 1 | 3 |
| **Total EC Treaty** | | | **3** | **1** | **5** |
| **OVERALL TOTAL** | **1** | **2** | **3** | **1** | **5** |

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

# 18. *General trend in the work of the Court* (1952–2009) — New cases and judgments

| Year | New cases [1] | | | | | | | Judgments/ Opinions [2] |
|---|---|---|---|---|---|---|---|---|
| | Direct actions | References for a preliminary ruling | Appeals | Appeals concerning interim measures or interventions | Requests for an opinion | Total | Applications for interim measures | |
| 1953 | 4 | | | | | 4 | | |
| 1954 | 10 | | | | | 10 | | 2 |
| 1955 | 9 | | | | | 9 | 2 | 4 |
| 1956 | 11 | | | | | 11 | 2 | 6 |
| 1957 | 19 | | | | | 19 | 2 | 4 |
| 1958 | 43 | | | | | 43 | | 10 |
| 1959 | 46 | | | | 1 | 47 | 5 | 13 |
| 1960 | 22 | | | | 1 | 23 | 2 | 18 |
| 1961 | 24 | 1 | | | 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 | | | 1 | 131 | 5 | 78 |
| 1976 | 51 | 75 | | | 1 | 127 | 6 | 88 |
| 1977 | 74 | 84 | | | | 158 | 6 | 100 |
| 1978 | 146 | 123 | | | 1 | 270 | 7 | 97 |
| 1979 | 1 218 | 106 | | | | 1 324 | 6 | 138 |
| 1980 | 180 | 99 | | | | 279 | 14 | 132 |
| 1981 | 214 | 108 | | | | 322 | 17 | 128 |
| 1982 | 217 | 129 | | | | 346 | 16 | 185 |
| 1983 | 199 | 98 | | | | 297 | 11 | 151 |
| 1984 | 183 | 129 | | | | 312 | 17 | 165 |
| 1985 | 294 | 139 | | | | 433 | 23 | 211 |
| 1986 | 238 | 91 | | | | 329 | 23 | 174 |
| 1987 | 251 | 144 | | | | 395 | 21 | 208 |
| 1988 | 193 | 179 | | | | 372 | 17 | 238 |
| 1989 | 244 | 139 | | | | 383 | 19 | 188 |

>>>

| Year | New cases (1) | | | | | | | Judgments/ Opinions (2) |
|---|---|---|---|---|---|---|---|---|
| | Direct actions | References for a preliminary ruling | Appeals | Appeals concerning interim measures or interventions | Requests for an opinion | Total | Applications for interim measures | |
| 1990 | 221 | 141 | 15 | 1 | | 378 | 12 | 193 |
| 1991 | 140 | 186 | 13 | 1 | 2 | 342 | 9 | 204 |
| 1992 | 251 | 162 | 24 | 1 | 2 | 440 | 5 | 210 |
| 1993 | 265 | 204 | 17 | | | 486 | 13 | 203 |
| 1994 | 125 | 203 | 12 | 1 | 3 | 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 | 197 | 224 | 66 | 13 | 2 | 502 | 4 | 273 |
| 2001 | 187 | 237 | 72 | 7 | | 503 | 6 | 244 |
| 2002 | 204 | 216 | 46 | 4 | | 470 | 1 | 269 |
| 2003 | 277 | 210 | 63 | 5 | 1 | 556 | 7 | 308 |
| 2004 | 219 | 249 | 52 | 6 | 1 | 527 | 3 | 375 |
| 2005 | 179 | 221 | 66 | 1 | | 467 | 2 | 362 |
| 2006 | 201 | 251 | 80 | 3 | | 535 | 1 | 351 |
| 2007 | 221 | 265 | 79 | 8 | | 573 | 3 | 379 |
| 2008 | 210 | 288 | 77 | 8 | 1 | 584 | 3 | 333 |
| 2009 | 143 | 302 | 104 | 2 | 1 | 552 | 1 | 377 |
| **Total** | **8 465** | **6 620** | **1 021** | **79** | **19** | **16 204** | **349** | **8 267** |

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

(2) Net figures.

## 19. *General trend in the work of the Court* (1952–2009) — New references for a preliminary ruling

(by Member State per year) ([1])

| | BE | BG | CZ | DK | DE | EE | EL | ES | FR | IE | IT | CY | LV | LT | LU | HU | MT | NL | AT | PL | PT | RO | SI | SK | FI | SE | UK | Others ([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** |

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| | BE | BG | CZ | DK | DE | EE | EL | ES | FR | IE | IT | CY | LV | LT | LU | HU | MT | NL | AT | PL | PT | RO | SI | SK | FI | SE | UK | Others [2] | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1986 | 13 | | | 4 | 18 | | 2 | 1 | 19 | 4 | 5 | | | | 1 | | | 16 | | | | | | | | | 8 | | **91** |
| 1987 | 15 | | | 5 | 32 | | 17 | 1 | 36 | 2 | 5 | | | | 3 | | | 19 | | | | | | | | | 9 | | **144** |
| 1988 | 30 | | | 4 | 34 | | | 1 | 38 | | 28 | | | | 2 | | | 26 | | | | | | | | | 16 | | **179** |
| 1989 | 13 | | | 2 | 47 | | 2 | 2 | 28 | 1 | 10 | | | | 1 | | | 18 | | | 1 | | | | | | 14 | | **139** |
| 1990 | 17 | | | 5 | 34 | | 2 | 6 | 21 | 4 | 25 | | | | 4 | | | 9 | | | 2 | | | | | | 12 | | **141** |
| 1991 | 19 | | | 2 | 54 | | 3 | 5 | 29 | 2 | 36 | | | | 2 | | | 17 | | | 3 | | | | | | 14 | | **186** |
| 1992 | 16 | | | 3 | 62 | | 1 | 5 | 15 | | 22 | | | | 1 | | | 18 | | | 1 | | | | | | 18 | | **162** |
| 1993 | 22 | | | 7 | 57 | | 5 | 7 | 22 | 1 | 24 | | | | 1 | | | 43 | | | 3 | | | | | | 12 | | **204** |
| 1994 | 19 | | | 4 | 44 | | | 13 | 36 | 2 | 46 | | | | 1 | | | 13 | | | 1 | | | | | | 24 | | **203** |
| 1995 | 14 | | | 8 | 51 | | 10 | 10 | 43 | 3 | 58 | | | | 2 | | | 19 | 2 | | 5 | | | | | 6 | 20 | | **251** |
| 1996 | 30 | | | 4 | 66 | | 4 | 6 | 24 | | 70 | | | | 2 | | | 10 | 6 | | 6 | | | | 3 | 4 | 21 | | **256** |
| 1997 | 19 | | | 7 | 46 | | 2 | 9 | 10 | 1 | 50 | | | | 3 | | | 24 | 35 | | 2 | | | | 6 | 7 | 18 | | **239** |
| 1998 | 12 | | | 7 | 49 | | 5 | 55 | 16 | 3 | 39 | | | | 2 | | | 21 | 16 | | 7 | | | | 2 | 6 | 24 | | **264** |
| 1999 | 13 | | | 3 | 49 | | 3 | 4 | 17 | 2 | 43 | | | | 4 | | | 23 | 56 | | 7 | | | | 4 | 5 | 22 | | **255** |
| 2000 | 15 | | | 3 | 47 | | 3 | 5 | 12 | 2 | 50 | | | | | | | 12 | 31 | | 8 | | | | 5 | 4 | 26 | 1 | **224** |
| 2001 | 10 | | | 5 | 53 | | 4 | 4 | 15 | 1 | 40 | | | | 2 | | | 14 | 57 | | 4 | | | | 3 | 4 | 21 | | **237** |
| 2002 | 18 | | | 8 | 59 | | 7 | 3 | 8 | | 37 | | | | 4 | | | 12 | 31 | | 3 | | | | 7 | 5 | 14 | | **216** |
| 2003 | 18 | | | 3 | 43 | | 4 | 8 | 9 | 2 | 45 | | | | 4 | | | 28 | 15 | | 1 | | | | 4 | 4 | 22 | | **210** |
| 2004 | 24 | | | 4 | 50 | | 18 | 8 | 21 | 1 | 48 | | | | 1 | 2 | | 28 | 12 | | 1 | | | | 4 | 5 | 22 | | **249** |
| 2005 | 21 | | 1 | 4 | 51 | | 11 | 10 | 17 | 2 | 18 | | | | 2 | 3 | | 36 | 15 | 1 | 2 | | | | 4 | 11 | 12 | | **221** |
| 2006 | 17 | | 3 | 3 | 77 | | 14 | 17 | 24 | 1 | 34 | | | 1 | 1 | 4 | | 20 | 12 | 2 | 3 | | | 1 | 5 | 2 | 10 | | **251** |
| 2007 | 22 | 1 | 2 | 5 | 59 | 2 | 8 | 14 | 26 | 2 | 43 | | | 1 | | 2 | | 19 | 20 | 7 | 3 | 1 | | 1 | 5 | 6 | 16 | | **265** |
| 2008 | 24 | | 1 | 6 | 71 | 2 | 9 | 17 | 12 | 1 | 39 | 1 | 3 | 3 | 4 | 6 | | 34 | 25 | 4 | 1 | | | | 4 | 7 | 14 | | **288** |
| 2009 | 35 | 8 | 5 | 3 | 59 | 2 | 11 | 11 | 28 | | 29 | 1 | 4 | 3 | | 10 | 1 | 24 | 15 | 10 | 3 | 1 | 2 | 1 | 2 | 5 | 28 | 1 | **302** |
| **Total** | **614** | **9** | **12** | **125** | **1 731** | **6** | **145** | **222** | **783** | **51** | **1 007** | **2** | **7** | **8** | **64** | **27** | **1** | **743** | **348** | **24** | **67** | **2** | **2** | **3** | **58** | **81** | **476** | **2** | **6 620** |

[1] Article 177 of the EC Treaty (subsequently Article 234 EC, now Article 267 TFEU), Article 35(1) EU, Article 41 CS, Article 150 EA, 1971 Protocol.

[2] Case C-265/00 Campina Melkunie (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09 Miles and Others (Chambre de recours des écoles européennes).

## 20. *General trend in the work of the Court* (1952–2009) — New references for a preliminary ruling (by Member State and by court or tribunal)

| | | | Total |
|---|---|---|---|
| **Belgium** | Cour constitutionnelle | 15 | |
| | Cour de cassation | 73 | |
| | Conseil d'État | 55 | |
| | Other courts or tribunals | 471 | **614** |
| **Bulgaria** | Софийски градски съд Търговско отделение | 1 | |
| | Other courts or tribunals | 8 | **9** |
| **Czech Republic** | Nejvyššího soudu | | |
| | Nejvyšší správní soud | 5 | |
| | Ústavní soud | | |
| | Other courts or tribunals | 7 | **12** |
| **Denmark** | Højesteret | 23 | |
| | Other courts or tribunals | 102 | **125** |
| **Germany** | Bundesgerichtshof | 128 | |
| | Bundesverwaltungsgericht | 93 | |
| | Bundesfinanzhof | 260 | |
| | Bundesarbeitsgericht | 19 | |
| | Bundessozialgericht | 74 | |
| | Staatsgerichtshof des Landes Hessen | 1 | |
| | Other courts or tribunals | 1 156 | **1 731** |
| **Estonia** | Riigikohus | 1 | |
| | Other courts or tribunals | 5 | **6** |
| **Greece** | Άρειος Πάγος | 10 | |
| | Συμβούλιο της Επικρατείας | 40 | |
| | Other courts or tribunals | 95 | **145** |
| **Spain** | Tribunal Supremo | 24 | |
| | Audiencia Nacional | 1 | |
| | Juzgado Central de lo Penal | 7 | |
| | Other courts or tribunals | 190 | **222** |
| **France** | Cour de cassation | 88 | |
| | Conseil d'État | 47 | |
| | Other courts or tribunals | 648 | **783** |
| **Ireland** | Supreme Court | 17 | |
| | High Court | 15 | |
| | Other courts or tribunals | 19 | **51** |
| **Italy** | Corte suprema di Cassazione | 103 | |
| | Corte Costituzionale | 1 | |
| | Consiglio di Stato | 63 | |
| | Other courts or tribunals | 840 | **1 007** |
| **Cyprus** | Ανώτατο Δικαστήριο | 2 | |
| | Other courts or tribunals | | **2** |

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| | | | Total |
|---|---|---|---|
| **Latvia** | Augstākā tiesa | 6 | |
| | Satversmes tiesa | | |
| | Other courts or tribunals | 1 | **7** |
| **Lithuania** | Lietuvos Respublikos Konstitucinis Teismas | 1 | |
| | Lietuvos Aukščiausiasis Teismas | 2 | |
| | Lietuvos vyriausiasis administracinis Teismas | 2 | |
| | Other courts or tribunals | 3 | **8** |
| **Luxembourg** | Cour supérieure de justice | 10 | |
| | Cour de cassation | 2 | |
| | Conseil d'État | 13 | |
| | Cour administrative | 7 | |
| | Other courts or tribunals | 32 | **64** |
| **Hungary** | Legfelsőbb Bíróság | 1 | |
| | Fővárosi Ítélőtábla | 2 | |
| | Szegedi Ítélötáblá | 1 | |
| | Other courts or tribunals | 23 | **27** |
| **Malta** | Constitutional Court | | |
| | Qorti ta' l- Appel | | |
| | Other courts or tribunals | 1 | **1** |
| **Netherlands** | Raad van State | 69 | |
| | Hoge Raad der Nederlanden | 183 | |
| | Centrale Raad van Beroep | 47 | |
| | College van Beroep voor het Bedrijfsleven | 139 | |
| | Tariefcommissie | 34 | |
| | Other courts or tribunals | 271 | **743** |
| **Austria** | Verfassungsgerichtshof | 4 | |
| | Oberster Gerichtshof | 75 | |
| | Oberster Patent- und Markensenat | 3 | |
| | Bundesvergabeamt | 24 | |
| | Verwaltungsgerichtshof | 59 | |
| | Vergabekontrollsenat | 4 | |
| | Other courts or tribunals | 179 | **348** |
| **Poland** | Sąd Najwyższy | 4 | |
| | Naczelny Sąd Administracyjny | 6 | |
| | Trybunał Konstytucyjny | | |
| | Other courts or tribunals | 14 | **24** |
| **Portugal** | Supremo Tribunal de Justiça | 2 | |
| | Supremo Tribunal Administrativo | 36 | |
| | Other courts or tribunals | 29 | **67** |
| **Romania** | Tribunal Dâmbovița | 1 | |
| | Other courts or tribunals | 1 | **2** |

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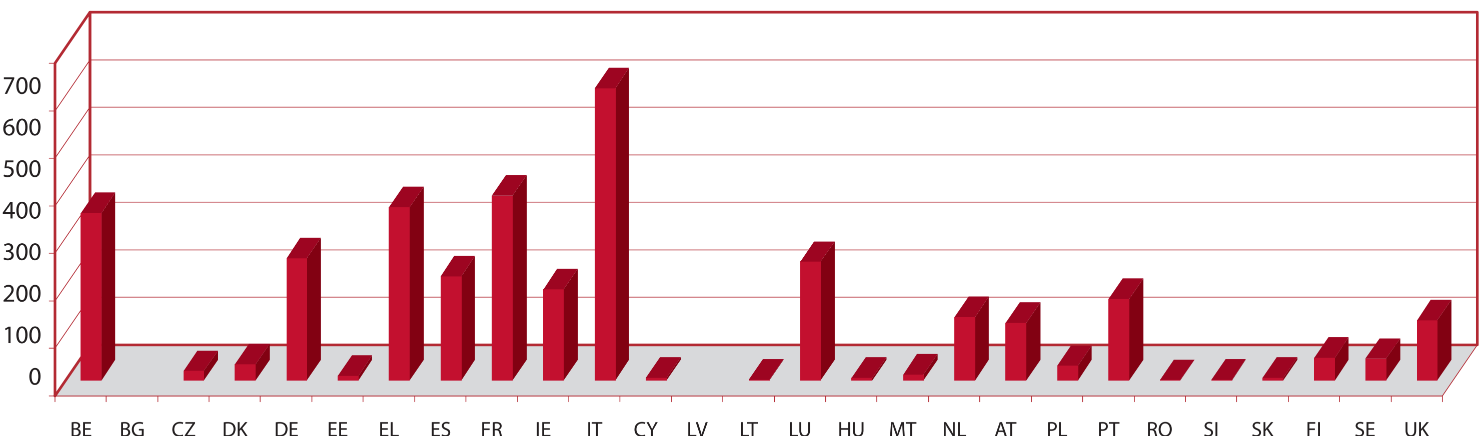
| | | | Total |
|---|---|---|---|
| **Slovenia** | Vrhovno sodišče | | |
| | Ustavno sodišče | | |
| | Other courts or tribunals | 2 | **2** |
| **Slovakia** | Ústavný Súd | | |
| | Najvyšší súd | 2 | |
| | Other courts or tribunals | 1 | **3** |
| **Finland** | Korkein hallinto-oikeus | 24 | |
| | Korkein oikeus | 10 | |
| | Other courts or tribunals | 24 | **58** |
| **Sweden** | Högsta Domstolen | 13 | |
| | Marknadsdomstolen | 4 | |
| | Regeringsrätten | 23 | |
| | Other courts or tribunals | 41 | **81** |
| **United Kingdom** | House of Lords | 40 | |
| | Court of Appeal | 53 | |
| | Other courts or tribunals | 383 | **476** |
| **Others** | Cour de justice Benelux/Benelux Gerechtshof [1] | | **1** |
| | The Complaints Board of the European Schools [2] | | **1** |
| **Total** | | | **6 620** |

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

[2] Case C-196/09 *Miles and Others.*

## 21. *General trend in the work of the Court* (1952–2009) — New actions for failure of a Member State to fulfil its obligations (1)




| | BE | BG | CZ | DK | DE | EE | EL | ES | FR | IE | IT | CY | LV | LT | LU | HU | MT | NL | AT | PL | PT | RO | SI | SK | FI | SE | UK | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2009 | 13 | | 4 | | 5 | 5 | 12 | 11 | 8 | 6 | 16 | 3 | | | 5 | 1 | 3 | 5 | 7 | 11 | 17 | 1 | | 2 | 1 | 1 | 5 | **142** |
| 1952–2009 | 353 | | 20 | 34 | 258 | 10 | 365 | 219 | 389 | 192 | 615 | 6 | | 2 | 250 | 6 | 13 | 134 | 121 | 31 | 172 | 1 | 2 | 6 | 48 | 46 | 127 | **3 420** |

(1) Articles 93, 169, 170, 171 and 225 of the EC Treaty (subsequently Articles 88 EC, 226 EC, 227 EC, 228 EC and 298 EC, now Articles 108 TFEU, 258 TFEU, 259 TFEU, 260 TFEU and 348 TFEU), Articles 141 EA, 142 EA and 143 EA and Article 88 CS.

# Chapter II

## The General Court

## A — Proceedings of the General Court in 2009

*By Mr Marc Jaeger, President of the General Court*

The growth in this Court's membership as enlargements have taken place means that it is becoming rare for a year to pass without a change in the Court's composition, even disregarding any partial renewal of its membership. Thus, 2009 saw the departure of two members, Ms Virpi Tiili, a Judge at the Court since 1995, and Mr Daniel Šváby, a Judge at the Court since 2004, who were replaced by Mr Heikki Kanninen and Mr Juraj Schwarcz respectively.

From a statistical point of view, the past year has been one of continuity. A large number of new cases were brought (568); although this figure shows a slight reduction compared with 2008, it remains well above the figures recorded in previous years. Consequently, although the significant improvement in the number of cases disposed of has also been confirmed (with 555 cases completed), the number of cases pending could not be reduced despite sustained efforts to achieve this.

In addition, 2009 was marked by two exceptional events.

First, this Court celebrated the completion of its first 20 years. The colloquium 'From 20 to 2020 — Building the CFI of tomorrow on solid foundations', which was organised to mark this anniversary, gave rise to outstanding discussions and contributions on the part of participants from a wide variety of backgrounds ([1]). Avenues concerning important matters related to the Court's future, its tasks and its operation were explored, strengthening the Court's conviction that it is necessary to pursue reforms, including of a structural nature, in order to ensure an ever increasing level of judicial protection.

Second, 2009 was the year in which the Treaty of Lisbon entered into force. While the major impact of this Treaty concerning the European project does not concern the Courts of the European Union first and foremost, mention should nevertheless be made of certain aspects that will not fail to affect this Court. First, the Court has a new name: the 'Court of First Instance of the European Communities' has been renamed the 'General Court of the European Union' in order to take account of its appellate jurisdiction in staff cases. Next, the conditions governing the admissibility of actions brought by individuals for the annulment of regulatory acts have been relaxed. Also, this Court's jurisdiction has been extended to cover certain actions brought by individuals in the fields of, first, common foreign and security policy and, second, police and judicial cooperation in criminal matters. Finally, the Charter of Fundamental Rights of the European Union has been elevated to the rank of the Treaties. These changes, which constitute important steps forward for judicial protection, could have a significant impact on both the number and the nature of cases brought before the General Court.

The following account is intended to provide an overview of this Court's diverse, and sometimes complex, field of activity when it exercises its jurisdiction in proceedings concerning the legality of measures (I), actions for damages (II), appeals (III) and applications for interim measures (IV).

([1]) Those contributions are available on the website http://www.curia.europa.eu and the colloquium papers will be published in the course of 2010.

# I. Proceedings concerning the legality of measures

*Admissibility of actions brought under Article 230 EC*

## 1. Measures against which an action may be brought

Measures against which an action may be brought under Article 230 EC are those producing binding legal effects of such a kind as to affect the applicant's interests by significantly altering his legal position [2].

In Case T-437/05 *Brink's Security Luxembourg* v *Commission* (judgment of 9 September 2009) the applicant had challenged the award of a public contract to one of its competitors and, in the course of that challenge, had made an application for access to certain documents. In its judgment the Court broke new ground, introducing some flexibility in relation to the definition of measures against which an action may be brought.

In the case in point the contested measure was the Commission's letter informing the applicant of its refusal to disclose the composition of the committee evaluating the tenders submitted. The procedure for obtaining access to Commission documents, which is governed by Articles 6 to 8 of Regulation (EC) No 1049/2001 [3], takes place in two stages. First, the applicant must send the Commission an initial application for access to documents. Second, in the event of a total or partial refusal, the applicant may make a confirmatory application to the Secretary-General of the Commission. In the event of a further total or partial refusal, the applicant may institute court proceedings against the Commission under the conditions laid down in Article 230 EC. Thus, only the measure adopted by the Secretary-General is capable of producing legal effects of such a kind as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment.

The Court concluded that the action for annulment, brought in respect of the refusal of the initial application, was in principle inadmissible. However, the Court noted that in its letter refusing the initial application the Commission had omitted to inform the applicant of its right to make a confirmatory application, although it was required to do so by Regulation No 1049/2001. Such an irregularity had the consequence of rendering admissible, exceptionally, an action for the annulment of the refusal of the initial application. If it were otherwise, the Commission might be able to avoid judicial review by reason of a breach of procedure attributable to it. As is apparent from the case-law, since the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty, the procedural rules governing actions for judicial review must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented so as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under European Union law.

## 2. Standing to bring proceedings

Under the fourth paragraph of Article 230 EC actions brought by individuals against acts of which they are not the addressees are admissible subject to the twofold condition that the applicants be directly and individually concerned by the contested act. According to the case-law, natural or

(2) Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

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

legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of those factors distinguishes them individually just as in the case of the person addressed [4]. Furthermore, in order to be of direct concern to an individual, the contested measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from the rules alone without the application of other intermediate rules [5].

In Case T-420/05 *Vischim* v *Commission* (judgment of 7 October 2009), the applicant sought annulment of Commission Directive 2005/53/EC of 16 September 2005 [6], which amended Directive 91/414/EEC [7] by including, in Annex I thereto (which lists the substances whose placing on the market is authorised by the Member States), the active substance chlorothalonil produced by the applicant, whilst imposing certain conditions, in particular in relation to the maximum hexachlorobenzene (HCB) content in that substance. Under that legislation, the Member States were obliged to amend or withdraw existing authorisations for plant protection products containing chlorothalonil which failed to comply with those conditions.

As the directive concerned was a measure of general application, the Court pointed out that, although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by natural or legal persons for annulment of a directive, it is clear from the case-law that that fact in itself is not sufficient to render such actions inadmissible. The institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which they are afforded by that provision of the Treaty, as the fact that the contested measure is of general application does not preclude it from being of direct and individual concern to certain natural and legal persons. In those circumstances, a European Union measure can be of a general nature and, at the same time, vis-à-vis some traders, in the nature of a decision. Noting that Directive 91/414 provides that the assessment procedure concerning active substances already on the market is initiated by notification made by an interested producer, who submits a dossier containing the data necessary for that purpose and is associated with the various stages of examination of his dossier, the Court held that the applicant, in its capacity as notifier, enjoyed procedural safeguards and, on that basis, was individually concerned by the contested directive.

With regard to the condition relating to direct concern, the Court found that through adoption of the contested directive the Commission had brought the assessment of chlorothalonil to an end, when it decided to include it in Annex I to Directive 91/414 subject to certain conditions. Moreover, by virtue of the directive, the Member States were obliged to review authorisations for plant protection products containing chlorothalonil and to verify compliance with the condition as to maximum HCB content, an action in respect of which they had no discretion. The contested directive was therefore of direct concern to the applicant, as an undertaking manufacturing the active substance in question, and consequently the action for annulment was admissible.

(4) Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107.

(5) Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43.

(6) OJ 2005 L 241, p. 51.

(7) Council Directive of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1). Under the directive, placing on the market may be authorised only if, in the light of scientific and technical knowledge, it may be expected that the plant protection products containing the active substance concerned will fulfil certain conditions relating to the products not being harmful for human or animal health or the environment.

## 3. Period within which proceedings must be commenced

In Case T-257/04 *Poland* v *Commission* (judgment of 10 June 2009, under appeal) and Joined Cases T-300/05 and T-316/05 *Cyprus* v *Commission* (judgment of 2 October 2009, not published), the Court ruled on the question of determining the starting point of the period of two months provided for in the fifth paragraph of Article 230 EC in the case of an action for annulment brought by an acceding State against a regulation concerning transitional measures to be adopted in the agricultural sphere which has been adopted and published before the accession of that State. In the cases in point, the Republic of Poland and the Republic of Cyprus claimed that the period allowed for commencing proceedings could not begin to run before their accession to the European Union, which was a condition of the entry into force of the regulation at issue.

In that connection, the Court recalled that, under the fifth paragraph of Article 230 EC, an action for annulment must be instituted within two months of the date of publication of the measure and that the strict application of rules concerning procedural time limits meets the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. In the circumstances of the cases before it, the Court thus concluded that the actions in question were out of time as the arguments of the States concerned did not call that conclusion into question. First, the Court considered to be irrelevant the question whether the entry into force of the regulations at issue was subject to the accession of the States concerned, since that question confused the challengeability of a measure, which is connected with the completion of all the requisite formalities as to publicity and causes the period for bringing proceedings to start running, with the entry into force of that measure, which may be delayed. Second, the Court held that, as the period laid down in Article 230 EC is of general application, that article did not require the States concerned to have the status of Member States and applied in any event to those States as legal persons. Third, the Court pointed out that the States concerned had not been deprived of their right to effective judicial protection, since non-member countries (including States before their accession to the European Union), although they cannot claim the status of litigant conferred on the Member States, may nevertheless bring proceedings by virtue of the right of action conferred on legal persons under the fourth paragraph of Article 230 EC. The Court noted that although the regulation in question was a measure of general application, it directly prevented the States concerned from exercising their own powers as they saw fit, by imposing various obligations on them concerning the establishment and implementation of a system, specifically a charging system, intended to eliminate surplus sugar stocks. Drawing an analogy with the case-law applicable to sub-State bodies ([8]), the Court concluded that, before they became Member States, the Republic of Poland and the Republic of Cyprus were directly and individually concerned by the contested regulation and consequently the strict application of the periods within which proceedings had to be brought, starting from the date of publication of the regulation, did not prevent them from asserting their rights.

In addition, the Republic of Cyprus claimed that its action was in any event admissible in so far as it was brought within the period allowed for commencing proceedings against a regulation that amended the original regulation. The Court observed that, although the definitive nature of a measure which has not been challenged within the time limit concerns not only the measure itself but also any later measure which is merely confirmatory (an approach which is justified by the requirement of legal stability and applies to individual measures as well as to those which have a legislative character), where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against those which, even if not amended,

([8]) Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 29.

form a whole with it [9]. Considering that conclusion in its context, however, the Court qualified it, stating that the fact that the action is out of time must be accepted in an action for annulment of an amended provision not only where the provision in question reproduces the provision contained in the act in respect of which the period allowed for commencing proceedings has expired but also where, although the new wording is different, the substance is not affected. Conversely, where a provision of a regulation is, at least in part, substantially amended, a fresh right of action arises against that provision and also against all the provisions which, even if not amended, form with it an indivisible and substantial whole. Here, as the regulation at issue made ancillary and procedural amendments, seeking solely to extend the periods prescribed by the original regulation, annulment of the provisions of the original regulation could not be sought by means of an action for annulment brought against the amending regulation.

## *Competition rules applicable to undertakings*

### 1. General

### (a) Duration of the infringement

In Case T-58/01 *Solvay* v *Commission* (judgment of 17 December 2009) the Court held that, even were particular circumstances to arise such as to reverse the burden of proof with regard to the duration of the infringement, the Commission would not on that account be released from its obligation to substantiate, in a decision establishing an infringement of Article 81(1) EC, its findings with regard to the duration of the infringement and to provide the information that it has available concerning such duration. Stating that the contested decision contained contradictory aspects regarding the end of the infringement, the Court held that the Commission, on which the burden of proof primarily fell, had not shown that the infringement in question had continued until the end of 1990. The Court therefore concluded that the contested decision should be varied by reducing by 25% the fine imposed on the applicant.

### (b) Limitation

Case T-405/06 *ArcelorMittal Luxembourg and Others* v *Commission* (judgment of 31 March 2009, under appeal) gave the Court an opportunity to confirm its earlier decision [10] concerning the scope *ratione personae* of the effects of actions which interrupt the limitation period. In the case in point, the parent company of a subsidiary which had participated in a cartel on the market for steel beams asserted that the actions which interrupted the five-year limitation period had effect only as against the undertakings which had participated in the infringement. Since it had neither been identified as such during the administrative procedure (during which the action interrupting the limitation period had been taken) nor been an addressee of the statement of objections, the parent company thus contended that the Commission could not raise that interruption against it. The Court rejected that interpretation, explaining that it entailed an objective fact, namely participation in the infringement, which is distinct from a subjective and contingent element such as an undertaking being identified during the administrative procedure as having so participated. An undertaking may have participated in the infringement without the Commission being aware that it has done so at the time when it takes an action interrupting the limitation period. That period is interrupted not only with respect to the undertakings which were the subject of an action taken for the purpose of the preliminary investigation or proceedings, but also with respect to those

[9] Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, paragraphs 29 and 30.

[10] Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR II-1277.

which, having participated in the infringement, are still unknown to the Commission and, accordingly, have not been the subject of any measure of investigation or are not the addressees of any procedural act.

As regards suspension of the limitation period, the Court stated that, whereas Regulation (EC) No 1/2003 ([11]) specifically provides that interruption of the limitation period applies with regard to all undertakings which have participated in the infringement, no such specific statement is made as regards suspension. The Court therefore considered whether initiation of an action before it had an effect in relation to the applicant undertaking alone or an *erga omnes* effect with respect to all the undertakings which had participated in the infringement, whether or not they had brought an action. In that connection, it stated at the outset that, as is the case with interruption of the limitation period, suspension of that period, which constitutes an exception to the principle of a five-year limitation period, must be interpreted restrictively. Therefore it could not be presumed that the legislature intended to apply the same rules in both situations. Furthermore, unlike interruption of the limitation period, which is intended to enable the Commission to take proceedings and impose effective sanctions in respect of infringements of the competition rules, suspension of the limitation period concerns, by definition, a situation in which the Commission has already adopted a decision. The fact that judicial proceedings have effect *inter partes* and the consequences which necessarily follow from that preclude in principle an action brought by one undertaking to which the contested decision was addressed from having any effect whatsoever on the situation of the other addressees. Lastly, the Court rejected the Commission's argument that the suspension of the limitation period resulting from the initiation by an undertaking of proceedings before it or the Court of Justice applies both to the legal entity which is party to the proceedings and to all the other legal entities forming part of the same economic unit, no matter which legal entity initiated those proceedings. While it is true that the competition rules are addressed to 'undertakings', understood as economic units, the fact remains that, for the purposes of the application and implementation of Commission decisions in such matters, it is necessary to identify, as the addressee, an entity having legal personality, which alone is able to initiate an action against the decision adopted at the close of the administrative procedure and of which it is an addressee. The Court concluded that the 10-year limitation period had been exceeded in relation to one of the applicants and annulled the contested decision in so far as it concerned that undertaking.

### (c) Rights of the defence

In Case T-24/07 *ThyssenKrupp Stainless* v *Commission* (judgment of 1 July 2009, under appeal), the Court recalled that, in order to allow the Commission to balance, on the one hand, the need to preserve the parties' rights of defence by granting as much access as possible to the file and, on the other, the concern to protect confidential information of other parties or third parties, those other parties and third parties had to provide the Commission with all relevant details. It pointed out that, if a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. In that regard, the Court held that a request which is in general terms and does not go into detail in respect of each document does not amount to a reasoned request and does not answer any question that the Commission has as to the apparent relevance of the information that was not accessible for the applicant's own defence.

([11]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

Furthermore, the Court observed that, in order to respect the rights of defence of undertakings, the Commission must give the parties concerned the right to be heard before it takes any of the decisions provided for in Articles 7, 8, 23 and 24(2) of Regulation No 1/2003. Where documents are provided to the applicant after adoption of one of the abovementioned decisions, such as a statement of objections, there is none the less no infringement of the applicant's rights of defence if the Commission has not amended the objections set out in the decision in question and, consequently, does not rely on facts on which the applicant has not been given an opportunity to explain itself.

## 2. Points raised on the scope of Article 81 EC

### (a) Temporal application of the law

Applying the principles laid down in the cases concerning the 'reinforcing bars' cartel ([12]), the Court recalled in *ArcelorMittal Luxembourg and Others* v *Commission* and *ThyssenKrupp Stainless* v *Commission* and in Case T-122/04 *Outokumpu and Luvata* v *Commission* (judgment of 6 May 2009) that, although the succession of the legal framework of the EC Treaty to that of the ECSC Treaty had led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that succession was part of the unity and continuity of the Community legal order and its objectives. In addition, the meaning of agreement and concerted practices under Article 65(1) ECSC corresponded to that of agreement and concerted practices for the purposes of Article 81 EC and those two provisions have been interpreted in the same way by the Community judicature. Thus the continuity of the Community legal order and the objectives governing its functioning required that, in so far as it succeeded the European Coal and Steel Community and in its own procedural framework, the European Community ensured, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals under the ECSC Treaty and the rules adopted for its application. That requirement applied all the more in so far as the distortion of competition resulting from non-compliance with the rules in the field of cartels was liable, under the EC Treaty, to expand its effects over time after the expiry of the ECSC Treaty. Regulation No 1/2003 had therefore to be interpreted as enabling the Commission, after 23 July 2002, to identify, and to impose penalties in respect of, cartels in the fields falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

### (b) Fines

The applicants in Case T-450/05 *Peugeot and Peugeot Nederland* v *Commission* (judgment of 9 July 2009) challenged, inter alia, the Commission's assessment of the gravity of the infringement. On the one hand, the infringement had been categorised as 'very serious' within the meaning of Point 1 A of the 1998 Guidelines ([13]), as the aim of the bonus system put in place by Peugeot in the Netherlands between 1997 and 2003 had been to encourage dealers to restrict parallel imports. To reach its conclusion that the Commission, in the exercise of its discretion, had not erred in characterising the infringement as very serious, the Court stated, inter alia, that the infringement was, by nature, especially serious, in view of the particularly deceitful methods used to perpetuate the remuneration system until 2003, in a context in which the Commission's previous practice and the consistent case-law on parallel imports, in particular in the motor vehicle sector, gave clear

([12]) Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others* v *Commission* [2007] ECR II-4331.

([13]) 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).

warnings as to the unlawfulness of such a system. It also pointed out that the applicants were members of a large industrial group with an important position on the relevant markets and that they had legal departments perfectly capable of gauging the anti-competitive nature of the conduct in question. On the other hand, so far as the actual impact of the infringement on the market was concerned, the Court found that the Commission had not paid sufficient attention to the role played by the change in price differentials in the decline in exports. Thus, the Court, exercising its unlimited jurisdiction, considered it appropriate to reduce by 10% the amount of the fine determined for the gravity of the infringement.

In Case T-13/03 *Nintendo and Nintendo of Europe* v *Commission* (judgment of 30 April 2009), the Court accepted that in the case of a complex of agreements and concerted practices of a vertical nature with the object and effect of restricting parallel exports in game consoles and cartridges, the respective shares held by the parties in the distribution of the relevant products were representative of the specific weight of each undertaking in the distribution system in question. The Commission was therefore held to be justified in referring to that criterion for the purposes of the differential treatment applied when establishing the basic amounts of the fines.

In the same judgment, the Court, considering whether the Commission had erred in determining the deterrent effect of the fine, made clear that the position of manufacturer of the products may, in the case of vertical infringements, also be a factor which is representative of its actual capacity to cause significant damage to competition. The manufacturer of the relevant products, which occupies a central position in the distribution system of those products, must display special vigilance and ensure that it observes the competition rules when concluding distribution agreements.

Further clarification concerning the question of the deterrent effect of fines was given in one of the judgments dealing with the monochloroacetic acid cartel. In Case T-168/05 *Arkema* v *Commission* (judgment of 20 September 2009, not published, under appeal), the Court pointed out that, although the Commission had applied a multiplier for deterrence in earlier cases involving the applicant, that could not call into question the use of the multiplier in later cases in which a penalty was imposed on the applicant for its participation in a cartel operating in the same period. As each infringement was different and was the subject of a different decision, the Commission could take into account the size of the undertakings concerned and apply a multiplier to the starting amount of the fine.

Following an examination of the extent to which the applicants had cooperated, the Court also varied one of the decisions concerning anti-competitive practices on the market for Nintendo game cartridges and consoles. In its judgment in *Nintendo and Nintendo of Europe* v *Commission*, it compared Nintendo's cooperation, on the one hand, with that of its exclusive distributor for Ireland and the United Kingdom, on the other, and did so first of all from a chronological point of view. On that basis it found that Nintendo and its distributor had provided relevant documents at the same stage of the procedure and the fact that Nintendo had begun to cooperate a few days later than the distributor was not decisive in that respect. Next, the Court compared the degree of cooperation from a qualitative point of view, taking into account both the circumstances in which those undertakings had cooperated and the intrinsic value of the information provided. In that connection, the Court noted that both undertakings had submitted information spontaneously and that the information provided by them was equally helpful to the Commission. The Court therefore concluded that, in accordance with the principle of equal treatment, Nintendo's cooperation had to be regarded as comparable to that of its distributor. Accordingly, the Court granted Nintendo the same rate of reduction of the fine as that which had been granted to the distributor.

*Outokumpu and Luvata* v *Commission* afforded the Court an opportunity to explain its earlier decisions concerning aggravating circumstances, particularly repeated infringement. The Court recalled that the concept of repeated infringement involves only a previous finding of infringement. The fact that the first infringement was committed under the ECSC Treaty and that, because of the particular circumstances of the case, no fine was imposed is not a bar on the principle that once the Commission has established, by a decision, that an undertaking has participated in a cartel, that decision may serve as a basis for a subsequent assessment of the propensity of the undertaking to infringe the rules relating to cartels.

The taking into account of a previous infringement was also specifically addressed in Case T-161/05 *Hoechst* v *Commission* (judgment of 30 September 2009, not published). Here, the applicant had maintained that the Commission was not able to take into account an earlier decision because the latter had become final only after the end of the infringement at issue. The Court pointed out, however, that, for it to be possible to take such a decision into account, it is sufficient that an undertaking has been found previously to be a perpetrator of an infringement of the same type, even if the decision is still subject to judicial review.

### (c) Imputability of the infringement

In its judgments concerning the cartel in the market for monochloroacetic acid, the Court made some interesting points on the imputability to the parent company of the unlawful conduct of its subsidiaries.

In particular, in *Hoechst* v *Commission,* the Court held that the applicant could not claim that its liability was transferred by a contract with one of its subsidiaries whereby its area of business was transferred. First, such a contract could not be relied upon against the Commission in order to escape the penalties incurred under competition law inasmuch as it sought to apportion liability between the companies for participating in a cartel. Second, the alleged transfer of liability effected in the case in point under the terms of the contract of transfer had no bearing on the determination of the applicant's liability, since that contract was concluded between the applicant and one of its wholly-owned subsidiaries, whose unlawful conduct could therefore be imputed to it in its capacity as parent company.

Likewise, in A*rkema* v *Commission,* the applicant denied that it was possible for the Commission to attribute the infringement of the subsidiary to the parent company, since the latter was only a non-operational holding company, playing very little role in the management of the subsidiary. The Court made clear that that fact was not sufficient to prevent the parent company from exercising decisive influence over the conduct of its subsidiary by coordinating financial investments within the group concerned. Indeed, in a group of companies, a holding company which coordinates, amongst other things, financial investments within the group is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one, in particular by means of budgetary control. In addition, the Court stated that no conclusion could be drawn from the fact that the two companies were operating on separate markets and had no supplier–customer relationship. In a group such as the group in question, the fact that there was a division of tasks was not unusual and did not reverse the presumption that the parent company and its subsidiary constituted a single undertaking within the meaning of Article 81 EC. Lastly, the Court recalled that the presumption that a parent company is liable for infringements committed by subsidiaries in which it holds all or nearly all the shares is based on an objective criterion which applies regardless of the size or legal structure of the undertaking. Therefore, if the application of that criterion has different consequences depending on the size of the group and its legal structure, that is merely an objective consequence of the differences between undertakings.

## 3. Points raised on the scope of Article 82 EC

In Case T-301/04 *Clearstream* v *Commission* (judgment of 9 September 2009), the Court ruled on the lawfulness of a Commission decision finding that the applicants had infringed Article 82 EC, first, by refusing to supply their services and, second, by applying discriminatory prices.

The Court stated that the Commission was correct in finding those abuses of a dominant position. In particular, the Court confirmed that the refusal to grant access and the unjustified discrimination in that regard were not two separate infringements but two manifestations of the same behaviour, as the unjustified discrimination stemmed from the refusal to provide comparable customers with the same or similar services.

In that connection, since the period of time required to obtain access considerably exceeded that which could be considered reasonable and justified and thus amounted to an abusive refusal to provide the service in question, that period of time was capable of causing a competitive disadvantage on the relevant market. The Court also confirmed that the application to a trading partner of different prices for equivalent services, continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market, could not fail to cause that partner a competitive disadvantage.

In Case T-57/01 *Solvay* v *Commission* (judgment of 17 December 2009), the Court found that documents seized solely for the purpose of verifying whether undertakings had participated in cartels and/or concerted practices under Article 81 EC could be used in support of allegations of infringements of Article 82 EC, since the practices which the Commission had considered to be at the root of the abuse of a dominant position and those which it had authorised its officials to investigate were substantially the same.

The Court held inter alia that a system of discounts was an abuse where, amongst other conditions, differentiated discounts were granted as soon as the customer ordered additional quantities from the applicant as compared with those agreed contractually, irrespective of the volumes, in absolute terms, of the latter. On that account, the unit price for those quantities was markedly lower than the average price paid by the customer for the basic quantities agreed contractually and was thus an incentive to the customer also to buy volumes in excess of the contractual quantities, since other suppliers would have had difficulty in offering, in respect of those volumes, prices which competed with the applicant's.

## 4. Points raised on the scope of the control of concentrations

### (a) Duty of care

In Case T-151/05 *NVV and Others* v *Commission* (judgment of 7 May 2009), the Court stated that in view of the need for rapid action and the very tight deadlines to which the Commission is subject in the procedure for the control of concentrations, the Commission cannot be required, in the absence of evidence indicating that information provided to it is inaccurate, to verify all the information it receives. Although the diligent and impartial examination which the Commission is obliged to carry out in the context of that procedure does not permit it to take as its basis facts or information which cannot be regarded as accurate, the need for rapid action presupposes that it cannot itself verify down to the last detail the authenticity and reliability of all the information it receives, since the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust.

### (b) Requests for information

In Case T-145/06 *Omya* v *Commission* (judgment of 4 February 2009), the Court defined the scope of the Commission's power in relation to requests for information. As regards the request for information in itself, the Court stated, first, that the need for the information requested must be assessed by reference to the view that the Commission can reasonably have at the time the request is made and not by reference to the actual need for the information in the subsequent procedure. Second, it stated that, since the period of suspension of the time limits set in Article 10 of Regulation No 139/2004 [14] resulting from the adoption of a decision under Article 11 thereof depends on the date on which the necessary information is communicated, the Commission does not infringe the principle of proportionality by suspending the procedure until such information has been communicated to it.

As regards the correction of information communicated by a party which proves to be incorrect, the Court pointed out, first, that the Commission is entitled to request correction if there is a risk that the errors identified could have a significant impact on its assessment of whether the concentration at issue is compatible with the common market. Second, the Court stated that legitimate expectation cannot be pleaded in order to avoid the consequences of infringing the obligation to provide complete and correct information on the sole ground that the infringement was not identified by the Commission in the course of its verifications.

### (c) Period within which proceedings must be commenced

In Case T-48/04 *Qualcomm v Commission* (judgment of 19 June 2009), the Commission maintained that Qualcomm's action against a decision declaring compatible with the common market the acquisition by two undertakings of joint control of Toll Collect, an automatic toll collection system, was inadmissible since, although Qualcomm had not been the addressee of that decision, the transmission of the decision to it constituted notification for the purposes of the fifth paragraph of Article 230 EC and, accordingly, the period allowed for commencing proceedings began to run from that time. The Court rejected the Commission's arguments. It recalled, first, that Article 20(1) of Regulation (EEC) No 4064/89 [15] requires there to be publication in the *Official Journal of the European Union* of decisions taken pursuant to that regulation and, accordingly, as regards persons who are not addressees identified in the contested decision, the period for instituting proceedings must be calculated by reference to the first of the cases set out in the fifth paragraph of Article 230 EC, namely from the time of publication. The Court pointed out that to accept the Commission's broad interpretation of the term addressee, which encompassed both the addressee(s) identified in a decision and any other persons designated as such by the Commission although they have not been so designated in the decision, would be to diminish the obligation provided for by Article 20(1) of Regulation No 4064/89, conferring on the Commission a discretion for the purpose of identifying from among persons who are not expressly named as addressees in a decision those who may bring an action from notification of a decision and not from its publication. The conferral of such a discretion could, however, entail a breach of the principle of equal treatment inasmuch as, among the persons who are not specifically named as addressees in a decision, those to whom that decision has been 'notified' will be able to challenge it from 'notification', whilst other

[14] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

[15] The case in point concerned Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

persons to whom the decision has not been 'notified' will be able to challenge it from publication. Furthermore, it is not always possible for the Commission to identify at the outset the persons who may bring an action as from notification of a decision. Such discrimination cannot therefore be justified by the objective of ensuring legal certainty as swiftly as possible.

### *State aid*

Cases concerning State aid accounted for a large part of the Court's activity in 2009: 70 cases were disposed of and 46 cases were brought. It is possible only to give an overview of the Court's decisions concerning (i) questions of admissibility, (ii) questions of substance and (iii) procedural questions.

#### 1. Admissibility

The case-law this year has further clarified, amongst other matters, the concept of an act producing binding legal effects and that of a legal interest in bringing proceedings.

As regards an act producing binding legal effects, the Court rejected in Case T-354/05 *TF1* v *Commission* (judgment of 11 March 2009) the Commission's argument that it takes no decision in the case of a procedure for review of existing aid leading to acceptance by the Member State of the appropriate measures proposed or seeking to limit that procedure to a quasi-contractual process. It is true that the Commission and the Member States may discuss the proposed appropriate measures but it is only where the Commission decides to accept the State's commitments as answering its concerns that the procedure for investigation of existing aid is brought to an end by a decision which is open to appeal.

In Case T-152/06 *NDSHT* v *Commission* (judgment of 9 June 2009, under appeal) the Court held that the obligation on the Commission to adopt a decision in response to a complaint arises only in the situation envisaged in Article 13 of Regulation (EC) No 659/1999 ([16]). Under the second sentence of Article 20(2) of that regulation, the Commission need only inform the complainant in writing that there are insufficient grounds for taking a view on the case. The latter situation arises, in particular, where Article 13 of that regulation does not apply because, in reality, the aid referred to in the complaint is not unlawful aid, but existing aid.

It follows from the Commission's exclusive right of initiative in the case of existing aid that a complainant cannot, by means of a complaint, require the Commission to assess the compatibility of existing aid. If, following an initial assessment, the Commission finds that the complaint relates not to unlawful aid but to existing aid, it is under no obligation to address a decision under Article 4 of Regulation No 659/1999 to the Member State concerned and cannot be compelled to apply the procedure provided for in Article 88(1) EC. Thus, a letter which categorises the aid complained of as existing aid does not have the characteristics of a decision which produces binding legal effects such as to affect the interests of the applicant.

As regards a legal interest in bringing proceedings, the Court held in *TF1* v *Commission* that the applicant could not be regarded as having no such interest on the ground that the contested decision, in imposing conditions concerning aid to a competitor, was favourable to the applicant. Such an argument was based on the premiss that the applicant's objections regarding the substance

([16]) 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).

of the decision, in particular concerning the manifestly unsuitable nature of the commitments to render the aid scheme compatible with the common market, were incorrect. However, annulment of the contested decision, either because of a manifest error by the Commission in determining appropriate measures to be implemented or because of an inadequate statement of reasons concerning the appropriateness of those measures to the problems identified, would not place the applicant in a less favourable situation than that resulting from the contested decision. Such annulment would thus mean that the contested decision was either characterised, or liable to be characterised, by inadequate commitments and was therefore unfavourable to the applicant.

In Case T-388/03 *Deutsche Post and DHL International* v *Commission* (judgment of 10 February 2009, under appeal), the Court made clear that concerned parties within the meaning of Article 88(2) EC had a legal interest in securing the annulment of a Commission decision, taken at the end of the preliminary examination procedure, since such an annulment would require the formal investigation procedure to be opened, permitting them to present their observations and thus exert an influence on the new decision. In that situation it was not for the Court to compare the pleas raised with the arguments in defence presented by the applicants in a separate case.

## 2. Substantive rules

### (a) Granting of an economic advantage

In Case T-25/07 *Iride and Irede Energia* v *Commission* (judgment of 11 February 2009, under appeal), the Court ruled on whether the liberalisation of a market was among the developments which are only to be expected by operators or whether, on the contrary, normal market conditions implied the stability of the legislative framework. It observed that in a democratic State the legislative framework could be changed at any time — all the more so where the previous framework provided for the partitioning of a market along national or regional lines, so that monopoly situations arose. It followed that the opening-up of a previously partitioned market could not be regarded as anomalous in relation to normal market conditions.

Economic operators are in that respect entitled to protection of their legitimate expectations. Nevertheless, where they have in fact received that protection, they cannot be allowed to claim that it should be implemented by one means rather than another, that is to say, by means of the exclusion from the concept of aid within the meaning of Article 87(1) EC of aid compensating for loss sustained by reason of the legislative changes, rather than by a declaration of the compatibility of that measure with the common market, in accordance with Article 87(3) EC.

The Court also applied the principle stated in the judgment of the Court of Justice in *TWD* v *Commission* [17], according to which the Commission does not exceed the limits of its discretion when, in the case of aid which a Member State proposes to grant to an undertaking, it takes a decision declaring that aid to be compatible with the common market, but subject to the condition of prior repayment by the undertaking of unlawful aid received earlier, by reason of the cumulative effect of the aid in question. The fact that the earlier unlawful aid was not granted as individual aid but as part of an aid scheme and that the exact benefit for the recipient undertakings could not, because of the lack of cooperation from the Member State concerned, be determined by the Commission was not justification for not applying the principle in question, since any other approach would be tantamount to rewarding a failure to comply with the duty to cooperate in good faith and would deprive the system for the review of State aid of effectiveness.

[17] Case C-355/95 P [1997] ECR I-2549, paragraphs 25 to 27.

In that connection, the obligation on the Member State and on the undertaking that is the potential recipient of new aid to provide the Commission with information to show that the aid is compatible with the common market also entails the need to show that there is no cumulative effect of the new aid and earlier unlawful aid. If the Commission has not been able — because of the failure of the Member State and the potential recipient of the aid to comply with that obligation — to assess the effects on competition which that cumulative effect might have, it cannot be criticised for a lack of definition or analysis of the market at issue.

### (b) Services of general economic interest

In *Deutsche Post and DHL International* v *Commission,* the Court stated that the dicta of the Court of Justice in *Altmark* ([18]) were fully applicable to earlier Commission decisions. Thus, the fact that the Commission had not been in a position, during the preliminary examination procedure under Article 88(2) EC, to carry out a complete examination of whether the level of compensation awarded to a service of general economic interest was appropriate constituted evidence of the existence of serious difficulties in establishing whether aid was compatible with the common market.

In *TF1* v *Commission*, the Court confirmed that the conditions laid down in *Altmark*, seeking to determine the existence of State aid within the meaning of Article 87(1) EC, are not to be confused with the Article 86(2) EC test, which is used to determine whether a measure constituting State aid may be regarded as compatible with the common market.

The Court also pointed out that — as the assessment of existing aid can lead only to measures which produce effects for the future — although any over-compensation in the past may possibly be relevant to an assessment of the compatibility of existing aid with the common market, the fact nevertheless remains that an examination as to whether there has been such over-compensation is not, in itself, absolutely necessary for a proper assessment of the need to propose appropriate measures for the future and determination of what those measures should be. The risk or otherwise of over-compensation for the future ultimately depends essentially on the specific detailed arrangements of the financing scheme itself, and not on the fact that the scheme has, in practice, led to over-compensation in the past.

### (c) Private investor in a market economy test

In Case T-156/04 *EDF* v *Commission* (judgment of 15 December 2009), the Court recalled that investment by public authorities in the capital of an undertaking, in whatever form, can constitute State aid. However, by virtue of the principle that the public and private sectors are to be treated equally, that cannot be the case where capital is placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions. In situations where the intervention does not form part of the exercise of public powers the private operator test applies in order to determine whether a private operator with a view to profit would have been likely to make the investment. In that regard, the Court pointed out that it is settled case-law that, in order to determine whether measures taken by the State represent the exercise of public powers or whether they are the consequence of obligations that the State must assume as shareholder, it is important to look not at the form of those measures, but at their nature, their subject matter and the rules to which they are subject, while taking into account the objective which they pursue.

([18]) Case C-280/00 [2003] ECR I-7747.

In the case in point, the Court observed that the Commission had not examined whether the capital increase in Électricité de France (EDF), carried out by the French Republic by means of the waiver of a tax claim, constituted a legal measure in the light of the private investor test. In the Commission's view, that test could not apply to a tax advantage since the waiver stemmed from the exercise by the State of its regulatory powers or even of its rights and powers as a public authority. The Court rejected the Commission's interpretation, stating that the application of the private investor test could not be dismissed solely on the ground that EDF's capital increase stemmed from the waiver by the State of a tax claim which it held against EDF. In such circumstances, it was for the Commission to determine whether a private investor would have invested a comparable amount in similar circumstances, irrespective of the form of the intervention by the State to increase EDF's capital and the possible use of tax resources to that end, with a view to ascertaining the economic rationale for that investment and to comparing it with the actions such an investor would have taken with respect to the same undertaking in the same circumstances. The Court also stated that such an obligation on the part of the Commission to determine whether the capital was provided by the State in circumstances corresponding to normal market conditions existed irrespective of the form in which the capital was provided by the State, regardless of whether it was similar to that which a private investor could have used.

Lastly, the Court stated that the very purpose of the private investor test is to establish whether, despite the fact that the State has at its disposal means which are not available to a private investor, the latter would, in the same circumstances, have taken an investment decision comparable to that taken by the State. The nature of the claim converted into capital and, therefore, the fact that a private investor cannot hold a tax claim are therefore irrelevant to the issue of whether or not the private investor test must be applied. Accordingly, the Court concluded that the Commission, by refusing to examine the contested measure in its context and to apply the private investor test, had erred in law. It therefore annulled the contested decision in part.

### (d) Obligation to recover aid

In Joined Cases T-427/04 and T-17/05 *France and France Télécom* v *Commission* (judgment of 30 November 2009), the Court confirmed the line of case-law according to which it must be possible, having regard to the information given in the decision, to calculate the amount of the aid to be recovered without overmuch difficulty. It held that the Commission is justified in confining itself to finding that there is an obligation to repay the aid in question and leaving it to the national authorities to calculate the exact amount of aid to be repaid, particularly where that calculation requires tax and social security systems, the detailed rules of which are laid down in the applicable national legislative provisions, to be taken into account. In the case in point attention must be drawn to the fact that the Commission had used a range of amounts.

In that connection, the Court pointed out that the Commission had stated, in the contested decision, that the amount of aid in question was between EUR 798 million and EUR 1 140 million. It followed that the amount of EUR 798 million had to be considered to be the minimum aid amount to be recovered. As the amounts comprising the range in which the amount of the aid fell were not indicative, the contested decision thus contained appropriate information which should have enabled the French Republic to determine itself, without too much difficulty, the final aid amount to be recovered. The Court also confirmed the line of cases stating that it must be possible to calculate the amount of the aid to be recovered, having regard to the information given in the Commission decision, without overmuch difficulty. In view of the Court of Justice's interpretation of the

contested decision [19], this Court held that the aid amount to be recovered here could be calculated without overmuch difficulty and was at least equal to the minimum amount within the range given by the Commission.

## 3. Procedural rules

### (a) Formal investigation procedure

In Case T-375/04 *Scheucher-Fleisch and Others* v *Commission* (judgment of 18 November 2009), the Court recalled that the Commission is required to initiate the formal investigation procedure if, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. When the Commission examined the compatibility of the aid in question with the common market, it was aware that one of the paragraphs of the national law in question did not comply with the condition set out in the Guidelines for State aid for advertising that a national quality control scheme cannot be restricted to products of a particular origin. That provision therefore raised doubts as to the compatibility of the aid in question with the Guidelines for State aid for advertising and should have led to the initiation of the procedure referred to in Article 88(2) EC. The Court therefore annulled the contested decision.

On another point, in *France and France Télécom* v *Commission,* the Court stated that the fact that the Commission had, in the contested decision, altered its analysis by comparison with the decision to initiate a formal investigation procedure would lead, in the case of the State concerned, to infringement of the rights of the defence only if the information contained in that decision or subsequently provided during the exchange of arguments in the administrative procedure had not enabled the State to comment properly on all the matters of law or fact contained in the contested decision. By contrast, differences between the contested decision and the opening decision which resulted from the Commission accepting, in whole or in part, the arguments put forward by the Member State, could not, by definition, give rise to an infringement of the rights of the defence of that State.

Similarly, in Case T-211/05 *Italy* v *Commission* (judgment of 4 September 2009), the Court held that the formal investigation procedure allows there to be a more in-depth examination and clarification of the questions raised in the decision to initiate the procedure, so that any difference between that decision and the final decision cannot be regarded in itself as constituting a defect rendering the final decision unlawful. The provisions relating to the review of State aid do not require the Commission to inform the Member State concerned of its position before adopting its decision, where the Member State has been given notice to submit its comments.

### (b) Legitimate expectations

The applicants in Joined Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 *Diputación Foral de Álava and Others* v *Commission* (judgment of 9 September 2009, under appeal) had argued, inter alia, that the Commission's conduct had constituted an exceptional circumstance capable of justifying their legitimate expectation that the aid schemes at issue were lawful, on the ground that there had been a failure to publish a notice to potential aid recipients, as provided for in the 1983 Communication on illegal aid.

[19] Case C-441/06 *Commission* v *France* [2007] ECR I-8887.

Although the Court found it regrettable that the notice had not been published in the Official Journal, it stated that it remained the case that the information contained in that Communication was wholly unambiguous. Moreover, to adopt the construction proposed by the applicants was to give the 1983 Communication on illegal aid a significance which is contrary to Article 88(3) EC. The risk attaching to illegally granted aid was a consequence of the practical effect of the obligation to notify laid down in Article 88(3) EC and did not depend on whether or not the notice provided for in the 1983 Communication on illegal aid was published in the Official Journal.

In particular, if the system of monitoring State aid established by the Treaty were to be maintained, the recovery of illegally granted aid could not be rendered impossible merely because there had been no publication of such a notice by the Commission. The Court concluded that the failure to publish the notice provided for in the 1983 Communication on illegal aid did not constitute an exceptional circumstance capable of justifying any expectation whatever that the illegally granted aid was lawful.

In addition, in *France and France Télécom* v *Commission*, the Court stated that very aim of the obligation to notify measures which were liable to grant undertakings State aid was to enable any doubts to be dispelled as to whether those measures did in fact amount to State aid. At the date of adoption of the law which provided for the special tax regime applicable to France Télécom, there was some doubt as to whether that regime conferred an advantage on the undertaking. The Court thus held that France should have notified the Commission of the measure in question. Since it had failed to give that notification before the implementation of the tax regime in question, it could not rely on the principle of protection of legitimate expectations unless it could prove that there were exceptional circumstances.

### (c) Procedure for adopting decisions

In *France and France Télécom* v *Commission*, the Court provided important clarification concerning the procedure for the adoption of Commission decisions on State aid. The Court held that it is possible, as provided in the second paragraph of Article 13 of the Rules of Procedure of the Commission [20], for the College of Commissioners to instruct one or more of its Members to adopt the definitive text of any decision the substance of which has already been determined in discussion. Where the College exercises that power, it is for the Court which is considering the question of whether that power was properly exercised to ascertain whether the College may be regarded as having adopted all the factual and legal elements of the decision in question. Since this Court found here that the technical differences between the version of the contested decision adopted on 2 August 2004 and the text which had been approved by the College of Commissioners on 19 and 20 July 2004 did not affect the scope of the contested decision, it did not uphold the plea.

### *Community trade mark*

Decisions relating to the application of Regulation (EC) No 40/94, replaced by Regulation (EC) No 207/2009 [21] which is essentially limited however to codifying the rules on the Community trade mark which have been significantly amended on several occasions since 1994, continued to

[20] OJ 2000 L 308, p. 26.

[21] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1). However, in this Report, reference is made only to the numbering of the articles in Regulation No 40/94.

represent in 2009 a large number of the cases disposed of by the Court (168 cases, that is to say 30% of the total number of cases disposed of in 2009).

## 1. Absolute grounds for refusal and absolute grounds for invalidity

Article 7(1)(c) of Regulation No 40/94 prohibits the registration as a Community trade mark of signs which, by reason of their descriptiveness, are incapable of fulfilling the function of indicating the commercial origin of the goods and services in question. Furthermore, according to settled case-law, the descriptiveness of a sign must be assessed by reference, on the one hand, to the goods or services in question and, on the other, to the relevant public's perception of that sign [22].

In Case T-234/06 *Torresan* v *OHIM — Klosterbrauerei Weissenohe (CANNABIS)* (judgment of 19 November 2009), the Court dismissed the appeal against the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) according to which, for the average consumer, the word sign CANNABIS was descriptive of the characteristics of beer, wine and other alcoholic beverages, which could contain among their ingredients cannabis as a flavouring in the manufacture thereof. The Court stated that such a finding is not affected by the fact that the word 'cannabis' is an evocative and allusive word which gives rise to the idea of pleasure, distraction or relaxation.

Furthermore, in Joined Cases T-200/07 to T-202/07 *Agencja Wydawnicza Technopol* v *OHIM (222, 333 and 555)*, Joined Cases T-64/07 to T-66/07 *Agencja Wydawnicza Technopol* v *OHIM (350, 250 and 150)* and Case T-298/06 *Agencja Wydawnicza Technopol* v *OHIM (1 000)* (judgments of 19 November 2009, not published), the Court stated that word signs consisting solely of figures are descriptive of goods such as brochures, periodicals, the daily press and games, in so far as they refer to the characteristics of those goods, in particular the number of pages, works, items of information and compiled games.

In the case of figurative signs consisting of numbers framed by a rectangle and accompanied by coloured decoration, the Court was also called upon to adjudicate, in Joined Cases T-425/07 and T-426/07 *Agencja Wydawnicza Technopol* v *OHIM (100 and 300)* (judgment of 19 November 2009), on the consequences of the refusal of an undertaking which made an application for registration of those signs as Community trade marks to state, in accordance with Article 38(2) of Regulation No 40/94, that it disclaimed any exclusive right to those numbers. Having recalled that, under that provision, where a trade mark contains an element which is not distinctive, and where the inclusion of that element could give rise to doubts as to the scope of protection afforded, OHIM may request, as a condition for registration, that the applicant state that he disclaims any exclusive right to that element, the Court explained that the function of such disclaimers is to make apparent the fact that the exclusive rights of the proprietor of a mark do not extend to the non-distinctive elements of that mark and that whether the elements of the marks applied for are distinctive, for the purposes of Article 38(2) of Regulation No 40/94, must be assessed not by reference to the overall impression given by those marks, but by reference to the elements comprising them.

In addition, the Court again adjudicated on the distinctiveness of very simple figurative signs, namely an exclamation mark, on its own or framed by a rectangle, in Case T-75/08 *Joop!* v *OHIM (!)* and Case T-191/08 *JOOP!* v *OHIM (!) (Representation of an exclamation mark in a rectangle)* (judgments of 30 September 2009, not published). The Court recalled that registration of a trade

[22] Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 39, and Case C-64/02 P *OHIM* v *Erpo Möbelwerk* [2004] ECR I-10031, paragraph 43.

mark which consists of signs that are used as advertising slogans, indications of quality or incitements to purchase the goods or services in question is not excluded as such by virtue of such use. A sign which fulfils functions other than that of a trade mark in the traditional sense of the term is only distinctive, however, if it may be perceived immediately as an indication of the commercial origin of the goods or services in question. The Court went on to observe that, in the cases in point, consumers, including those with a higher degree of attention, were not able to determine the origin of the goods designated by reference to an exclamation mark, which would be viewed rather as a term of praise, even if the exclamation mark were positioned inside a rectangular frame — a secondary element giving the sign in question the appearance of a label. Furthermore, in Case T-424/07 *Pioneer Hi-Bred International* v *OHIM (OPTIMUM)* (judgment of 20 January 2009, not published), the Court stated that, precisely because it is commonly used in everyday language, as well as in trade, as a generic laudatory term, the sign OPTIMUM cannot be regarded as appropriate for the purpose of identifying the commercial origin of the goods which it designates and that the fact that the goods in question are intended for a specialised public in no way alters that assessment, given that the level of attention of such a public, which is generally high, is relatively low when it comes to promotional indications.

Under Article 7(3) of Regulation No 40/94, a trade mark may be registered if it has become distinctive in relation to the goods or services in question in consequence of the use which has been made of it. In this respect, in Case T-137/08 *BCS* v *OHIM — Deere (Combination of the colours green and yellow)* (judgment of 28 October 2009, under appeal), the Court first recalled that not every use of a sign, in the case in point a combination of the colours green and yellow, necessarily constitutes use as a trade mark. However, in the circumstances of this case, OHIM's decision not to declare the mark consisting of that sign invalid was based inter alia on statements from professional associations according to which the combination of the colours green and yellow referred to the intervener's agricultural machines and on the fact that the intervener had been using the same combination of colours on its machines for a considerable time. The Court also stated that, although it must be proved that the disputed mark has acquired distinctive character throughout the Union, the same types of evidence do not have to be provided in respect of each Member State.

## 2. Relative grounds for refusal and relative grounds for invalidity

The main contributions to the case-law in 2009 concern the assessment of similarity of signs and the evaluation of likelihood of confusion. First of all, in Case T-80/08 *CureVac* v *OHIM — Qiagen (RNAiFect)* (judgment of 28 October 2009), the Court found that the similarities between the signs RNAifect and RNActive resulting from the identical nature of the first three letters is strongly mitigated by the differences between their last five letters. It stated that, while it is true that the consumer normally attaches more importance to the first part of words where it is more pronounced, the public will not consider a descriptive or weakly distinctive element forming part of a complex mark to be the distinctive and dominant element of the overall impression conveyed by that mark. In the case in point, the element 'rna' had limited distinctive character, and the consumer would assume that this was a reference to a chemical compound. Accordingly, that element could not be regarded by the public as being distinctive and dominant in the overall impression conveyed by the complex marks in question. On the other hand, in Case T-434/07 *Volvo Trademark* v *OHIM — Grebenshikova (SOLVO)* (judgment of 2 December 2009), the Court held that there is a certain degree of phonetic similarity between the signs SOLVO and VOLVO and, accordingly, that OHIM was wrong to believe that it could dispense with a global assessment of the likelihood of confusion.

Next, in Case T-230/07 *Laboratorios Del Dr. Esteve* v *OHIM — Ester C (ESTER-E)* (judgment of 8 July 2009, not published), the Court specified certain circumstances in which the conceptual

comparison between signs can counteract the visual and phonetic similarities between those signs. The Court observed that, although the sign ESTEVE has no meaning in any official Union language apart from Spanish, the sign ESTER-E will be associated with a well-known first name or with a chemical compound and that that conceptual difference between those signs means that there is no likelihood of confusion. On the other hand, in Case T-386/07 *Peek & Cloppenburg* v *OHIM — Redfil (Agile)* (judgment of 29 October 2009, not published), the Court stated that situations in which a sign whose meaning the relevant public is capable of grasping immediately has only limited distinctiveness in relation to the goods or services in question do not constitute such circumstances. It took the view that the conceptual difference between the signs Aygill's and Agile is not sufficient to counteract the visual and phonetic similarities between those signs. With regard to the goods at issue, sports equipment and clothing, the word 'agile' has a laudatory character, which, in light of those similarities, might also be attributed by consumers to the earlier mark. Also, in Case T-291/07 *Viñedos y Bodegas Príncipe Alfonso de Hohenlohe* v *OHIM – Byass (ALFONSO)* (judgment of 23 September 2009, not published), the Court upheld OHIM's assessment that the earlier mark PRINCIPE ALFONSO and the mark applied for ALFONSO are conceptually different for Spanish consumers, in particular in that, in so far as the 'principe' element singles out one person from among all those with the same first name, the mark applied for has a clear and specific meaning, so that the relevant public will be capable of grasping it immediately.

As regards comparison of goods or services, in Case T-316/07 *Commercy* v *OHIM — easyGroup IP Licensing (easyHotel)* (judgment of 22 January 2009), the Court, having recalled that goods and services are complementary where there is a close connection between them, such that one is indispensable or important for the use of the other, stated that that definition implies that those goods or services can be used together and therefore that they are intended for the same public.

Other significant case-law developments in 2009 concern Article 8(4) of Regulation No 40/94, in particular in the context of invalidity proceedings. In Joined Cases T-318/06 to T-321/06 *Moreira da Fonseca* v *OHIM – General Óptica (GENERAL OPTICA)* (judgment of 24 March 2009), the Court recalled that, in order to oppose the registration or apply for a declaration of invalidity of a Community trade mark under that provision, the sign relied on must satisfy all of four conditions: it must be used in the course of trade; it must be of more than mere local significance; the right to that sign must have been acquired in accordance with the law of the Member State in which the sign was used prior to the date of application for registration of the Community trade mark and it must confer on its proprietor the right to prohibit the use of a subsequent trade mark. The Court went on to state that the first two conditions must be interpreted in the light of European Union law alone, while the other two conditions must be assessed in the light of the criteria set by applicable national law. Lastly, as regards the second condition, the Court held, first, that the significance must be assessed in the light of both the geographical dimension and the economic dimension and, second, that the fact that a sign confers on its proprietor an exclusive right throughout the national territory is in itself insufficient to prove that it is of more than mere local significance. Moreover, in Joined Cases T-114/07 and T-115/07 *Last Minute Network* v *OHIM — Last Minute Tour (LAST MINUTE TOUR)* (judgment of 11 June 2009), the Court held that, when applying Article 8(4) of Regulation No 40/94, the Board of Appeal is required to take into consideration both the legislation of the Member State concerned, applicable by virtue of the reference made by that provision, and the relevant national case-law.

Furthermore, in Case T-165/06 *Fiorucci* v *OHIM — Edwin (ELIO FIORUCCI)* (judgment of 14 May 2009, under appeal), the Court ascertained whether the conditions for the application of Article 52(2) of Regulation No 40/94 had been observed by the Board of Appeal of OHIM. In the case in point, Mr Elio Fiorucci applied, inter alia, for a declaration of invalidity in respect of the mark ELIO FIORUCCI, relying on his right to a name protected by Italian law. Having recalled that, under that provision,

OHIM may declare a Community trade mark to be invalid if its use can be prohibited pursuant to, in particular, a right to a name protected by a national law, the Court held that the protection guaranteed by the relevant Italian provision is not precluded where the name of the person concerned has achieved renown on account of his commercial activity.

In addition, Case T-435/05 *Danjaq* v *OHIM — Mission Productions (Dr. No*) (judgment of 30 June 2009) enabled the Court to make it clear that the same sign may be protected as an original creative work by copyright and as an indicator of the commercial origin of the goods and services in question by trade mark law. The Court recalled that those two exclusive rights are based on distinct qualities, that is to say the original nature of a creation, on the one hand, and the ability of a sign to distinguish that commercial origin, on the other. Therefore, even if the title of a film can be protected by certain national laws as an artistic creation independently of the protection afforded to the film itself, it does not automatically enjoy the protection afforded to trade marks. Accordingly, even if the signs Dr. No and Dr. NO serve to distinguish the film bearing that title from the other films in the 'James Bond' series, that does not establish that such signs indicate the commercial origin of the goods and services in question.

Lastly, the Court clarified the rules concerning proof of genuine use of the earlier mark in the context of invalidity proceedings. It stated in Case T-450/07 *Harwin International* v *OHIM — Cuadrado (Pickwick COLOUR GROUP)* (judgment of 12 June 2009) that OHIM is required to examine the issue of proof of genuine use of the earlier mark even where the proprietor of the Community trade mark which is the subject matter of an application for a declaration of invalidity has not submitted a specific request to that effect, but has challenged the evidence submitted by the proprietor of the earlier mark to prove use.

## 3. Grounds for revocation

Under Article 50 of Regulation No 40/94, a Community trade mark is liable to revocation inter alia where the use of the trade mark may mislead the public as to the nature, quality or geographical origin of the goods or services in question.

In this respect, in *ELIO FIORUCCI* the Court found that the fact that a mark and a patronymic are identical is not sufficient to warrant the conclusion that the public concerned will think that the person whose patronymic constitutes the mark designed the goods bearing that mark, since that public is aware that, behind every trade mark consisting of a patronymic, there is not necessarily a fashion designer of that name. In order that Article 50 of Regulation No 40/94 may be applied, the person concerned must prove that the mark has been used in a deceptive manner or that a sufficiently serious risk of deception has been established, which was not demonstrated in the case in point.

In Case T-27/09 *Stella Kunststofftechnik* v *OHIM — Stella Pack (Stella)* (judgment of 10 December 2009), the Court also clarified the respective purpose and effects of revocation and opposition proceedings. It observed in particular that the relevant provisions do not provide that opposition proceedings brought on the basis of an earlier mark and still pending can influence in any way the admissibility or even the progress of revocation proceedings against that mark. Opposition proceedings and revocation proceedings are two distinct and autonomous types of proceedings: opposition is designed to frustrate, under certain conditions, an application for registration of a mark due to the existence of an earlier mark, and rejection of an opposition does not entail revocation of the mark concerned, whereas revocation can be brought about only where proceedings have been instituted for that purpose.

## 4. Formal and procedural issues

Since a large number of cases dealt with formal and procedural issues in 2009, it is necessary to limit these remarks to an outline of the main developments.

First, Case T-140/08 *Ferrero* v *OHIM — Tirol Milch (TiMi KiNDERJOGHURT)* (judgment of 14 October 2009, under appeal) is of particular importance, since it enabled the Court to specify the value, in the context of invalidity proceedings, of assessments made and conclusions reached by a Board of Appeal of OHIM in an earlier decision in opposition proceedings involving the same parties and the same Community trade mark. In particular, it was held that there was no room for application of either the principle of *res judicata*, since proceedings before OHIM are administrative and the relevant provisions lay down no rule to that effect, or the principles of legal certainty and the protection of legitimate expectations, since Regulation No 40/94 does not exclude the possibility of invalidity proceedings following the failure of opposition proceedings.

Second, as regards the consequences for OHIM of annulment of a decision of the Board of Appeal, the Court stated in Case T-402/07 *Kaul* v *OHIM — Bayer (ARCOL)* (judgment of 25 April 2009, under appeal) that OHIM has to ensure that the appeal brought by the applicant before the Board of Appeal, which again becomes pending following that annulment, leads to a new decision, possibly adopted by the same board. It stated that, if, as in the case in point, the judgment annulling the decision has not taken a position on whether or not the marks at issue are similar, the Board of Appeal must re-examine that question, independently of the position adopted in the earlier annulled decision.

Third, the Court clarified the scope of the duty to state the reasons on which decisions of the Boards of Appeal are based where a trade mark covers several different goods or services. In Case T-118/06 *Zuffa* v *OHIM (ULTIMATE FIGHTING CHAMPIONSHIP)* (judgment of 2 April 2009), the Court stated that it is possible to use general reasoning for a series of goods or services only where there exists between them a sufficiently direct and specific link as to enable the considerations constituting the grounds of the decision in question, first, to explain adequately the reasoning followed by the Board of Appeal for each of the goods and services belonging to that category and, second, to be applicable without distinction to each of the goods or services concerned. In Joined Cases T-405/07 and T-406/07 *CFCMCEE* v *OHIM (P@YWEB CARD and PAYWEB CARD)* (judgment of 20 May 2009 under appeal), the Court added that general reasoning must none the less enable it carry out its review. Moreover, where a decision offers no reason whatsoever as to why OHIM took the view that certain goods formed a homogenous group, it is not permitted to advance supplementary reasons in the course of the proceedings.

Fourth, in Case T-189/07 *Frosch Touristik* v *OHIM — DSR touristik (FLUGBÖRSE)* (judgment of 3 June 2009, under appeal), the Court stated that only the date of filing of the application for registration, and not that of registration, is relevant to the examination that OHIM must carry out during invalidity proceedings in which it is alleged that a Community trade mark does not fulfil the conditions of Article 7 of Regulation No 40/94. That approach avoids a situation in which the probability of the mark losing its registrability increases with the length of the registration procedure.

Fifth, in Case T-277/06 *Omnicare* v *OHIM — Astellas Pharma (OMNICARE)* (judgment of 7 May 2009), Case T-410/07 *Jurado Hermanos* v *OHIM (JURADO)* (judgment of 12 May 2009), Case T-136/08 *Aurelia Finance* v *OHIM (AURELIA)* (judgment of 13 May 2009) and Joined Cases T-20/08 and T-21/08 *Evets* v *OHIM (DANELECTRO and QWIK TUNE)* (judgment of 23 September 2009, under appeal), the Court adjudicated on the scope of application of Article 78 of Regulation No 40/94 relating to *restitutio in integrum*, according to which the applicant for or proprietor of a mark or any other party

to proceedings before OHIM who has not observed a time limit may, under certain conditions, have his rights re-established. In particular, in the first and fourth judgments mentioned above, the Court stated that that provision is applicable to the time limit for challenging a decision before the Board of Appeal, but not to the time limit for bringing the application for *restitutio in integrum* itself. In addition, in the second judgment, it clarified the concept of a party to the proceedings while, in the third, it established that, if the proprietor of a mark delegates administrative tasks relating to the renewal of the mark to a company specialised in that field, it must ensure that the latter offers the assurance necessary to enable it to be assumed that those tasks will be carried out properly. In particular, where that company installs a computerised renewal reminder system, it must provide for a mechanism for detecting and correcting possible errors.

Lastly, as regards a revocation decision adopted by a department of OHIM in order to rectify an error affecting the costs section of a decision previously adopted by that department, the Court stated, in Case T-419/07 *Okalux* v *OHIM — Messe Düsseldorf (OKATECH)* (judgment of 1 July 2009), that, since that revocation could be only partial, the period for bringing proceedings had to be calculated by reference to the first decision.

### *Environment — System for greenhouse gas emission allowance trading*

In Case T-263/07 *Estonia* v *Commission* (judgment of 23 September 2009, under appeal) and Case T-183/07 *Poland* v *Commission* (judgment of 23 September 2009, under appeal), the Court set out important case-law regarding the distribution of competence between the Member States and the Commission when the Member States' national allocation plans for emission allowances ('NAPs') are drawn up and the Commission checks whether they are compatible with the criteria laid down by Directive 2003/87/EC ([23]).

Here, the Commission had found in the contested decisions that the NAPs of the Republic of Poland and the Republic of Estonia were incompatible with certain criteria laid down by Directive 2003/87, while indicating that no objections would be raised against those NAPs provided that certain amendments were made. The Member States concerned contended before the Court that, by setting a ceiling for greenhouse gas allowances above which their NAPs would be rejected and by substituting, in this context, its method of analysis for that adopted by the relevant Member State, the Commission had infringed the distribution of competence provided for by Directive 2003/87. The Court upheld those claims and annulled the contested decisions.

The Court observed that the reduction of greenhouse gas emissions is of primary importance in the context of the fight against global warming, which represents one of the greatest social, economic and environmental threats which the world currently faces. Pursuit of that objective nevertheless cannot justify maintaining in force a decision rejecting a NAP if that measure was adopted in breach of the competences allocated by Directive 2003/87 to the Member States and the Commission respectively.

The Court pointed out that, in accordance with the third paragraph of Article 249 EC, Directive 2003/87 is binding upon the Member States to which it is addressed as to the result to be achieved, but leaves them freedom of action as to the choice of the forms and methods appropriate for that purpose. The Commission has the burden, when exercising its supervisory power, of proving that

([23]) European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

the instruments used by a Member State in that respect are contrary to Community law. It is only by applying those principles that it is possible to ensure compliance with the principle of subsidiarity, according to which, in areas which do not fall within its exclusive competence, the Community is to take action only if and in so far as the objectives pursued cannot be sufficiently achieved by the Member States.

The Court further stated that it is clear from Directive 2003/87, first, that the Member State alone has the power to draw up the NAP and to take final decisions fixing the total quantity of allowances which it will allocate for each five-year period and the distribution of that quantity amongst economic operators and, second, that the Commission has power to review the NAP in light of the criteria laid down by the directive, the Member State being unable to allocate the allowances unless the amendments to the NAP that are proposed following the Commission's initial refusal are accepted by the latter. The Court also explained that the Commission is entitled to make criticisms concerning the incompatibilities found and to formulate proposals designed to allow the Member State to modify its NAP in a manner which would make it compatible with the criteria.

However, the Court found that, by specifying a specific quantity of allowances and by rejecting the NAPs of the Member States concerned in so far as the total quantity of allowances proposed exceeded that threshold, the Commission had exceeded the limits of the power of review conferred upon it by Directive 2003/87, since it is for Member States alone to set that quantity.

Likewise, while the Commission may draw up its own ecological and economic model in order to verify whether the NAPs of the various Member States are compatible with the criteria laid down by Directive 2003/87, an exercise in which it has a wide discretion, it cannot, on the other hand, claim to set aside the data in a NAP so as to replace them with data obtained from its own assessment method, as otherwise it would be acknowledged as having a veritable power of uniformisation which that directive does not confer upon it. The Court also observed that, when drawing up its NAP, the Member State is obliged to make choices concerning the policies to be adopted, the method to be used and the data to be taken into account in order to predict the expected evolution of emissions, while the Commission's review of those choices is limited to verifying whether the data and parameters upon which the choices are founded are credible and sufficient.

The Court therefore held that, by substituting its method of analysis for that used by the Member States concerned, instead of merely checking that their NAPs were compatible with the criteria laid down by Directive 2003/87, in the light, where appropriate, of the data resulting from its own method, the Commission exceeded the powers conferred upon it by that directive.

### *Common foreign and security policy*

#### 1. Combating of terrorism

In Case T-341/07 *Sison* v *Council* (judgment of 30 September 2009) the Court, first, recalled the principles resulting from the judgments in *Organisation des Modjahedines du peuple d'Iran* v *Council* [24] and *Sison* v *Council* [25] that concern the obligation to state reasons for decisions to freeze funds of persons linked to terrorist activities. Both the statement of reasons for an initial decision to freeze funds and the statement of reasons for subsequent decisions must refer not only to the

[24] Case T-228/02 [2006] ECR II-4665.

[25] Judgment of 11 July 2007 in Case T-47/03, not published.

legal conditions of application of Regulation No 2580/2001 ([26]), in particular the existence of a national decision taken by a competent authority, but also to the actual and specific reasons why the Council considers that the person concerned must be made the subject of a measure freezing funds. Also, the broad discretion enjoyed by the Council with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds extends to the evaluation of the threat that may be presented by an organisation having in the past committed acts of terrorism, notwithstanding the suspension of its terrorist activities for a certain period. In those circumstances the Council cannot be required to state with greater precision in what way freezing the funds of the person concerned may in concrete terms contribute to the fight against terrorism or to produce evidence to show that that person might use his funds to commit or facilitate acts of terrorism in the future.

Secondly, after recalling the conditions for implementing a decision to freeze funds, the rules relating to the burden of proof incumbent on the Council in this context and the scope of judicial review in such matters, the Court stated that, having regard both to the wording, context and objectives of the provisions at issue and to the major part played by the national authorities in the fund-freezing process provided for, a decision to 'instigat[e] … investigations or prosecut[e]' must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism. That requirement is not satisfied by a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity, in relation to a dispute concerning, for example, rights and duties of a civil nature.

The Court also explained that the Council, when contemplating adopting or maintaining, after review, a fund-freezing measure pursuant to Regulation No 2580/2001, on the basis of a national decision for the 'instigation of investigations or prosecution' for an act of terrorism, may not disregard subsequent developments arising out of those investigations or that prosecution. It may thus happen that police or security enquiries are closed without giving rise to any judicial consequences, because it proved impossible to gather sufficient evidence, or that measures of investigation ordered by the investigating judge do not lead to proceedings going to judgment for the same reasons. Similarly, a decision to prosecute may end in the abandoning of the prosecution or in acquittal in the criminal proceedings. It would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation. To decide otherwise would be tantamount to giving the Council and the Member States the excessive power to freeze a person's funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken.

## 2. Combating of nuclear proliferation

In Joined Cases T-246/08 and T-332/08 *Melli Bank* v *Council* (judgment of 9 July 2009, under appeal) and Case T-390/08 *Bank Melli Iran* v *Council* (judgment of 14 October 2009, under appeal), which were dealt with under an expedited procedure, the Court examined for the first time actions challenging measures to freeze funds adopted within the framework of the body of restrictive measures that have been introduced in order to apply pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems.

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

The origin of the regime at issue is to be found in a resolution of the United Nations Security Council, given effect by Regulation (EC) No 423/2007 [27] which provides for the freezing of the funds of the persons, entities or bodies designated by the Security Council and the freezing of the funds of entities owned or controlled by entities which have been identified as being engaged in, directly associated with or providing support for nuclear proliferation. On the basis of this regulation, an Iranian bank and its wholly-owned United Kingdom subsidiary were the subject of decisions freezing funds, having regard to their alleged role as a facilitator for the sensitive activities of the Islamic Republic of Iran, in connection with numerous purchases of sensitive materials for Iran's nuclear and missile programmes and in supplying financial services.

While the Court relied in these judgments upon the principles already set out in the case-law relating to the freezing of funds with regard to the combating of terrorism, it also introduced certain specific reasoning.

First, in response to the plea of illegality raised by Melli Bank plc in respect of Regulation No 423/2007 on the basis that it infringes the principle of proportionality, the Court recalled that the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued [28]. The Court explained that the purpose of Regulation No 423/2007 is to stop nuclear proliferation and its funding and so to bring pressure to bear upon the Islamic Republic of Iran to put an end to the activities concerned. That objective forms part of a more general framework of endeavours linked to the maintenance of international peace and security and is, therefore, legitimate. In addition, the freezing of the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation is linked to that objective since there is a not insignificant danger that such an entity may exert pressure on the entities it owns or controls in order to circumvent the effect of the measures applying to it, by encouraging them either to transfer their funds to it, directly or indirectly, or to carry out transactions which it cannot itself perform by reason of the freezing of its funds. Finally, the case-law makes it clear that the right to property and the right to carry on economic activity are not absolute rights and that their exercise may be subject to restrictions justified by objectives of public interest pursued by the Community. According to the case-law, the importance of the aims pursued by the legislation at issue is such as to justify negative consequences, even of a substantial nature, for some operators [29]. The Court noted that the freedom to carry on economic activity and the right to property of the banks concerned were to a considerable extent restricted by the freezing of their funds, since they could not dispose of their funds located in the Community or held by Community nationals, except under specific authorisations, and their branches in the Community could not enter into new transactions with their customers. None the less, the Court considered that, given the prime importance of the preservation of international peace and security, the difficulties caused were not disproportionate to the ends sought.

Second, in Case T-390/08 the Court provided important clarification regarding the obligation to apprise the persons concerned of the grounds for measures which, although general, are nevertheless of direct and individual concern to them and may restrict the exercise of their fundamental

(27) Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

(28) Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13.

(29) See, to this effect, Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraphs 21 to 23.

rights. It held that that the Council is bound, in so far as may be possible, to apprise the entities concerned of the fund-freezing measures by making individual notification. The rule that ignorance of the law is no defence cannot be relied on where the measure in question has, in regard to the person concerned, the nature of an individual measure. In the case in point, the Council did not make individual notification, even though it knew the address of the applicant's headquarters. The Court thus considered that the Council did not fulfil its obligation to apprise the applicant of the grounds of the contested decision. However, it was clear from the case-file that the French banking commission informed the applicant's branch in Paris of the adoption of the contested decision and of its publication in the Official Journal that same day. Thus, the applicant was informed timeously and officially both of the adoption of the contested decision and of the fact that it could consult the statement of reasons for that decision in the Official Journal, and therefore, in those exceptional circumstances, the breach found did not justify annulment of the contested decision.

### *Marketing authorisation for plant protection products*

In 2009 the Court delivered a number of judgments concerning Commission decisions adopted on the basis of Directive 91/414 which lays down the Community rules on authorisation and withdrawal of authorisation for the placing of plant protection products on the market. Despite the particularly technical nature of such cases, it is appropriate to mention two judgments in which the Court based its reasoning on the conclusions to be drawn from the precautionary principle.

In Case T-326/07 *Cheminova and Others* v *Commission* (judgment of 3 September 2009), the Court noted that Article 5(1)(b) of Directive 91/414 provides that, for an active substance to be authorised, it must be possible to expect that, in the light of current scientific and technical knowledge, use of plant protection products containing that active substance, consequent on application consistent with good plant protection practice, will not have any harmful effects on human or animal health or any unacceptable influence on the environment. Interpreting that provision in the light of the precautionary principle, the Court stated that, in the domain of human health, the existence of solid evidence which, while not resolving scientific uncertainty, may reasonably raise doubts as to the safety of a substance justifies, in principle, the refusal to authorise that substance. Thus, the reference made by Directive 91/414 to 'current scientific and technical knowledge' cannot support the inference that undertakings which have notified an active substance and which are faced with the likelihood of a decision not to include that substance as an authorised substance should have the possibility of submitting new studies and data for as long as doubts persist regarding the safety of the active substance. Such an interpretation would run counter to the objective of a high level of protection of human and animal health and of the environment, in that it would be tantamount to granting to the notifier — on whom the burden of proof lies as regards the safety of the active substance and who has a better knowledge of that substance — a right of veto over the adoption of a decision not to authorise the substance.

In Case T-334/07 *Denka International* v *Commission* (judgment of 19 November 2009), the Court recalled that, in accordance with the precautionary principle, where there is scientific uncertainty as to the existence or extent of risks to human health the Community institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent [30]. Moreover, in a situation in which there is scientific uncertainty, a risk assessment cannot be required to provide the Community institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality.

[30] Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 99, and Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305, paragraph 139.

Pointing out that there were gaps in the dossier submitted by the applicant and thus no reliable conclusion could be drawn as regards the genotoxic and carcinogenic properties of dichlorvos, the Court concluded, in the light of the available toxicological data, the uncertainties relating to the safety of that substance and the gaps in the dossier, that the Commission did not make a manifest error of assessment in adopting the contested decision.

### *Access to documents of the institutions*

Case T-121/05 *Borax Europe* v *Commission* (judgment of 11 March 2009, not published) and Case T-166/05 *Borax Europe* v *Commission* (judgment of 11 March 2009, not published) prompted the Court to provide explanation in respect of exceptions to the right of access to documents held by the institutions, namely those relating to the protection of the privacy and integrity of the individual and to the protection of the decision-making process.

Here, the applicant was refused disclosure of documents and sound recordings of meetings, relating, in particular, to comments and reports of experts and industry representatives provided in the context of a procedure for the classification of boric acid and borates. That procedure had resulted in the publication by the Commission of the final conclusions of those experts recommending that the products be classified as toxic substances. In order to justify the refusal of access, the Commission stated in particular that disclosure of those documents would infringe the right to protection of personal data resulting from Regulation (EC) No 45/2001 ([31]) and would permit identification of the experts, who would be at risk of being exposed to external pressure because of the economic interests at stake. The Court annulled the contested decisions in particular on the ground that the Commission had not explained how access to the documents at issue could concretely and effectively undermine the interests protected by the relevant exception.

Before doing so, the Court explained that the Commission could not base its refusal on the assurance which it contended it gave the experts that they could express themselves personally and that their identities and opinions would not be disclosed. The confidentiality undertaking, which according to the Commission bound it to the experts, was concluded between the latter and that institution and could not therefore be relied upon against Borax, whose rights of access to the documents were guaranteed subject to the conditions and within the limits laid down by Regulation No 1049/2001. Furthermore, a decision refusing access to documents held by an institution could be based only on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question could not make such a refusal in reliance on an undertaking to the participants at a meeting if that undertaking could not be justified by reference to one of those exceptions. The Commission did not explain why identification of the experts would undermine their privacy or infringe Regulation No 45/2001 and did not substantiate to the required legal standard a sufficiently foreseeable risk that revelation of their opinion would expose them to unjustified external pressure undermining their integrity, in particular as omission of the experts' names and countries of origin was in any event apt to remove any possible risk in this regard.

The Court also pointed out that, while the legislature had provided for a specific exception to the right of public access to the documents of the institutions as regards legal advice, it had not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. Since, according to the case-law, it could not correctly be held that there was a general

([31]) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

need for confidentiality in respect of advice from the Council's legal service relating to legislative matters [32], the same principle had to be applied to the advice at issue, for which the Community legislature had not laid down a specific exception and which remained subject to the general rules as regards the public right of access to documents. It followed that scientific opinions obtained by an institution for the purpose of the preparation of legislation had, as a rule, to be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions might deter experts from taking further part in its decision-making process was inherent in the rule which recognised the principle of access to documents containing opinions intended for internal use in the context of consultations and preliminary deliberations.

## II. Actions for damages

### *1. Admissibility*

According to case-law, the action for damages provided for in Article 235 EC is an independent form of action, and such an action seeking to challenge a measure cannot be inferred to be inadmissible from the fact that an action for annulment brought against that measure is inadmissible. Thus, individuals who would not be directly and individually concerned by a legislative measure do not, for this reason alone, lack entitlement to bring an action seeking to render the Community liable for the unlawfulness of that measure [33].

In Case T-166/08 *Ivanov* v *Commission* (order of 30 September 2009, not published, under appeal), the Court clarified the limits of the independence of actions for annulment and actions for damages, stating that it cannot be a consequence of the independence of those forms of action that an individual who has allowed the time limit for bringing an action laid down in the fifth paragraph of Article 230 EC to pass may escape being time-barred by seeking to obtain, through an action for damages, the benefit which he could have obtained if he had brought an action for annulment within the time limit. Consequently, the fact that an application for annulment is time-barred, which is a matter of public policy, means that an application for damages which is closely linked to the application for annulment is time-barred too. Thus, an action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of an individual decision which has become definitive and it would, if upheld, nullify the legal effects of that decision. The Court nevertheless pointed out that an applicant remains entitled to contest, by means of an action for damages, the wrongful acts or omissions resulting from the conduct of an institution where that conduct is subsequent to decisions whose legality he has not contested within the time limit.

In Case T-440/03 *Arizmendi and Others* v *Council and Commission* (judgment of 18 December 2009), the Court applied innovative reasoning to the question of the admissibility of an action seeking compensation for loss or damage allegedly suffered as a result of the Commission's sending to a Member State a reasoned opinion stating that it was failing to fulfil its obligations under the applicable Community legislation. In the case in point, following receipt of the reasoned opinion the French Republic had in fact repealed the statutory monopoly held by shipbrokers, who constituted

[32] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 57.

[33] See, to this effect, Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975 and Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331.

a body of persons enjoying a hybrid status combining that of holder of a professional office having a monopoly over certain operations and that of trader.

According to settled case-law, an action for damages founded on the fact that the Commission has not instituted infringement proceedings under Article 226 EC is inadmissible. Since the Commission is not bound to institute infringement proceedings under Article 226 EC, its decision not to institute such proceedings is not in any event unlawful, so that it cannot give rise to non-contractual liability on the part of the Community [34]. The Commission considered that solution to be applicable by analogy to situations where it has not refrained from instituting infringement proceedings but, on the contrary, has issued a reasoned opinion, which constitutes a stage preliminary to infringement proceedings before the Court of Justice.

The General Court rejected that line of argument, recalling that the action for damages is an independent form of action, with a particular purpose to fulfil within the context of legal remedies in that it seeks compensation for damage resulting from a measure or unlawful conduct attributable to a Community institution. Accordingly, irrespective of whether it constitutes an act that can be challenged in an action for annulment, every measure of an institution, even if it has been adopted by the institution in the exercise of a discretion, is, in principle, capable of being the subject of an action for damages; that discretion does not have the effect of freeing the institution from its obligation to act in accordance with higher rules of law, such as the Treaty and general principles of Community law, and with the relevant secondary legislation. Consequently, while, within the framework of its powers under Article 226 EC, the Commission enjoys a discretion in deciding whether to send a reasoned opinion to a Member State, it is conceivable that, in quite exceptional circumstances, a person may demonstrate that such an opinion is vitiated by unlawfulness that constitutes a sufficiently serious breach of a rule of law such as to cause him loss or damage. The Court thus concluded that the action was admissible.

### *2. Sufficiently serious breach of a rule conferring rights on individuals*

In order for the Community to incur non-contractual liability, the applicant must establish a sufficiently serious breach of a rule of law intended to confer rights on individuals [35].

In the context of an application seeking compensation for the damage allegedly caused to the applicants by the Commission's decision to withdraw authorisation for the import from Costa Rica of animals from aquaculture, the Court stated in Case T-238/07 *Ristic and Others* v *Commission* (judgment of 9 July 2009, not published) that, in order to ensure the practical effect of the condition relating to breach of a rule conferring rights on individuals, it is necessary for the protection offered by the rule invoked to be effective in relation to the person who invokes it and, therefore, that that person be among those upon whom the rule in question confers rights. A rule not protecting the person against the unlawfulness he invokes, but protecting another person, cannot be accepted as a source of damages. In the case in point, the applicants could not therefore invoke, in their application for damages, unlawfulness resulting from the alleged breach of Costa Rica's right to be heard and of the right of the Federal Republic of Germany to participate in the procedure.

[34] Orders in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraphs 13 to 15, Case T-201/96 *Smanor and Others* v *Commission* [1997] ECR II-1081, paragraphs 30 and 31, and Case T-202/02 *Makedoniko Metro and Michaniki* v *Commission* [2004] ECR II-181, paragraphs 43 and 44.

[35] Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 42 and 43.

Also, in *Arizmendi and Others* v *Council and Commission*, the Court observed that during an infringement procedure the Commission can only give an opinion regarding a Member State's failure to comply with Community law, since ultimately the Court of Justice alone has jurisdiction to find that a Member State has failed to fulfil its obligations under Community law. In so far as, in that opinion, the Commission merely sets out its view as to whether a Member State has failed to fulfil its Community law obligations, the adoption of the opinion cannot result in a sufficiently serious breach of a rule of law intended to confer rights on individuals. Therefore, even where the view as to the purport of Community law which the Commission sets out in a reasoned opinion is incorrect, that cannot constitute a sufficiently serious breach capable of causing the Community to incur non-contractual liability. On the other hand, if assessments set out in a reasoned opinion go beyond determination as to whether a Member State has failed to fulfil its obligations or if other conduct on the part of the Commission in an infringement procedure, for example the wrongful disclosure of trade secrets or of information damaging a person's reputation, exceeds the powers which are conferred upon it, those assessments or that conduct can constitute a breach such as to render the Community liable.

## III. Appeals

In 2009, 31 appeals were brought against decisions of the Civil Service Tribunal and 31 cases were brought to a close by the General Court (Appeal Chamber). Two of those cases merit particular attention.

First, in Case T-404/06 P *ETF* v *Landgren* (judgment of 8 September 2009), the Court upheld the innovatory position of the Civil Service Tribunal that grounds must be stated for every decision terminating a contract of indefinite duration, on the basis of reasoning founded on the requirements of the Staff Regulations and on the inseparable link between the obligation to state reasons and exercise of the power of judicial review.

Second, in Case T-58/08 P *Commission* v *Roodhuijzen* (judgment of 5 October 2009), the Court held that the conditions for the extension of the Joint Sickness Insurance Scheme to the spouse of an official under Article 72(1) of the Staff Regulations of Officials of the European Communities do not mean that a non-marital partnership between an official and that official's partner must be equivalent to marriage. In order for a qualifying non-marital partnership to exist, it is necessary only that there be a union between two persons and that they produce a document recognised by a Member State acknowledging their status as non-marital partners; there is no need to verify whether the consequences stemming from the partnership entered into by the official concerned are similar to those stemming from a marriage.

## IV. Applications for interim measures

In 2009, 24 applications for interim measures were brought before the General Court, an appreciable reduction compared with the number of applications made in the preceding year (58). In 2009, 20 such cases were disposed of, compared with 57 in 2008. Only one application for suspension of operation of a measure was granted, in Case T-95/09 R *United Phosphorus* v *Commission* (order of the President of the Court of 28 April 2009, not published).

The case giving rise to this order formed part of a series of cases in which the President of the Court had, in 2007 and 2008, dismissed six other applications for the suspension of decisions prohibiting the marketing of certain substances. They were dismissed for lack of urgency, because the damage

alleged was not irreparable and was not sufficiently serious as it represented less than 1% of the worldwide turnover of the group to which the applicant companies belonged. While, in the seventh order, made in *United Phosphorus*, the President of the Court accepted that serious and irreparable harm was imminent, he did so because of the particular circumstances of the case, namely the deep crisis from which the world economy had been suffering for months and which was affecting the value of numerous undertakings and their capacity to secure liquidity. The group to which the applicant belonged had lost much of its value, which showed that the damage alleged was serious. While acknowledging that the mere possibility of bringing an action for damages is sufficient to show that financial harm is in principle reparable, the President of the Court added that he is not obliged to apply the relevant conditions 'mechanically and rigidly', but must determine, in the light of the circumstances of the case, the manner in which urgency is to be verified.

In the case in point, the President of the Court took account in particular of the fact that, in parallel with the administrative procedure that had led to the decision prohibiting the products at issue, the applicant had resubmitted its application for authorisation of those products, under a newly created accelerated procedure that was capable of being concluded only a few months after the date imposed for the withdrawal of the products from the market and in the framework of which it was able to present all of the scientific data alleged to have been improperly neglected in the procedure that had led to the decision prohibiting the products. The President of the Court stated that it would be unreasonable to allow the prohibition of the marketing of a product in respect of which it was not improbable that its marketing would be authorised only a few months later. Also, a number of factors indicated that a return of the applicant to the market in question appeared problematic by reason of the fact that, at the crucial point in time, it would probably not have available to it any source for the supply of the product. That conclusion was supported, at the level of balancing the interests involved, by the finding of a certain slowness in the administrative procedure which showed that the Commission itself did not see any specific reason why the product in question had to be withdrawn from the market as quickly as possible, and by the circumstance that the contested decision itself laid down a period of 13 months for the sale of existing stocks, a fact which indicated that the use of the product was hardly of such a kind as to involve serious risks to public health. The President of the Court accepted that there was a prima facie case, on the ground that the action in the main proceedings prima facie raised complex, delicate and highly technical issues which called for a detailed examination that could not be carried out in the proceedings for interim measures but had to be the subject of the proceedings in the main action.

So far as concerns the condition relating to urgency, in Case T-159/09 R *Biofrescos* v *Commission* (order of 25 May 2009, not published), Case T-196/09 R *TerreStar Europe* v *Commission* (order of 10 July 2009, not published) and Case T-238/09 R *Sniace* v *Commission* (order of 13 July 2009, not published) the President of the Court dismissed applications for interim measures since the applicants had done no more than put forward mere suppositions in the form of the 'worst-case scenarios' which would arise if their applications were to be dismissed, instead of providing specific and precise particulars, supported by detailed certified documents showing the situation in which they would in all probability be placed if the interim measures sought were not granted.

In Case T-52/09 R *Nycomed Danmark* v *EMEA* (order of the President of the Court of 24 April 2009, not published), an undertaking — which was intending to apply to the Commission for marketing authorisation in respect of a medicinal product — was required under the applicable legislation first to seek validation of its application for authorisation from the European Medicines Agency (EMEA). After being refused validation by the EMEA, the undertaking applied for interim measures in order to prevent another pharmaceutical company from gaining an edge and obtaining marketing authorisation for a competing product. The President of the Court dismissed the application, observing that the damage caused by a delay in placing the medicinal product in question on the

market was purely hypothetical in nature in that it presupposed the occurrence of future, uncertain events. There was no certainty whatsoever that that product would be placed on the market, as that depended on the Commission's granting a marketing authorisation, for which the applicant intended to apply only after successfully completing the validation procedure pending before the EMEA; the applicant had also not specified the probability of the actual risk that it would be overtaken in the race to get its product onto the market by competing undertakings, failing to identify undertakings which had already initiated the procedure for obtaining marketing authorisation for a substitute product. The situation was similar in Case T-457/08 R *Intel* v *Commission* (order of the President of the Court of 27 January 2009, not published), relating to certain measures taken in the context of a proceeding under Article 82 EC. The applicant sought, prior to closure of the administrative procedure before the Commission, to avoid the consequences of a final decision which would be taken on the conclusion of that procedure in breach of its rights of defence. According to the President of the Court, the occurrence of the damage alleged depended on a future and hypothetical event, namely the adoption by the Commission of a final decision unfavourable to the applicant. Not only was the adoption of such a decision not certain, but any harmful consequences would not have been irreparable, since the applicant would have been able to apply for that decision to be annulled or suspended.

In Case T-352/08 R *Pannon Hőerőmű* v *Commission* (order of 23 January 2009, not published), which concerned a Commission decision ordering national authorities to recover State aid classified as unlawful, the President of the Court ruled on the relevant date for determining fulfilment of the condition for the grant of interim measures that relates to the presence of urgency and stated that the circumstances capable of justifying urgency must in principle be established by reference to the legal and factual position obtaining when the application for interim measures is lodged, as set out in that application. In the case in point, the Commission decision provided that the national authorities' calculation of the amount to be recovered had to comply with a specific methodology to be determined by the legislature. On the date when the recipient of the aid in question applied for the operation of that decision to be suspended, the legislative process had still only reached the stage of a draft law, which could be amended in the course of parliamentary debate, so that there was not yet a definitive legal framework governing the recovery procedure. The application for interim measures was therefore held premature.

The President of the Court was faced on a number of occasions with allegedly serious and irreparable damage of a financial nature. In *United Phosphorus* v *Commission*, he classified the damage caused to the applicant, namely the loss of market share and customers, as purely financial, stating that the risk of an irremediable change in the applicant's market share could be placed on an equal footing with the risk of disappearing from the market entirely and justify adoption of the interim measure sought only if the market share liable to be irremediably lost was sufficiently large in the light, in particular, of the characteristics of the group to which the undertaking concerned belonged. With regard to the concept of a group, in Case T-199/08 R *Ziegler* v *Commission* (order of 15 January 2009, not published, under appeal) the President of the Court took account of the economic link between the companies in a network comprising around 100 closely connected companies with common interests.

In the field of tendering and selection procedures, the President of the Court was provided with the opportunity in Case T-511/08 R *Unity OSG FZE* v *Council and EUPOL Afghanistan* (order of 23 January 2009, not published) and in *TerreStar Europe* v *Commission* to confirm a recent development in the case-law [36], establishing that the harm suffered as a result of 'losing the opportunity of being

[36] Order of the President of 25 April 2008 in Case T-41/08 R *Vakakis* v *Commission*, not published.

selected' can be assigned an economic value capable of satisfying the requirement that full compensation be made for the harm actually suffered. He therefore rejected the argument that the harm was irreparable because it would be impossible to quantify.

Finally, *Sniace* v *Commission* concerned an application for suspension of operation of a decision by which the Commission had instructed the national authorities to recover State aid found to be unlawful from the undertaking which had received it. The President of the Court confirmed the case-law requiring the applicant to show, in the application for interim measures, that the remedies available to him under the applicable national law to oppose immediate recovery of the State aid at issue do not enable him, by invoking in particular his financial position, to avoid serious and irreparable damage. This case-law was applied in Case T-149/09 R *Dover* v *Parliament* (order of 8 June 2009, not published) and in *Biofrescos* v *Commission*, because of the clear correspondence between the respective situations. In the latter two cases, the applications for interim measures concerned (i) the recovery by the European Parliament of parliamentary allowances wrongly paid to a member, in a situation in which the Parliament was required to institute proceedings for recovery before the national courts, and (ii) a Commission decision instructing national authorities to recover import duties payable by an undertaking. The President of the Court thus concluded that there was no urgency, as there was nothing to indicate that the domestic remedies available to the applicants would not enable the feared damage to be avoided.

# B — Composition of the General Court

(Order of precedence as at 7 October 2009)

*First row, from left to right:*

I. Wiszniewska-Białecka, President of Chamber; M. E. Martins Ribeiro, President of Chamber; M. Vilaras, President of Chamber; J. Azizi, President of Chamber; M. Jaeger, President of the Court; A. W. H. Meij, President of Chamber; N. J. Forwood, President of Chamber; O. Czúcz, President of Chamber; I. Pelikánová, President of Chamber.

*Second row, from left to right:*

N. Wahl, Judge; S. Papasavvas, Judge; K. Jürimäe, Judge; E. Cremona, Judge; F. Dehousse, Judge; V. Vadapalas, Judge; I. Labucka, Judge; E. Moavero Milanesi, Judge; M. Prek, Judge.

*Third row, from left to right:*

E. Coulon, Registrar; H. Kanninen, Judge; S. Frimodt Nielsen, Judge; S. Soldevila Fragoso, Judge; V. Ciucă, Judge; T. Tchipev, Judge; A. Dittrich, Judge; L. Truchot, Judge; K. O'Higgins, Judge; J. Schwarcz, Judge.

# 1. Members of the General Court

*(in order of their entry into office)*

**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 General Court since 11 July 1996; President of the General Court since 17 September 2007.

**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; member of a number of committees and advisory bodies, inter alia Chairperson of the Supervisory Commission for the Marketing of Medicinal Products (1988–90), member of the Advisory Council on Consumer Affairs (1990–94), member of the Competition Council (1991–94) and member of the editorial board of the Nordic Intellectual Property Law Review (1982–90); Judge at the Court of First Instance from 18 January 1995 to 6 October 2009.

**Josef Azizi**

Born 1948; Doctor of Laws and Master of Sociology and Economics of the University of Vienna; Lecturer and senior lecturer at the Vienna School of Economics, the Faculty of Law of the University of Vienna and various other universities; Honorary Professor at the Faculty of Law of the University of Vienna; Ministerialrat and Head of Department at the Federal Chancellery; Member of the Steering Committee on Legal Cooperation of the Council of Europe (CDCJ); Representative *ad litem* before the Verfassungsgerichtshof (Constitutional Court) in proceedings for review of the constitutionality of federal laws; Coordinator responsible for the adaptation of Austrian federal law to Community law; Judge at the General Court since 18 January 1995.

**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 General Court since 17 September 1998.

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

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

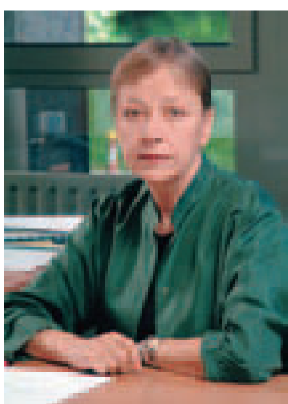
**Maria Eugénia Martins de Nazaré Ribeiro**
Born 1956; studied in Lisbon, Brussels and Strasbourg; Member of the Bar in Portugal and Brussels; independent researcher at the Institut d'études européennes de l'Université libre de Bruxelles (Institute of European Studies, Free University of Brussels); Legal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

**Franklin Dehousse**
Born 1959; law degree (University of Liege, 1981); research fellow (Fonds national de la recherche scientifique, 1985–89); legal adviser to the Chamber of Representatives (1981–90); Doctor in Laws (University of Strasbourg, 1990); Professor (Universities of Liege and Strasbourg; College of Europe; Institut royal supérieur de Défense; Université Montesquieu, Bordeaux; Collège Michel Servet of the Universities of Paris; Faculties of Notre-Dame de la Paix, Namur); Special Representative of the Minister for Foreign Affairs (1995–99); Director of European Studies of the Royal Institute of International Relations (1998–2003); assesseur at the Council of State (2001–03); consultant to the European Commission (1990–2003); member of the Internet Observatory (2001–03); Judge at the General Court since 7 October 2003.

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

**Ottó Czúcz**

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



**Irena Wiszniewska-Białecka**

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

**Irena Pelikánová**

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

**Daniel Šváby**

Born 1951; Doctor of Laws (University of Bratislava); Judge at District Court, Bratislava; Judge, Appeal Court, responsible for civil law cases, and Vice-President, Appeal Court, Bratislava; member of the civil and family law section at the Ministry of Justice Law Institute; acting Judge responsible for commercial law cases at the Supreme Court; Member of the European Commission of Human Rights (Strasbourg); Judge at the Constitutional Court (2000–04); Judge at the Court of First Instance from 12 May 2004 to 6 October 2009.

**Vilenas Vadapalas**

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

**Küllike Jürimäe**

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

**Ingrida Labucka**

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

**Savvas S. Papasavvas**

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

**Enzo Moavero Milanesi**

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

**Nils Wahl**

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

**Miro Prek**

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

**Teodor Tchipev**

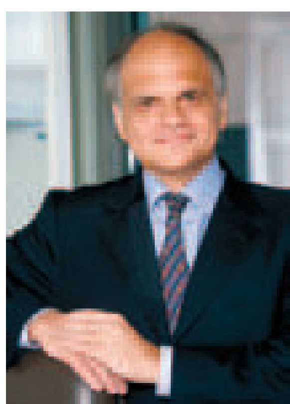
Born 1940; Degree in law at St Kliment Ohridski University, Sofia (1961); Doctorate in law (1977); Lawyer (1963–64); Legal adviser, State Automobile Enterprise for International Transport (1964–73); Research fellow at the Institute of Law, Bulgarian Academy of Sciences (1973–88); Associate professor of civil procedure at the Faculty of Law of St Kliment Ohridski University, Sofia (1988–91); Arbitrator at the Court of Arbitration of the Chamber of Trade and Industry (1988–2006); Judge at the Constitutional Court (1991–94); Associate professor at Paisiy Hilendarski University, Plovdiv (February 2001 to 2006); Minister for Justice (1994–95); Associate professor of civil procedure at the New Bulgarian University, Sofia (1995–2006); Judge at the General Court since 12 January 2007.

**Valeriu M. Ciucă**

Born 1960; Degree in law (1984), doctorate in law (1997), Alexandru Ioan Cuza University, Iaşi; Judge at the Court of First Instance, Suceava (1984–89); Military judge at the Military Court, Iaşi (1989–90); Professor at Alexandru Ioan Cuza University, Iaşi (1990–2006); Stipended student specialising in private law at the University of Rennes (1991–92); Assistant professor at Petre Andrei University, Iaşi (1999–2002); Lecturer at the Université du Littoral Côte d'Opale, Dunkirk (Research Unit on Industry and Innovation) (2006); Judge at the General Court since 12 January 2007.

**Alfred Dittrich**

Born 1950; studied law at the University of Erlangen–Nuremberg (1970–75); Articled law clerk in the Nuremberg Higher Regional Court district (1975–78); Adviser at the Federal Ministry of Economic Affairs (1978–82); Counsellor at the Permanent Representation of the Federal Republic of Germany to the European Communities (1982); Adviser at the Federal Ministry of Economic Affairs, responsible for Community law and competition issues (1983–92); Head of the EU Law Section at the Federal Ministry of Justice (1992–2007); Head of the German delegation on the Council Working Party on the Court of Justice; Agent of the Federal Government in a large number of cases before the Court of Justice of the European Communities; Judge at the General Court since 17 September 2007.



**Santiago Soldevila Fragoso**

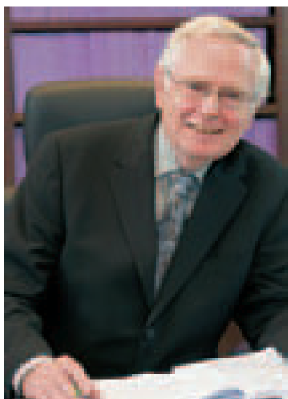
Born 1960; graduated in law from the Autonomous University of Barcelona (1983); Judge (1985); from 1992 judge specialising in contentious administrative proceedings, assigned to the High Court of Justice of the Canary Islands at Santa Cruz de Tenerife (1992 and 1993), and to the National High Court (Madrid, May 1998 to August 2007), where he decided judicial proceedings in the field of tax (VAT), actions brought against general legislative provisions of the Ministry of the Economy and against its decisions on State aid or the government's financial liability, and actions brought against all agreements of the central economic regulators in the spheres of banking, the stock market, energy, insurance and competition; Legal Adviser at the Constitutional Court (1993–98); Judge at the General Court since 17 September 2007.

**Laurent Truchot**

Born 1962; graduate of the Institut d'études politiques, Paris (1984); former student of the École nationale de la magistrature (National School for the Judiciary) (1986–88); Judge at the Regional Court, Marseilles (January 1988 to January 1990); Law Officer in the Directorate for Civil Affairs and the Legal Professions at the Ministry of Justice (January 1990 to June 1992); Deputy Section Head, then Section Head, in the Directorate-General for Competition, Consumption and the Combating of Fraud at the Ministry for Economic Affairs, Finance and Industry (June 1992 to September 1994); Technical Adviser to the Minister for Justice (September 1994 to May 1995); Judge at the Regional Court, Nîmes (May 1995 to May 1996); Legal Secretary at the Court of Justice in the Chambers of Advocate General Léger (May 1996 to December 2001); Auxiliary Judge at the Court of Cassation (December 2001 to August 2007); Judge at the General Court since 17 September 2007.

**Sten Frimodt Nielsen**

Born 1963; graduated in law from Copenhagen University (1988); civil servant in the Ministry of Foreign Affairs (1988–91); tutor in international and European law at Copenhagen University (1988–91); Embassy Secretary at the Permanent Mission of Denmark to the United Nations in New York (1991–94); civil servant in the Legal Service of the Ministry of Foreign Affairs (1994–95); external lecturer at Copenhagen University (1995); Adviser, then Senior Adviser, in the Prime Minister's Office (1995–98); Minister Counsellor at the Permanent Representation of Denmark to the European Union (1998–2001); Special Adviser for legal issues in the Prime Minister's Office (2001–02); Head of Department and Legal Counsel in the Prime Minister's Office (March 2002 to July 2004); Assistant Secretary of State and Legal Counsel in the Prime Minister's Office (August 2004 to August 2007); Judge at the General Court since 17 September 2007.

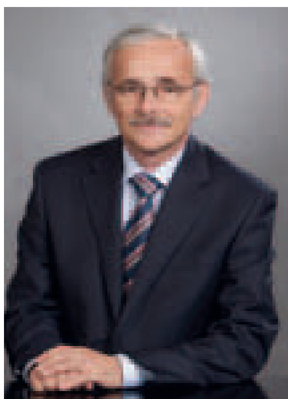


**Kevin O'Higgins**

Born 1946; educated at Crescent College Limerick, Clongowes Wood College, University College Dublin (BA degree and Diploma in European Law) and the King's Inns; called to the Bar of Ireland in 1968; Barrister (1968–82); Senior Counsel (Inner Bar of Ireland, 1982–86); Judge of the Circuit Court (1986–97); Judge of the High Court of Ireland (1997–2008); Bencher of King's Inns; Irish Representative on the Consultative Council of European Judges (2000–08); Judge at the General Court since 15 September 2008.

**Heikki Kanninen**

Born 1952; graduate of the Helsinki School of Economics and of the Faculty of Law of the University of Helsinki; Legal Secretary at the Supreme Administrative Court of Finland; General Secretary to the Committee for Reform of Legal Protection in Public Administration; Principal Administrator at the Supreme Administrative Court; General Secretary to the Committee for Reform of Administrative Litigation, Counsellor in the Legislative Drafting Department of the Ministry of Justice; Assistant Registrar at the EFTA Court; Legal Secretary at the Court of Justice of the European Communities; Judge at the Supreme Administrative Court (1998–2005); Member of the Asylum Appeal Board; Vice-Chairman of the Committee on the Development of the Finnish Courts; Judge at the Civil Service Tribunal from 6 October 2005 to 6 October 2009; Judge at the General Court since 7 October 2009.



**Juraj Schwarcz**

Born 1952; Doctor of Law (Comenius University, Bratislava, 1979); company lawyer (1975–90); Registrar responsible for the commercial register at the City Court, Košice (1991); Judge at the City Court, Košice (January to October 1992); Judge and President of Chamber at the Regional Court, Košice (November 1992 to 2009); temporary Judge at the Supreme Court of the Slovak Republic, Commercial Law Division (October 2004 to September 2005); Head of the Commercial Law Division at the Regional Court, Košice (October 2005 to September 2009); external member of the Commercial and Business Law Department at Pavol Josef Šafárik University, Košice (1997–2009); external member of the teaching staff of the Judicial Academy (2005–09); Judge at the General Court since 7 October 2009.

**Emmanuel Coulon**

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

## 2. Change in the composition of the General Court in 2009

*Formal sitting on 6 October 2009*

By decisions of 25 February 2009 and 8 July 2009, Mr Heikki Kanninen was appointed as Judge at the Court for the period from 1 September 2009 to 31 August 2010, following the resignation of Ms Virpi Tiili, and Mr Juraj Schwarcz was appointed as Judge at the Court for the period from 7 October 2009 to 31 August 2010, following the resignation of Mr Daniel Šváby.

# 3. Order of precedence

### from 1 January to 6 October 2009

M. JAEGER, President of the Court
V. TIILI, President of Chamber
J. AZIZI, President of Chamber
A. W. H. MEIJ, President of Chamber
M. VILARAS, President of Chamber
N. J. FORWOOD, President of Chamber
M. E. MARTINS RIBEIRO, President of Chamber
O. CZÚCZ, President of Chamber
I. PELIKÁNOVÁ, President of Chamber
F. DEHOUSSE, Judge
E. CREMONA, Judge
I. WISZNIEWSKA-BIAŁECKA, Judge
D. ŠVÁBY, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
E. MOAVERO MILANESI, Judge
N. WAHL, Judge
M. PREK, Judge
T. TCHIPEV, Judge
V. CIUCĂ, Judge
A. DITTRICH, Judge
S. SOLDEVILA FRAGOSO, Judge
L. TRUCHOT, Judge
S. FRIMODT NIELSEN, Judge
K. O'HIGGINS, Judge

E. COULON, Registrar

### from 7 October to 31 December 2009

M. JAEGER, President of the Court
J. AZIZI, President of Chamber
A. W. H. MEIJ, President of Chamber
M. VILARAS, President of Chamber
N. J. FORWOOD, President of Chamber
M. E. MARTINS RIBEIRO, President of Chamber
O. CZÚCZ, President of Chamber
I. WISZNIEWSKA-BIAŁECKA, President of Chamber
I. PELIKÁNOVÁ, President of Chamber
F. DEHOUSSE, Judge
E. CREMONA, Judge
V. VADAPALAS, Judge
K. JÜRIMÄE, Judge
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
E. MOAVERO MILANESI, Judge
N. WAHL, Judge
M. PREK, Judge
T. TCHIPEV, Judge
V. CIUCĂ, Judge
A. DITTRICH, Judge
S. SOLDEVILA FRAGOSO, Judge
L. TRUCHOT, Judge
S. FRIMODT NIELSEN, Judge
K. O'HIGGINS, Judge
H. KANNINEN, Judge
J. SCHWARCZ, Judge

E. COULON, Registrar

## 4. Former Members of the General Court

David Alexander Ogilvy Edward (1989–92)
Christos Yeraris (1989–92)
José Luis Da Cruz Vilaça (1989–95), President from 1989 to 1995
Jacques Biancarelli (1989–95)
Donal Patrick Michael Barrington (1989–96)
Romain Alphonse Schintgen (1989–96)
Heinrich Kirschner (1989–97)
Antonio Saggio (1989–98), President from 1995 to 1998
Cornelis Paulus Briët (1989–98)
Koen Lenaerts (1989–2003)
Bo Vesterdorf (1989–2007), President from 1998 to 2007
Rafael García-Valdecasas y Fernández (1989–2007)
Andreas Kalogeropoulos (1992–98)
Christopher William Bellamy (1992–99)
André Potocki (1995–2001)
Rui Manuel Gens de Moura Ramos (1995–2003)
Pernilla Lindh (1995–2006)
Virpi Tiili (1995–2009)
John D. Cooke (1996–2008)
Jörg Pirrung (1997–2007)
Paolo Mengozzi (1998–2006)
Hubert Legal (2001–07)
Verica Trstenjak (2004–06)
Daniel Šváby (2004–09)

### Presidents

José Luis Da Cruz Vilaça (1989–95)
Antonio Saggio (1995–98)
Bo Vesterdorf (1998–2007)

### Registrar

Hans Jung (1989–2005)

# C — Statistics concerning the judicial activity of the General Court

### General activity of the General Court

1. New cases, completed cases, cases pending (2005–09)

### New cases

2. Nature of proceedings (2005–09)
3. Type of action (2005–09)
4. Subject matter of the action (2005–09)

### Completed cases

5. Nature of proceedings (2005–09)
6. Subject matter of the action (2009)
7. Subject matter of the action (2005–09) (judgments and orders)
8. Bench hearing action (2005–09)
9. Duration of proceedings in months (2005–09) (judgments and orders)

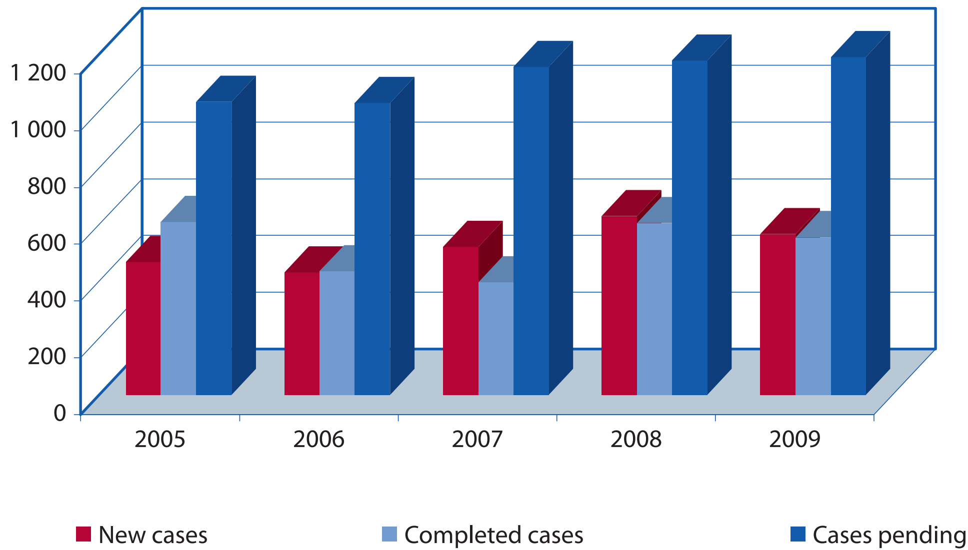
### Cases pending as at 31 December

10. Nature of proceedings (2005–09)
11. Subject matter of the action (2005–09)
12. Bench hearing action (2005–09)

### Miscellaneous

13. Proceedings for interim measures (2005–09)
14. Expedited procedures (2005–09)
15. Appeals against decisions of the General Court to the Court of Justice (1989–2009)
16. Distribution of appeals before the Court of Justice according to the nature of the proceedings (2005–09)
17. Results of appeals before the Court of Justice (2009) (judgments and orders)
18. Results of appeals before the Court of Justice (2005–09) (judgments and orders)
19. General trend (1989–2009) (new cases, completed cases, cases pending)

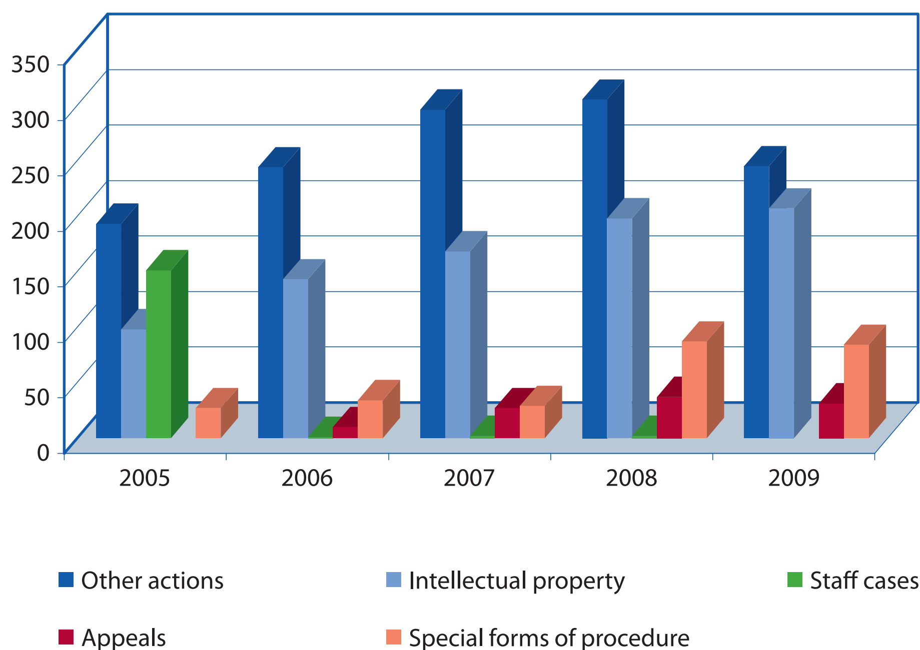
## 1. *General activity of the General Court* —New cases, completed cases, cases pending (2005–09) ([1])




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| New cases | 469 | 432 | 522 | 629 | 568 |
| Completed cases | 610 | 436 | 397 | 605 | 555 |
| Cases pending | 1 033 | 1 029 | 1 154 | 1 178 | 1 191 |

([1]) Unless otherwise indicated, this table and the following tables take account of special forms of procedure. The following are considered to be 'special forms of procedure': application to set a judgment aside (Article 41 of the Statute of the Court of Justice; Article 122 of the Rules of Procedure of the General Court); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 123 of the Rules of Procedure); revision of a judgment (Article 44 of the Statute of the Court of Justice; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 43 of the Statute of the Court of Justice; Article 129 of the Rules of Procedure); taxation of costs (Article 92 of the Rules of Procedure); legal aid (Article 96 of the Rules of Procedure), and rectification of a judgment (Article 84 of the Rules of Procedure).

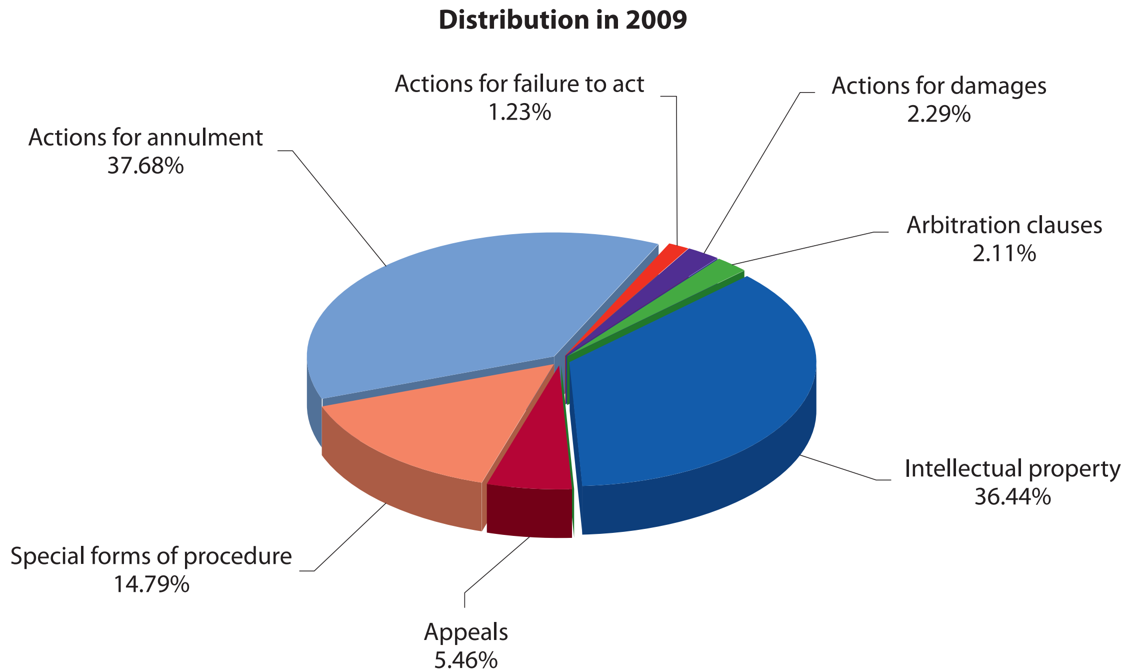
## 2. *New cases* — Nature of proceedings (2005–09) [1]




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Other actions | 193 | 244 | 296 | 305 | 246 |
| Intellectual property | 98 | 143 | 168 | 198 | 207 |
| Staff cases | 151 | 1 | 2 | 2 | |
| Appeals | | 10 | 27 | 37 | 31 |
| Special forms of procedure | 27 | 34 | 29 | 87 | 84 |
| **Total** | **469** | **432** | **522** | **629** | **568** |

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

# 3. *New cases* — Type of action (2005–09)



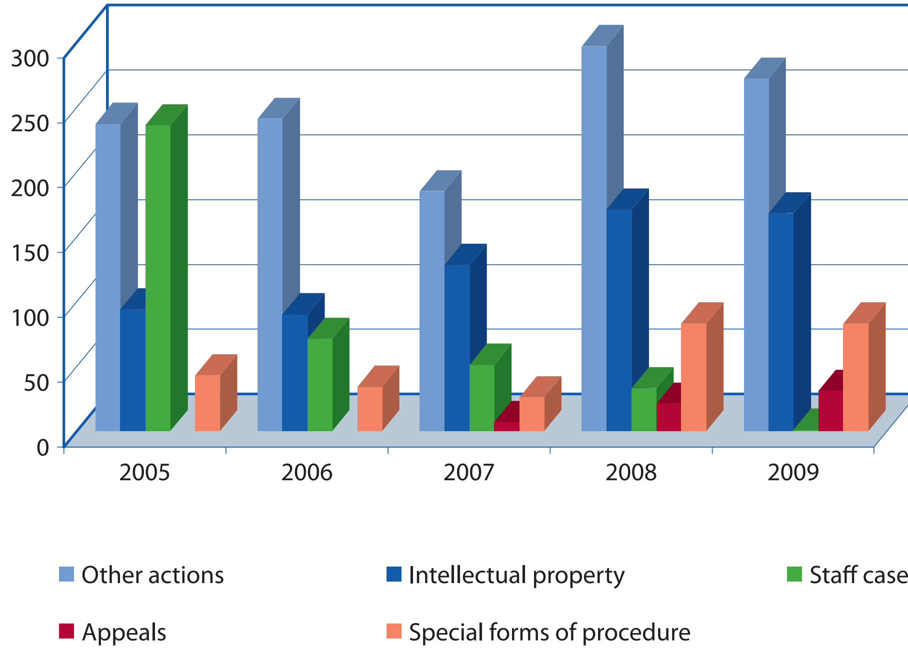

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Actions for annulment | 160 | 223 | 249 | 269 | 214 |
| Actions for failure to act | 9 | 4 | 12 | 9 | 7 |
| Actions for damages | 16 | 8 | 27 | 15 | 13 |
| Arbitration clauses | 8 | 9 | 8 | 12 | 12 |
| Intellectual property | 98 | 143 | 168 | 198 | 207 |
| Staff cases | 151 | 1 | 2 | 2 | |
| Appeals | | 10 | 27 | 37 | 31 |
| Special forms of procedure | 27 | 34 | 29 | 87 | 84 |
| **Total** | **469** | **432** | **522** | **629** | **568** |

## 4. *New cases* — Subject matter of the action (2005–09)

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Accession of new States | | | | | 1 |
| Agriculture | 21 | 18 | 34 | 14 | 18 |
| Approximation of laws | | | 1 | | |
| Arbitration clause | 2 | 3 | 1 | 12 | 12 |
| Budget of the Communities | | | 2 | | 1 |
| Commercial policy | 5 | 18 | 9 | 10 | 8 |
| Common Customs Tariff | | 2 | 1 | | |
| Common foreign and security policy | | 5 | 12 | 6 | 7 |
| Community own resources | 2 | | | | |
| Company law | 12 | 11 | 10 | 30 | 23 |
| Competition | 40 | 81 | 62 | 71 | 39 |
| Culture | | 3 | 1 | 2 | 1 |
| Customs union | 2 | | 4 | 1 | 5 |
| Economic and monetary policy | 1 | 2 | | | |
| Energy | | 1 | | | 2 |
| Environment and consumers | 18 | 21 | 41 | 14 | 7 |
| External relations | 2 | 2 | 1 | 2 | 5 |
| Fisheries policy | 2 | | 5 | 23 | 1 |
| Free movement of goods | | | 1 | 1 | 1 |
| Freedom of establishment | | | | 1 | |
| Freedom of movement for persons | 2 | 4 | 4 | 1 | 1 |
| Freedom to provide services | | 1 | | 3 | 4 |
| Intellectual property | 98 | 145 | 168 | 198 | 207 |
| Justice and home affairs | 1 | | 3 | 3 | 2 |
| Law governing the institutions | 28 | 15 | 28 | 43 | 47 |
| Regional policy | 12 | 16 | 18 | 7 | 6 |
| Research, information, education and statistics | 9 | 5 | 10 | 1 | 6 |
| Social policy | 9 | 3 | 5 | 3 | 2 |
| State aid | 25 | 28 | 37 | 55 | 46 |
| Taxation | | 1 | 2 | | |
| Transport | | 1 | 4 | 1 | |
| **Total EC Treaty/TFEU** [1] | **291** | **386** | **464** | **502** | **452** |
| **Total CS Treaty** | | | | **1** | |
| **Total EA Treaty** | | **1** | | | |
| Staff Regulations | 151 | 11 | 29 | 39 | 32 |
| Special forms of procedure | 27 | 34 | 29 | 87 | 84 |
| **OVERALL TOTAL** | **469** | **432** | **522** | **629** | **568** |

[1] On 1 December 2009, the date of entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union (TFEU) replaced the Treaty establishing the European Community.

## 5. *Completed cases* — Nature of proceedings (2005–09)




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Other actions | 237 | 241 | 185 | 297 | 272 |
| Intellectual property | 94 | 90 | 128 | 171 | 168 |
| Staff cases | 236 | 71 | 51 | 33 | 1 |
| Appeals | | | 7 | 21 | 31 |
| Special forms of procedure | 43 | 34 | 26 | 83 | 83 |
| **Total** | **610** | **436** | **397** | **605** | **555** |

## 6. *Completed cases* — Subject matter of the action (2009)

| | Judgments | Orders | Total |
|---|---|---|---|
| Accession of new States | | 1 | 1 |
| Agriculture | 15 | 23 | 38 |
| Arbitration clause | 2 | 3 | 5 |
| Commercial policy | 6 | | 6 |
| Common foreign and security policy | 6 | 2 | 8 |
| Company law | 4 | 8 | 12 |
| Competition | 21 | 10 | 31 |
| Culture | 1 | 1 | 2 |
| Customs union | 10 | | 10 |
| Energy | 1 | | 1 |
| Environment and consumers | 10 | 12 | 22 |
| Fisheries policy | 1 | 16 | 17 |
| Free movement of goods | | 1 | 1 |
| Freedom of movement for persons | | 1 | 1 |
| Freedom to provide services | | 2 | 2 |
| Intellectual property | 127 | 42 | 169 |
| Justice and home affairs | | 3 | 3 |
| Law governing the institutions | 3 | 24 | 27 |
| Regional policy | 1 | 2 | 3 |
| Research, information, education and statistics | 3 | 1 | 4 |
| Social policy | 3 | 3 | 6 |
| State aid | 56 | 14 | 70 |
| **Total EC Treaty/TFEU** [1] | **270** | **169** | **439** |
| **Total EA Treaty** | | **1** | **1** |
| Staff Regulations | 21 | 11 | 32 |
| Special forms of procedure | 1 | 82 | 83 |
| **OVERALL TOTAL** | **292** | **263** | **555** |

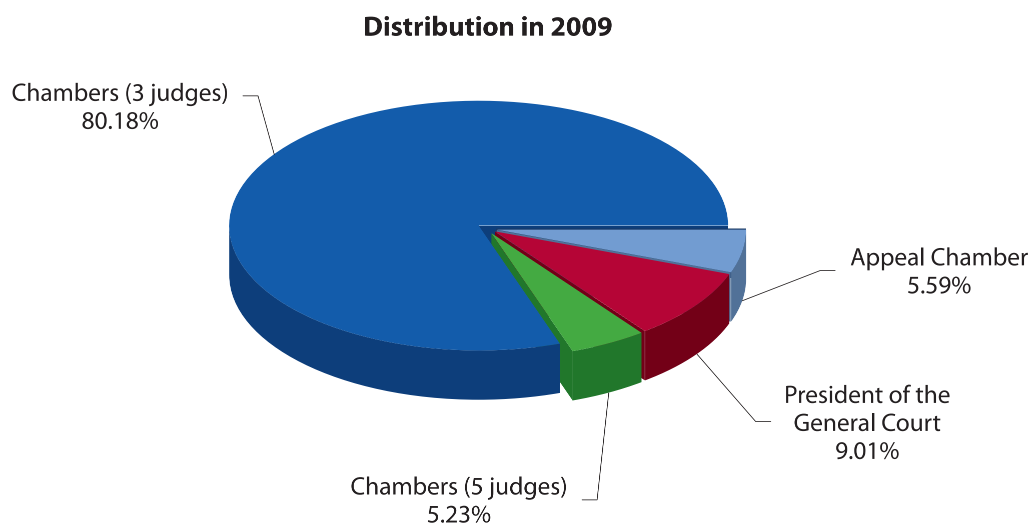
[1] On 1 December 2009, the date of entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union (TFEU) replaced the Treaty establishing the European Community.

# 7. *Completed cases* — Subject matter of the action (2005–09) (judgments and orders)

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Accession of new States | | 1 | | | 1 |
| Agriculture | 34 | 25 | 11 | 38 | 38 |
| Approximation of laws | | | 1 | 1 | |
| Arbitration clause | 1 | | 1 | 3 | 5 |
| Association of the Overseas Countries and Territories | 4 | 2 | | | |
| Budget of the Communities | | | 1 | | |
| Commercial policy | 7 | 13 | 4 | 12 | 6 |
| Common Customs Tariff | | | 1 | 3 | |
| Common foreign and security policy | 5 | 4 | 3 | 6 | 8 |
| Community own resources | | 2 | | | |
| Company law | 6 | 6 | 6 | 24 | 12 |
| Competition | 35 | 42 | 38 | 31 | 31 |
| Culture | | | | 2 | 2 |
| Customs union | 7 | 2 | 2 | 3 | 10 |
| Economic and monetary policy | | 1 | 1 | 1 | |
| Energy | | 3 | 1 | | 1 |
| Environment and consumers | 19 | 19 | 15 | 28 | 22 |
| External relations | 11 | 5 | 4 | 2 | |
| Fisheries policy | 2 | 24 | 4 | 4 | 17 |
| Free movement of goods | 1 | | | 2 | 1 |
| Freedom of establishment | 1 | | | 1 | |
| Freedom of movement for persons | 1 | 4 | 4 | 2 | 1 |
| Freedom to provide services | | | 1 | | 2 |
| Intellectual property | 94 | 91 | 129 | 171 | 169 |
| Justice and home affairs | 1 | | 2 | 1 | 3 |
| Law governing the institutions | 35 | 14 | 17 | 36 | 27 |
| Regional policy | 4 | 7 | 6 | 42 | 3 |
| Research, information, education and statistics | 1 | 3 | 10 | 10 | 4 |
| Social policy | 6 | 5 | 3 | 3 | 6 |
| State aid | 53 | 54 | 36 | 37 | 70 |
| Taxation | | 1 | | 2 | |
| Transport | 1 | 2 | 1 | 3 | |
| **Total EC Treaty/TFEU** (1) | **329** | **330** | **302** | **468** | **439** |
| **Total CS Treaty** | **1** | **1** | **10** | | |
| **Total EA Treaty** | **1** | | **1** | | **1** |
| Staff Regulations | 236 | 71 | 58 | 54 | 32 |
| Special forms of procedure | 43 | 34 | 26 | 83 | 83 |
| **OVERALL TOTAL** | **610** | **436** | **397** | **605** | **555** |

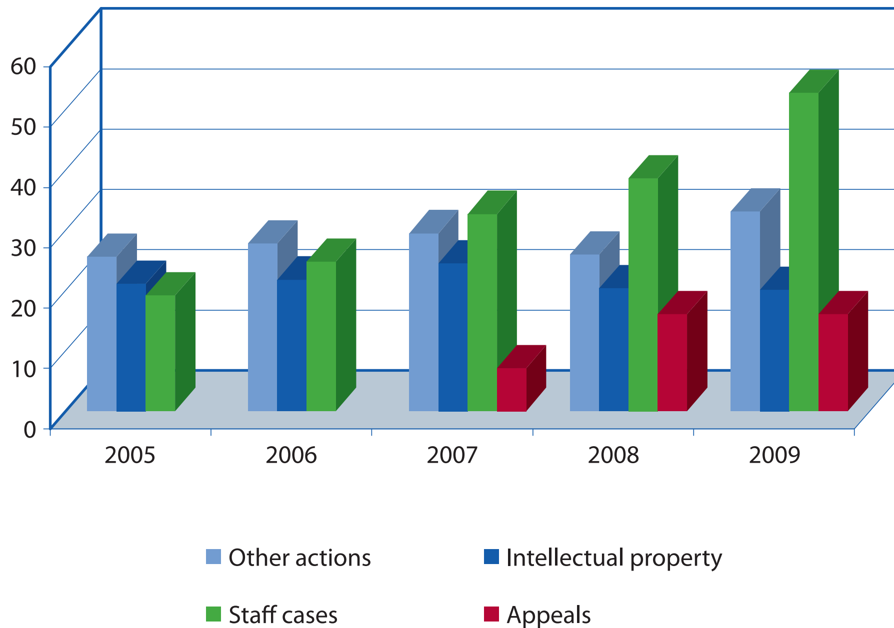
(1) On 1 December 2009, the date of entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union (TFEU) replaced the Treaty establishing the European Community.

# 8. *Completed cases* — Bench hearing action (2005–09)




| | 2005 | | | 2006 | | | 2007 | | | 2008 | | | 2009 | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Judgments | Orders | Total | Judgments | Orders | Total | Judgments | Orders | Total | Judgments | Orders | Total | Judgments | Orders | Total |
| Grand Chamber | 6 | | 6 | | | | 2 | | 2 | | | | | | |
| Appeal Chamber | | | | | | | 3 | 4 | 7 | 16 | 10 | 26 | 20 | 11 | 31 |
| President of the General Court | | 25 | 25 | | 19 | 19 | | 16 | 16 | | 52 | 52 | | 50 | 50 |
| Chambers (5 judges) | 28 | 34 | 62 | 22 | 33 | 55 | 44 | 8 | 52 | 15 | 2 | 17 | 27 | 2 | 29 |
| Chambers (3 judges) | 181 | 329 | 510 | 198 | 157 | 355 | 196 | 122 | 318 | 228 | 282 | 510 | 245 | 200 | 445 |
| Single judge | 7 | | 7 | 7 | | 7 | 2 | | 2 | | | | | | |
| **Total** | **222** | **388** | **610** | **227** | **209** | **436** | **247** | **150** | **397** | **259** | **346** | **605** | **292** | **263** | **555** |

## 9. *Completed cases* — Duration of proceedings in months (2005–09) ([1]) (judgments and orders)

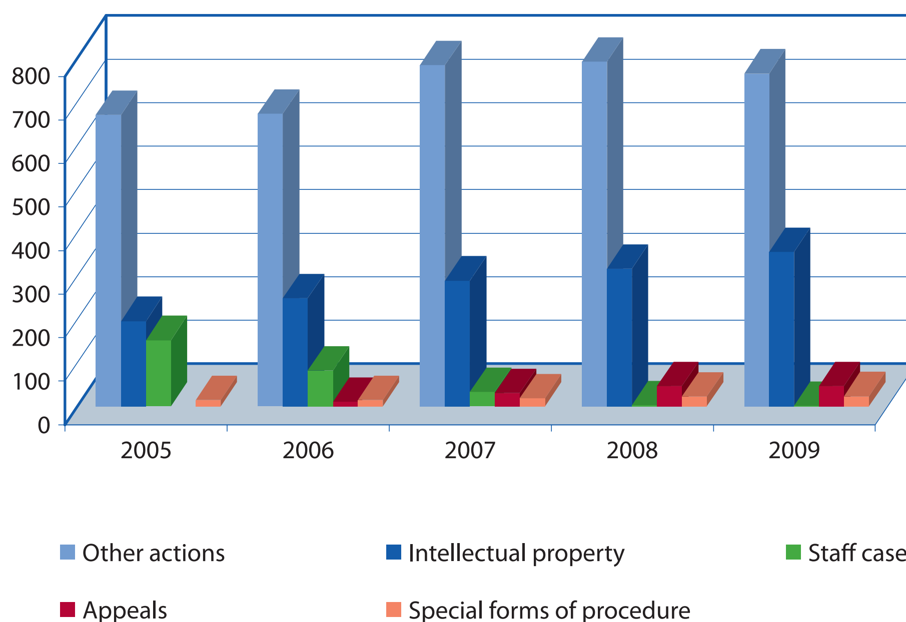



| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Other actions | 25.6 | 27.8 | 29.5 | 26.0 | 33.1 |
| Intellectual property | 21.1 | 21.8 | 24.5 | 20.4 | 20.1 |
| Staff cases | 19.2 | 24.8 | 32.7 | 38.6 | 52.8 |
| Appeals | | | 7.1 | 16.1 | 16.1 |

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

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

## 10. *Cases pending as at 31 December* — Nature of proceedings (2005–09)




Other actions · Intellectual property · Staff cases · Appeals · Special forms of procedure

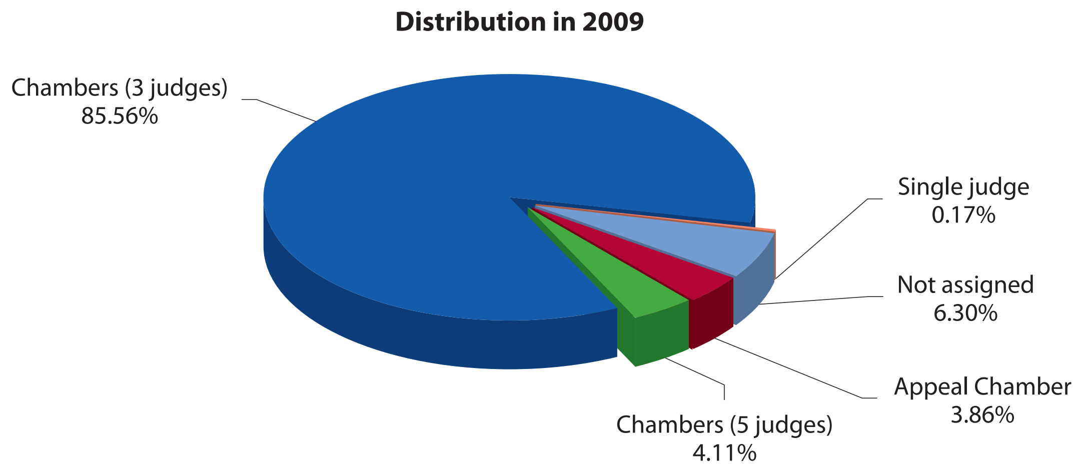
| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Other actions | 670 | 673 | 784 | 792 | 766 |
| Intellectual property | 196 | 249 | 289 | 316 | 355 |
| Staff cases | 152 | 82 | 33 | 2 | 1 |
| Appeals | | 10 | 30 | 46 | 46 |
| Special forms of procedure | 15 | 15 | 18 | 22 | 23 |
| **Total** | **1 033** | **1 029** | **1 154** | **1 178** | **1 191** |

# 11. *Cases pending as at 31 December* — Subject matter of the action (2005–09)

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Accession of new States | 1 | | | | |
| Agriculture | 82 | 74 | 97 | 73 | 53 |
| Approximation of laws | 1 | 1 | 1 | | |
| Arbitration clause | 1 | 3 | 3 | 12 | 20 |
| Association of the Overseas Countries and Territories | 2 | | | | |
| Budget of the Communities | | | 1 | 1 | 2 |
| Commercial policy | 23 | 28 | 33 | 31 | 33 |
| Common Customs Tariff | 1 | 3 | 3 | | |
| Common foreign and security policy | 8 | 9 | 18 | 18 | 17 |
| Community own resources | 2 | | | | |
| Company law | 16 | 23 | 27 | 33 | 45 |
| Competition | 134 | 173 | 197 | 236 | 244 |
| Culture | | 3 | 4 | 4 | 3 |
| Customs union | 13 | 11 | 13 | 11 | 6 |
| Economic and monetary policy | 1 | 2 | 1 | | |
| Energy | 4 | 2 | 1 | 1 | 2 |
| Environment and consumers | 43 | 44 | 70 | 56 | 40 |
| External relations | 9 | 6 | 3 | 3 | 8 |
| Fisheries policy | 28 | 4 | 5 | 24 | 8 |
| Free movement of goods | | | 1 | | |
| Freedom of movement for persons | 2 | 3 | 3 | 2 | 2 |
| Freedom to provide services | | 1 | | 3 | 5 |
| Intellectual property | 197 | 251 | 290 | 317 | 355 |
| Justice and home affairs | | | 1 | 3 | 2 |
| Law governing the institutions | 42 | 43 | 54 | 61 | 81 |
| Regional policy | 27 | 36 | 48 | 13 | 16 |
| Research, information, education and statistics | 16 | 18 | 18 | 9 | 10 |
| Social policy | 9 | 7 | 9 | 9 | 5 |
| State aid | 190 | 164 | 165 | 184 | 160 |
| Taxation | | | 2 | | |
| Transport | 2 | 1 | 4 | 2 | 2 |
| **Total EC Treaty/TFEU** [1] | **854** | **910** | **1 072** | **1 106** | **1 119** |
| **Total CS Treaty** | **11** | **10** | | **1** | **1** |
| **Total EA Treaty** | **1** | **2** | **1** | **1** | |
| Staff Regulations | 152 | 92 | 63 | 48 | 48 |
| Special forms of procedure | 15 | 15 | 18 | 22 | 23 |
| **OVERALL TOTAL** | **1 033** | **1 029** | **1 154** | **1 178** | **1 191** |

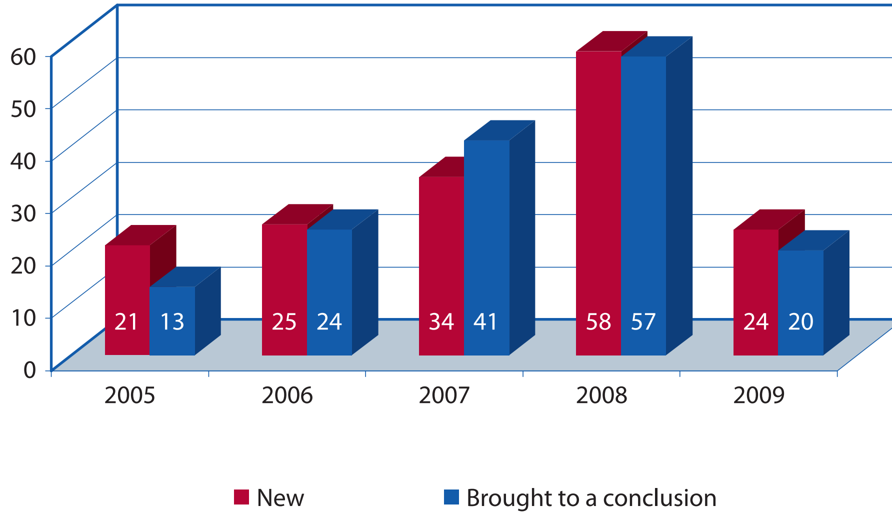
[1] On 1 December 2009, the date of entry into force of the Lisbon Treaty, the Treaty on the Functioning of the European Union (TFEU) replaced the Treaty establishing the European Community.

# 12. *Cases pending as at 31 December* — Bench hearing action (2005–09)




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Grand Chamber | 1 | 2 | | | |
| Appeal Chamber | | 10 | 30 | 46 | 46 |
| President of the General Court | | 1 | | | |
| Chambers (5 judges) | 146 | 117 | 75 | 67 | 49 |
| Chambers (3 judges) | 846 | 825 | 971 | 975 | 1 019 |
| Single judge | 4 | 2 | | | 2 |
| Not assigned | 36 | 72 | 78 | 90 | 75 |
| **Total** | **1 033** | **1 029** | **1 154** | **1 178** | **1 191** |

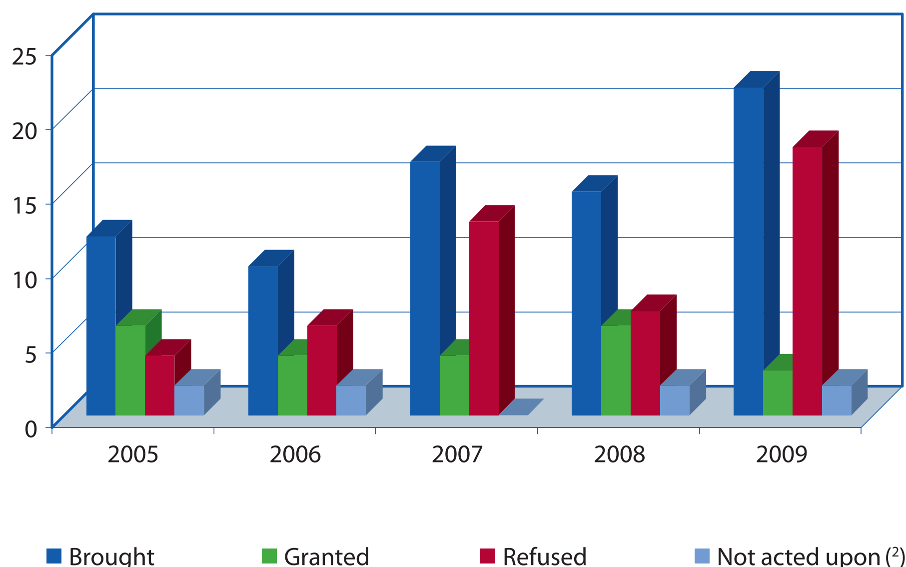
## 13. *Miscellaneous* — Proceedings for interim measures (2005–09)




**Distribution in 2009**

| | New applications for interim measures | Applications for interim measures brought to a conclusion | Outcome | | |
|---|---|---|---|---|---|
| | | | Dismissed | Granted | Removal from the register/no need to adjudicate |
| Agriculture | 1 | 1 | 1 | | |
| State aid | 1 | 2 | 2 | | |
| Arbitration clause | 2 | 1 | 1 | | |
| Competition | 5 | 6 | 4 | | 2 |
| Company law | 2 | 1 | 1 | | |
| Law governing the institutions | 4 | 3 | 2 | | 1 |
| Environment and consumers | 5 | 3 | 2 | 1 | |
| Freedom of movement for persons | 1 | 1 | | | 1 |
| Freedom to provide services | 1 | 1 | 1 | | |
| Customs union | 2 | 1 | 1 | | |
| **Total** | **24** | **20** | **15** | **1** | **4** |

# 14. *Miscellaneous* — Expedited procedures (2005–09) ([1])

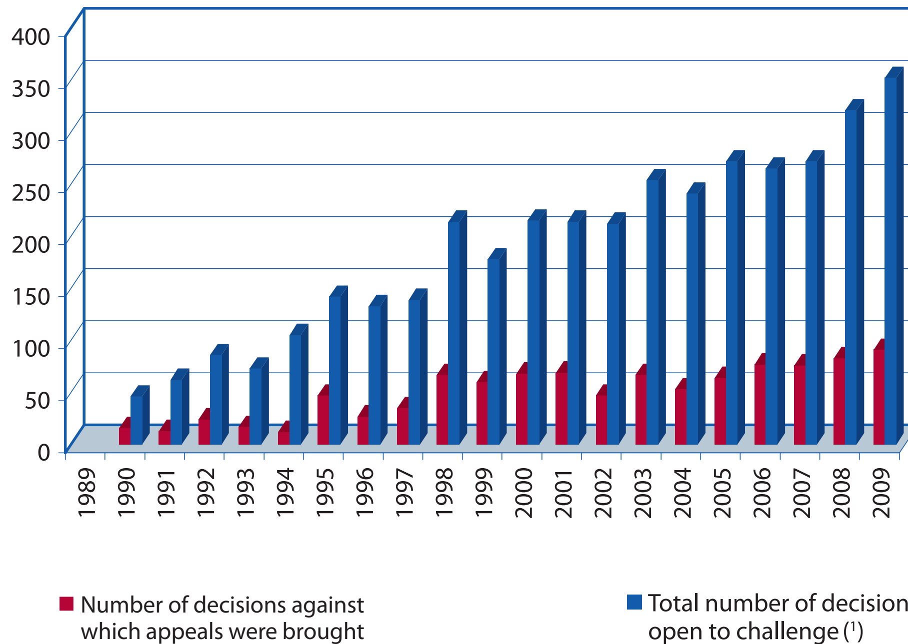



| | 2005 | | | | 2005 | | | | 2007 | | | | 2008 | | | | 2009 | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Outcome | | | | Outcome | | | | Outcome | | | | Outcome | | | | Outcome | | |
| | **Brought** | Granted | Refused | Not acted upon ([2]) | **Brought** | Granted | Refused | Not acted upon ([2]) | **Brought** | Granted | Refused | Not acted upon ([2]) | **Brought** | Granted | Refused | Not acted upon ([2]) | **Brought** | Granted | Refused | Not acted upon ([2]) |
| Agriculture | 2 | | | | 2 | 1 | 3 | | | | | | 1 | | | | 2 | | 3 | |
| State aid | | | | | 1 | | | | 1 | | 2 | | 1 | | 1 | | | | | |
| Arbitration clause | | | | | | | | | | | | | 1 | | | 1 | | | | |
| Competition | 2 | 3 | 2 | | 4 | 2 | 2 | | 1 | | 1 | | 1 | | 1 | | 2 | | 2 | |
| Company law | 3 | 2 | 1 | 1 | | | | | 1 | | | | 3 | 1 | 3 | | 2 | | 2 | |
| Law governing the institutions | 1 | | 1 | | | | | | 1 | | 1 | | 3 | | 2 | 1 | 5 | | 5 | |
| Environment and consumers | 2 | 1 | | 1 | 3 | 1 | 1 | | 7 | 1 | 7 | | | | | | 2 | | 1 | 1 |
| Freedom to provide services | | | | | | | | | | | | | | | | | 1 | 1 | | |
| Commercial policy | | | | | | | | | 2 | 1 | | | | 1 | | | 2 | | 2 | |
| Common foreign and security policy | | | | | | | | | 3 | 2 | 1 | | 4 | 4 | | | 5 | 1 | 2 | 1 |
| Procedure | | | | | | | | | | | | | | | | | 1 | | 1 | |
| Research, information, education and statistics | | | | | | | | | 1 | | 1 | | | | | | | | | |
| Community own resources | 2 | | | | | | | 2 | | | | | | | | | | | | |
| Staff Regulations | | | | | | | | | | | | | 1 | | | | | 1 | | |
| **Total** | **12** | **6** | **4** | **2** | **10** | **4** | **6** | **2** | **17** | **4** | **13** | **0** | **15** | **6** | **7** | **2** | **22** | **3** | **18** | **2** |

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

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

# 15. *Miscellaneous* — Appeals against decisions of the General Court to the Court of Justice (1989–2009)




| | Number of decisions against which appeals were brought | Total number of decisions open to challenge (1) | Percentage of decisions against which appeals were brought |
|---|---|---|---|
| **1989** | | | |
| **1990** | 16 | 46 | 35% |
| **1991** | 13 | 62 | 21% |
| **1992** | 24 | 86 | 28% |
| **1993** | 17 | 73 | 23% |
| **1994** | 12 | 105 | 11% |
| **1995** | 47 | 142 | 33% |
| **1996** | 27 | 133 | 20% |
| **1997** | 35 | 139 | 25% |
| **1998** | 67 | 214 | 31% |
| **1999** | 60 | 178 | 34% |
| **2000** | 68 | 215 | 32% |
| **2001** | 69 | 214 | 32% |
| **2002** | 47 | 212 | 22% |
| **2003** | 67 | 254 | 26% |
| **2004** | 53 | 241 | 22% |
| **2005** | 64 | 272 | 24% |
| **2006** | 77 | 265 | 29% |
| **2007** | 76 | 272 | 28% |
| **2008** | 83 | 321 | 26% |
| **2009** | 91 | 352 | 26% |

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

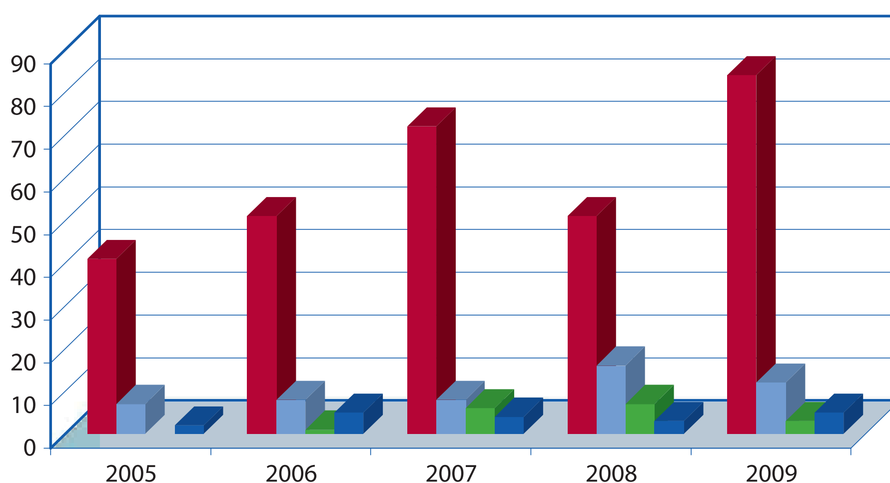
## 16. Miscellaneous — Distribution of appeals before the Court of Justice according to the nature of the proceedings (2005–09)

| | 2005 | | | 2006 | | | 2007 | | | 2008 | | | 2009 | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Appeals | Decisions open to challenge | **Appeals as a percentage** | Appeals | Decisions open to challenge | **Appeals as a percentage** | Appeals | Decisions open to challenge | **Appeals as a percentage** | Appeals | Decisions open to challenge | **Appeals as a percentage** | Appeals | Decisions open to challenge | **Appeals as a percentage** |
| Other actions | 37 | 120 | **31%** | 46 | 146 | **32%** | 52 | 163 | **32%** | 51 | 190 | **27%** | 65 | 201 | **32%** |
| Intellectual property | 16 | 71 | **23%** | 18 | 59 | **31%** | 14 | 63 | **22%** | 23 | 100 | **23%** | 25 | 148 | **17%** |
| Staff cases | 11 | 81 | **14%** | 13 | 60 | **22%** | 10 | 46 | **22%** | 9 | 31 | **29%** | 1 | 3 | **33%** |
| **Total** | 64 | 272 | **24%** | 77 | 265 | **29%** | 76 | 272 | **28%** | 83 | 321 | **26%** | 91 | 352 | **26%** |

## 17. *Miscellaneous* — Results of appeals before the Court of Justice (2009) (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 |
|---|---|---|---|---|---|
| State aid | 4 | | 2 | | **6** |
| Competition | 18 | 4 | 1 | | **23** |
| Company law | 1 | | | | **1** |
| Law governing the institutions | 19 | 1 | | | **20** |
| Environment and consumers | 8 | | | 3 | **11** |
| Free movement of goods | 2 | | | | **2** |
| Commercial policy | 1 | 1 | | | **2** |
| Common foreign and security policy | | 2 | | 1 | **3** |
| Regional policy | 1 | 2 | | | **3** |
| Principles of Community law | 1 | | | | **1** |
| Intellectual property | 19 | 2 | | 1 | **22** |
| External relations | 1 | | | | **1** |
| Community own resources | 1 | | | | **1** |
| Staff Regulations | 8 | | | | **8** |
| **Total** | **84** | **12** | **3** | **5** | **104** |

## 18. *Miscellaneous* — Results of appeals before the Court of Justice (2005–09) (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

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Appeal dismissed | 41 | 51 | 72 | 51 | 84 |
| Decision totally or partially set aside and no referral back | 7 | 8 | 8 | 16 | 12 |
| Decision totally or partially set aside and referral back | | 1 | 6 | 7 | 3 |
| Removal from the register/no need to adjudicate | 2 | 5 | 4 | 3 | 5 |
| **Total** | **50** | **65** | **90** | **77** | **104** |

# 19. *Miscellaneous* — General trend (1989–2009)

## New cases, completed cases, cases pending

| | New cases [1] | Completed cases [2] | Cases pending on 31 December |
|---|---|---|---|
| **1989** | 169 | 1 | 168 |
| **1990** | 59 | 82 | 145 |
| **1991** | 95 | 67 | 173 |
| **1992** | 123 | 125 | 171 |
| **1993** | 596 | 106 | 661 |
| **1994** | 409 | 442 | 628 |
| **1995** | 253 | 265 | 616 |
| **1996** | 229 | 186 | 659 |
| **1997** | 644 | 186 | 1 117 |
| **1998** | 238 | 348 | 1 007 |
| **1999** | 384 | 659 | 732 |
| **2000** | 398 | 343 | 787 |
| **2001** | 345 | 340 | 792 |
| **2002** | 411 | 331 | 872 |
| **2003** | 466 | 339 | 999 |
| **2004** | 536 | 361 | 1 174 |
| **2005** | 469 | 610 | 1 033 |
| **2006** | 432 | 436 | 1 029 |
| **2007** | 522 | 397 | 1 154 |
| **2008** | 629 | 605 | 1 178 |
| **2009** | 568 | 555 | 1 191 |
| **Total** | **7 975** | **6 784** | |

(1) 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance (now the General Court).
1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.
1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance.
2004–05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance.

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

# Chapter III

## The Civil Service Tribunal

## A — Proceedings of the Civil Service Tribunal in 2009

*By Mr Paul Mahoney, President of the Civil Service Tribunal*

**1.** The judicial statistics of the Civil Service Tribunal for 2008 had shown that, for the first time in 10 years, the number of actions brought had dropped markedly compared with the previous year. The number of actions brought in 2009 (113) shows that the phenomenon observed was not an isolated one. The reversal in the trend of growth in staff case litigation seems to have been confirmed. As in the previous year, we can speculate that the rule that the unsuccessful party is to pay the costs, which came into force with the Rules of Procedure of the Tribunal on 1 November 2007, might have played a part in the development noted.

This year the number of cases brought to a close was clearly more than in the two previous years. That is due in large part to the fact that, in the wake of the judgment of the Court of Justice of 22 December 2008 in Case C-443/07 P *Centeno Mediavilla and Others* v *Commission*, the Civil Service Tribunal was able to bring to a close 32 cases with a connection to that 'test' case. There are, however, currently 18 connected cases still pending.

As, in 2009, for the first time since the creation of the Civil Service Tribunal, the number of completed cases (155) was significantly higher than the number brought (113), there has been a discernible improvement as regards the accumulation of cases. The number of pending cases is now only 175, whereas it was 217 at the end of 2008.

The average duration of proceedings was 15.1 months, which represents a clear reduction of the average duration of proceedings compared with the previous year, when it was 17 months.

Although the Civil Service Tribunal is naturally pleased to be able to report such satisfactory judicial statistics, the exceptional nature of the circumstances which made it possible to achieve such figures must be emphasised, and it must be pointed out that, while the number of completed cases is very much higher than that of cases brought in 2009, that is in large part a result of the abovementioned judgment in *Centeno Mediavilla and Others* v *Commission*. In that respect, the figures for 2007 and 2008, which show a balance between the number of completed cases and the number of cases brought, are definitely a better reflection of the true capacity of the Civil Service Tribunal to produce judgments.

**2.** During this year the Civil Service Tribunal has continued to endeavour to answer the legislature's appeal for the facilitation, at every stage of the procedure, of the amicable settlement of disputes. However, it proved possible to bring only two cases to a close following an amicable settlement at the instigation of the bench hearing the action. The Civil Service Tribunal takes the view that this rather unsatisfactory figure is in large part attributable to the often reluctant attitude of the parties, and the institutions in particular, although in many instances, the case was suitable for amicable settlement and there was a genuine chance of reaching such a settlement. The various benches hearing the actions received the impression, in some cases, that the institutions would only have been prepared to conclude an amicable settlement if they had been convinced that they had committed a wrongful act. However, other, not strictly legal, factors, such as equity, may be taken into consideration to justify the conclusion of an amicable settlement.

**3.** Appeals were brought before the General Court against 31 decisions of the Civil Service Tribunal, which corresponds to 32.98% of the decisions subject to appeal delivered by the Tribunal and 32.29% of the total number of cases brought to a close, leaving aside the instances of unilateral

discontinuance by one of the parties [1]. Ten decisions of the Civil Service Tribunal were set aside by the General Court.

**4.** As regards the composition of the Civil Service Tribunal, 2009 saw the arrival of a new Judge, Mrs M.-I. Rofes i Pujol, following the resignation of the President of the Second Chamber, Mr H. Kanninen, as a result of his appointment as a Judge in the General Court. On 7 October 2009, Mr H. Tagaras was elected President of the Second Chamber.

**5.** Also on 7 October 2009, the Civil Service Tribunal decided to alter the criteria for assigning cases to chambers, so as to make them less specialised.

**6.** The account given below will describe the most significant decisions of the Civil Service Tribunal as regards procedure, merits, the question of costs and, finally, proceedings for interim relief. As there are no significant new developments as regards legal aid, the section usually devoted to this question has been omitted.

## I. Procedural aspects

### Jurisdiction of the Civil Service Tribunal

In Case F-64/09 *Labate* v *Commission* (order of 29 September 2009) an action for failure to act was brought before the Civil Service Tribunal on the basis of Article 232 EC by a 'person to whom [the] Staff Regulations [of officials of the European Communities ("the Staff Regulations")] apply' within the meaning of Article 91 of those regulations, who was in dispute, not with the Commission as a Community institution, but with the appointing authority within the Commission, that is to say, with the Commission as employer. The Civil Service Tribunal held that the question whether the applicant was entitled to bring an action for failure to act on the basis of Article 232 EC was to be examined only by the court having jurisdiction to rule on actions for failure to act brought by individuals, namely the Court of First Instance (hereafter in this section 'the General Court'). The Civil Service Tribunal therefore referred the case to that court on the basis of Article 8(2) of the Annex to the Statute of the Court of Justice.

### No need to adjudicate

In Case F-11/05 RENV *Chassagne* v *Commission* (order of 18 November 2009) the Civil Service Tribunal was faced with a situation in which an applicant, who had not formally discontinued the proceedings within the meaning of Article 74 of the Rules of Procedure, had clearly manifested his intention not to pursue his claims. The Civil Service Tribunal, having heard the parties, held that it was incumbent upon it, in the interests of the sound administration of justice and in the light of the persistent failure of the applicant to act, to find of its own motion, pursuant to Article 75 of the Rules of Procedure, that the action had become devoid of purpose and that there was no need to adjudicate [2].

(1) The relation between appealed decisions and cases brought to a close, not including cases unilaterally discontinued by one of the parties, may be considered a better reflection of the 'rate of challenge' of the decisions of the Civil Service Tribunal than the relation between appealed decisions and decisions subject to appeal, given that a certain number of cases is brought to a close by amicable settlement each year.

(2) See, to that effect, the order of 22 October 2009 in Case F-10/08 *Aayhan* v *Parliament*.

## Conditions for admissibility

### 1. *Definition of act adversely affecting an official*

In Joined Cases F-5/05 and F-7/05* *Violetti and Others and Schmit* v *Commission* (judgment of 28 April 2009, under appeal to the General Court) [3], the Civil Service Tribunal, faced with the question whether the decision by the Director of the European Anti-Fraud Office (OLAF) to forward to the judicial authorities of the Member State concerned the information obtained during internal investigations into matters liable to result in criminal proceedings against an official constitutes an act adversely affecting that official within the meaning of Article 90a of the Staff Regulations, answered that question in the affirmative. The Civil Service Tribunal found inter alia that that decision cannot be regarded as a merely intermediate or preparatory decision if Article 90a of the Staff Regulations, according to which any person to whom the Staff Regulations apply may submit to the Director of OLAF a complaint within the meaning of Article 90(2) against an act adversely affecting him in connection with investigations by OLAF, is not to be deprived of all effect. The Civil Service Tribunal also held that it is difficult to conceive that such decisions should be denied the status of 'act adversely affecting [an official]', especially given that the Community legislature itself has foreseen the need to make OLAF's internal investigations subject to strict procedural safeguards and, in particular, to make the most significant acts which OLAF adopts in the course of such investigations subject to observance of the fundamental principle of the rights of the defence, which includes, inter alia, the right to be heard.

### 2. *Time limits*

In the judgment of 6 May 2009 in Case F-137/07 *Sergio and Others* v *Commission*, the point was made that, where it is clear that a complaint was lodged by a lawyer on behalf of officials or other staff, the administration is entitled to take the view that the lawyer is the proper addressee of the decision taken in response to that complaint. In the absence of indications to the contrary received by the administration before service of its reply, service on the lawyer is equivalent to service on the officials or other staff he represents and thus causes the time limit of three months for bringing an action laid down in Article 91(2) of the Staff Regulations to begin running.

In the order of 8 July 2009 in Case F-62/08 *Sevenier* v *Commission* (under appeal to the General Court), it was recalled, regarding the calculation of the time limits for the pre-litigation procedure, that, in the absence of specific rules concerning the time limits covered by Article 90 in the Staff Regulations themselves, reference must be made to Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ, English Special Edition, 1971(II), p. 354).

Moreover, that order made clear that the third indent of Article 91(3) of the Staff Regulations, according to which 'where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired, the period for lodging the appeal shall start to run afresh', cannot be applicable to the stage of the request before the lodging of the complaint. That specific provision, which relates to the rules for calculating periods for filing appeals, must be interpreted literally and strictly. It follows that the express rejection of a request after an implied decision rejecting that same request cannot enable the official concerned to

[3] The judgments marked with an asterisk have been translated into all the official languages of the European Union except Irish.

continue the pre-litigation procedure by opening for him a new period for lodging a complaint, as that decision is in the nature of a purely confirmatory measure.

### *3. Material new fact*

In the order of 11 June 2009 in Case F-81/08 *Ketselidou* v *Commission*, it was recalled that a finding by a judgment of a Community court that an administrative decision of general application infringed the Staff Regulations could not constitute, for officials who have failed to avail themselves in time of the remedies available under the Staff Regulations, a new fact justifying the submission of a request for re-examination of the individual decisions relating to them by the appointing authority. By that ruling, the Civil Service Tribunal followed a line of settled case-law of the Court of Justice and the General Court.

# II. Merits

## General principles

### *1. Lack of authority of the author of a measure*

In the judgment of 30 November 2009 in Case F-80/08* *Wenig* v *Commission* it was made clear that, although there is no written provision to that effect, respect for the principle of legal certainty requires that decisions concerning the exercise of powers conferred by the Staff Regulations on the appointing authority and by the conditions of employment of other servants of the European Communities ('CEOS') on the authority authorised to conclude contracts should be the subject of appropriate publicity under detailed rules and procedures which it is for the administration to determine. In the absence of appropriate publicity, such a decision cannot be relied on against an official who is the subject of an individual decision adopted on the basis of it. A plea alleging the lack of authority of the author of such an individual decision must, accordingly, be upheld and that decision set aside.

### *2. Possibility of reliance on directives*

In its judgments of 30 April 2009 in Case F-65/07* *Aayhan and Others* v *Parliament* and of 4 June 2009 in Joined Cases F-134/07 and F-8/08 *Adjemian and Others* v *Commission*, the latter judgment being under appeal to the General Court, the Civil Service Tribunal stated that directives, which are addressed to the Member States and not to the Community institutions, cannot be treated, as such, as imposing any obligations on the institutions in their relations with their staff. However, that consideration does not in itself totally preclude a directive being relied upon in relations between institutions and their officials or servants. The provisions of a directive may, in the first place, be indirectly applicable to an institution if they constitute the expression of a general principle of Community law that it must then apply as such. In that regard, the Civil Service Tribunal held, inter alia, that, although it is viewed as a major element in the protection of workers, stable employment does not constitute a general principle of law in the light of which the lawfulness of a measure adopted by an institution may be assessed. Secondly, a directive may also be binding on an institution where the latter, within the scope of its organisational autonomy and within the limits of the Staff Regulations, has sought to carry out a specific obligation laid down by a directive or in the specific instance where an internal measure of general application itself expressly refers to measures laid down by the Community legislature pursuant to the Treaties (see, in that connection, Article 1e(2) of the Staff Regulations, which provides that officials are to be 'accorded working conditions complying with appropriate health and safety standards at least equivalent

to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties'). Thirdly, the institutions, in accordance with their duty to cooperate in good faith which follows from Article 10 EC, must, as far as possible, in order to guarantee a consistent interpretation of Community law, take into account, in their conduct as employers, legislative provisions adopted at Community level.

### 3. *Limits of the administration's discretion*

While the Civil Service Tribunal is careful not to substitute its own analysis for that of the administration, particularly in areas in which the administration has a wide discretion under the rules, it none the less saw fit to censure certain decisions vitiated by manifest errors of assessment. The Civil Service Tribunal set aside a decision to dismiss (judgment of 7 July 2009 in Case F-54/08 *Bernard* v *Europol*) and a refusal to promote (judgment of 17 February 2009 in Case F-51/08 *Stols* v *Council*, under appeal to the General Court). The Civil Service Tribunal also recalled that where the administration decides to attach internal rules to the exercise of its discretion, such rules are binding and confer authority on the court to exercise a closer review (see, as regards 'appraisal rules' to be observed by the reporting officers of an institution, the judgment of 17 February 2009 in Case F-38/08 *Liotti* v *Commission*, under appeal to the General Court). In any event, the administration may not disregard the general principles of law (see, as regards an assessment held to be contrary to the principle of equal treatment, the judgment of 11 February 2009 in Case F-7/08 *Schönberger* v *Parliament*).

### 4. *Interpretation of Community law*

In its judgment of 29 September 2009 in Joined Cases F-69/07 and F-60/08* *O* v *Commission* the Civil Service Tribunal had to rule on the lawfulness of a decision by which the Commission had deferred medical cover for the applicant, as provided for by the first paragraph of Article 100 of the CEOS [4]. The Civil Service Tribunal, having recalled that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs, the objects of the rules of which it is part and the provisions of Community law as a whole, interpreted Article 100 of the CEOS in the light of the requirements flowing from freedom of movement for workers, enshrined in Article 39 EC. In order to respond to the defendant's argument that, in invoking, in particular, Article 39 EC, on which the applicant did not rely in her pleadings, the Tribunal was reviewing of its own motion the lawfulness of an administrative act of the authority authorised to conclude contracts in relation to a plea alleging infringement of a provision of the Treaty, the Civil Service Tribunal held that, in defining the legal framework within which a provision of secondary law must be interpreted, the Community judicature does not rule on the lawfulness of that provision by reference to higher rules of law, including those of the Treaty, but seeks the interpretation of the provision at issue which makes its application as compatible as possible with primary law and as consistent as possible with the legal framework within which it falls.

([4]) That article provides that, where the medical examination made before a member of the contract staff is engaged shows that he is suffering from sickness or invalidity, the authority referred to in the first paragraph of Article 6 may, in so far as risks arising from such sickness or invalidity are concerned, decide to grant him guaranteed benefits in respect of invalidity or death only after a period of five years from the date of his entering the service of the institution.

### *5. Principle of performance of contracts in good faith*

In the judgment of 2 July 2009 in Case F-19/08 *Bennett and Others* v *OHIM*, it was made clear that the employment relationship between an institution and its staff, even if it derives from a contract, is governed by the CEOS, in conjunction with the Staff Regulations, and is thus governed by public law. However, the fact that staff are subject to rules of Community administrative law does not preclude the institution's being required, in implementing certain clauses of an employee's contract which supplement those rules, to respect the principle of performance in good faith of contracts, which is a principle common to the laws of the great majority of the Member States. In this case the Civil Service Tribunal found that the defendant had breached the principle of the performance in good faith of contracts, and ordered it to make good the non-material damage caused to the applicants as a result of their being misled as to their real prospects of career advancement.

### *6. Giving effect to a judgment setting aside a measure*

In the judgment of 5 May 2009 in Case F-27/08 *Simões Dos Santos* v *OHIM* (under appeal to the General Court), it was made clear that the implementation of a decision of a court setting aside a measure for lack of a proper legal basis cannot systematically justify the administration's taking a measure with retroactive effect to remedy an initial illegality. Such retroactivity is consistent with the principle of legal certainty only in exceptional cases, where the objective to be attained requires it and where the legitimate expectations of the persons concerned are duly respected.

In that case, having found that the implementation of judgments annulling measures presented particular difficulties, in so far as no alternative implementing measure to those adopted by the defendant, which were held to have disregarded the force of res judicata and the principle of the non-retroactivity of measures, appeared a priori free of difficulties, the Civil Service Tribunal held that the award, of its own motion, of damages constituted the form of compensation which best met the interests of the applicant and the requirements of the service, and that it also allowed the judgments annulling measures to be given proper effect.

## Rights and obligations of officials

In its judgment of 7 July 2009 in Case F-39/08* *Lebedef* v *Commission*, under appeal to the General Court, the Civil Service Tribunal, having recalled that staff representation is of vital importance for the proper functioning of the Community institutions and, accordingly, for the fulfilment of their tasks, none the less pointed out that the system, which specifically provides for the grant of secondment to certain staff representatives, implies that, in the case of officials or servants not on secondment, participation in staff representation activities should be occasional and, calculated on a six monthly or quarterly basis, cover a relatively limited percentage of working time. In this case, the application to the Civil Service Tribunal was from a staff representative who was seconded at the rate of 50%, who devoted none of his working time to the service to which he was assigned and who contested the decision of the appointing authority to deduct several days' leave from his annual leave entitlement. The Civil Service Tribunal dismissed the action, observing that the person concerned had neither requested permission nor, at the very least, informed his service in advance that he would be absent.

## Careers of officials

### 1. Competitions

In the judgment in *Bennett and Others* v *OHIM*, the Civil Service Tribunal, having recalled that it follows from the case-law that the interest of the service may justify requiring of a candidate in a competition specific linguistic knowledge in certain languages of the Union, pointed out that, in the context of the internal running of the institutions, a system of full linguistic pluralism would give rise to great difficulties of management and would be economically onerous. Accordingly, the smooth running of the institutions and bodies of the Union, particularly where the body concerned has limited resources, may objectively justify a limited choice of languages of internal communication, and thus of the languages of the tests of a competition.

In Case F-99/08* *Di Prospero* v *Commission*, leading to the judgment of 17 November 2009, the Civil Service Tribunal had before it a plea of illegality, in the light of the first paragraph of Article 27 of the Staff Regulations, which provides that '[r]ecruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis …', of a clause in a notice of open competition which provided that the tests of several open competitions might be held at the same time and that, accordingly, candidates could apply for only one of those competitions. The Civil Service Tribunal held that that clause was incompatible with the above provision of the Staff Regulations and consequently annulled the decision of the European Personnel Selection Office (EPSO) rejecting the candidature of the applicant for one of the two open competitions for which she had applied.

### 2. Appointment procedures

The Civil Service Tribunal has had to rule in three actions by applicants contesting decisions rejecting their canditature for the vacant post of head of the Commission representation in Athens. By three judgments of 2 April 2009 in Case F-128/07* *Menidiatis* v *Commission*, Case F-143/07 *Yannoussis* v *Commission* and Case F-129/07 *Kremlis* v *Commission*, the Civil Service Tribunal upheld the plea of the applicants alleging the illegality of the use of the secondment procedure provided for by the second indent of Article 37, first paragraph, (a), of the Staff Regulations and annulled the contested decisions. In particular, it held that the 'sensitive political nature' of the duties carried out by the heads of representation of the Commission is not in itself such as to justify recourse to secondment of an official. Such an interpretation of the second indent of Article 37, first paragraph, (a), of the Staff Regulations would amount to allowing secondment to assist the relevant Commissioners of all officials carrying out 'sensitive political' duties within the institution which are normally the responsibility of senior management and would thus undermine the very structure of the European civil service as established in Article 35 of the Staff Regulations, thereby calling into question in particular the clarity of hierarchical relations.

In the judgment of 6 May 2009 in Case F-39/07* *Campos Valls* v *Council* it was made clear that the qualifications required by a notice of vacancy cannot be interpreted independently of the job description in that notice.

## Emoluments and social security benefits of officials

In Case F-115/07 *Balieu-Steinmetz and Noworyta* v *Parliament*, leading to the judgment of 28 April 2009, the applicants, who were telephone switchboard operators, had referred to the Civil Service Tribunal the decision of the Parliament not to pay them a fixed allowance for overtime. The applicants put forward a plea alleging breach of the principle of equal treatment, maintaining that

their colleagues who took up their duties before 1 May 2004 continued to receive the allowance. The Parliament, in its defence, relied on case-law according to which a person cannot rely on an unlawful act committed in favour of a third party, and on the fact that the payment of the fixed allowance to the applicants' colleagues was unlawful. The Civil Service Tribunal observed that it is true that a person cannot rely on an unlawful act committed in favour of a third party, but none the less found that, in this case, the Parliament had not been able to establish to a sufficient legal standard that the payment of the fixed allowance to the colleagues of the applicants had no legal basis. The Civil Service Tribunal accordingly annulled the contested decisions. Working conditions on the telephone switchboard of the Parliament were also the subject of the judgment of 18 May 2009 in Case F-66/08 *De Smedt and Others* v *Parliament*, essentially concerning the notion of 'shift-work' within the meaning of Article 56a of the Staff Regulations.

## Disciplinary rules

In the judgment in *Wenig* v *Commission*, the point was made that judicial review of the merits of a measure of suspension can only be very limited given the provisional nature of such a measure. Thus, the Tribunal must confine itself to verifying that the allegations of a serious wrongful act are sufficiently plausible and that they are not manifestly without foundation. The Civil Service Tribunal took the view that this was so in this case.

## Conditions of employment of other servants

### *1. Recruitment of contract staff*

In its judgment of 29 September 2009 in Joined Cases F-20/08, F-34/08 and F-75/08* *Aparicio and Others* v *Commission*, the Civil Service Tribunal, called upon to rule on a plea of illegality of a verbal and numerical test set for the recruitment of contract staff, found that the Commission and EPSO, each exercising their authority, did not, in this case, exceed the limits of their wide discretion by setting a verbal and numerical reasoning test, making it eliminatory in nature and imposing it on staff already in post.

### *2. Decision of the Commission of 28 April 2004 on the maximum duration of the use of non-permanent staff in the Commission's services*

In the judgment of 29 January 2009 in Case F-98/07 *Petrilli* v *Commission*, under appeal to the General Court, it was stated that an institution cannot, without breaching the first paragraph of Article 88 of the CEOS, restrict generally and impersonally, inter alia by means of general implementing provisions or an internal decision of general application, the maximum possible period of employment of contract staff as determined by the legislature itself. The institutions have no power to derogate from an express rule in the Staff Regulations or the CEOS by means of an implementing provision, unless they are expressly authorised to do so. In this case, the Civil Service Tribunal found that the Commission decision limiting the total duration of the work done by a member of the contract staff to six years unlawfully restricted the scope of the first paragraph of Article 88 of the CEOS which allows the appointing authority to conclude and renew the contracts of auxiliary contract staff for a maximum of three years. It took as its basis, on that point, the fact that a member of the auxiliary contract staff may have been previously employed in another capacity for a certain period, thus reducing, though the effect of the contested decision, the time for which it is normally permitted to employ him to less than three years.

### 3. *Members of the contract staff for auxiliary tasks*

In the judgment in *Adjemian and Others* v *Commission*, it was held that each post for a member of the contract staff for auxiliary tasks must meet temporary or intermittent needs. In an administration with a large workforce, it is inevitable that such needs will recur, inter alia as a result of the unavailability of officials, increases in workload in particular circumstances or the need for each Directorate-General to have recourse occasionally to persons with specific qualifications or knowledge. Such circumstances constitute objective reasons justifying both the fixed duration of auxiliary staff contracts and their renewal as the need arises.

### 4. *Session auxiliaries of the European Parliament*

In its judgment in *Aayhan and Others* v *Parliament*, the Civil Service Tribunal, interpreting Article 78 of the CEOS in the light of the framework agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, held that the Parliament's intermittent needs for large numbers of additional staff only for the duration of its sessions constitute 'objective reasons' within the meaning of clause 5(1)(a) of the framework agreement justifying the use of successive fixed-term employment contracts for auxiliary staff, renewed when each new parliamentary session is held, as provided for by Article 78 of the CEOS until 1 January 2007. Although such needs were foreseeable, the additional activity was none the less not sustained and permanent.

## III. Costs

### 1. *Taxation of costs*

In its order of 10 November 2009 in Case F-14/08 DEP *X* v *Parliament*, the Civil Service Tribunal upheld the applicant's application for an order that the defendant pay default interest on the costs to be reimbursed from the date of delivery of the order on taxation of costs, the applicable rate of interest being calculated on the basis of the rates set by the European Central Bank for principal refinancing operations, applicable during the period concerned, plus two points, provided that it does not exceed that claimed by the applicant.

### 2. *Tribunal's costs*

In its order of 7 October 2009 in Case F-3/08 *Marcuccio* v *Commission*, the Civil Service Tribunal applied for the first time Article 94 of its Rules of Procedure, under which, where a party has caused the Tribunal to incur avoidable costs, in particular where the action is manifestly an abuse of process, the Tribunal may order that party to refund them in whole or in part, but the amount of that refund may not exceed EUR 2 000.

It is to be noted that, in Case F-86/08 *Voslamber* v *Commission*, which led to the judgment of 30 November 2009, the defendant institution had put before the Civil Service Tribunal claims that the applicant should be ordered to reimburse a part of the Tribunal's costs pursuant to Article 94 of the Rules of Procedure. It declared those claims inadmissible, pointing out that the option available under that provision was a specific power of the Tribunal.

## IV. Interim proceedings

The only order for interim proceedings made by the President of the Civil Service Tribunal in 2009 (order of 18 December 2009 in Case F-92/09 R *U* v *Parliament*) is worth noting in that, by that order the judge hearing the application for interim relief, for the first time, ordered the suspension of the operation of a decision of an institution. In this case, the applicant had been dismissed, on conclusion of the procedure provided for by Article 51 of the Staff Regulations for dealing with incompetence, and sought the suspension of the operation of the decision dismissing her. As regards the condition relating to urgency, the President of the Civil Service Tribunal found that the applicant did not have sufficient means to meet the expenses necessary to ensure that her basic needs were met until a ruling was made on the principal claim. The applicant had been refused unemployment benefits by the national authorities in her country of residence and, moreover, it was unlikely that the applicant would be able to find a new job very soon in view of the difficult personality she appeared to have. As regards the condition relating to the prima facie case, the President of the Civil Service Tribunal found that it appeared at first sight that the defendant institution did not undertake all the efforts required by its duty to have regard for the welfare of the applicant to dispel the uncertainty as to a possible link between the professional difficulties of the person concerned and her mental health. Finally, as regards the balancing of the interests involved, the President of the Civil Service Tribunal found that, even if the reinstatement of the applicant was liable to be damaging to the organisation of the Parliament's services, it was for that institution to consider the possibility of requiring her to take leave under Article 59(5) of the Staff Regulations.

## B — Composition of the Civil Service Tribunal

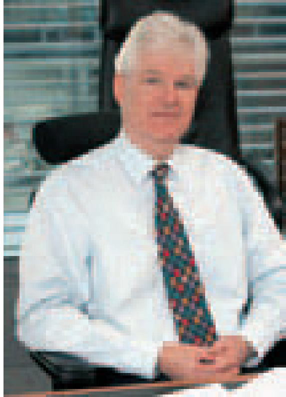
(Order of precedence as at 7 October 2009)

*From left to right:*

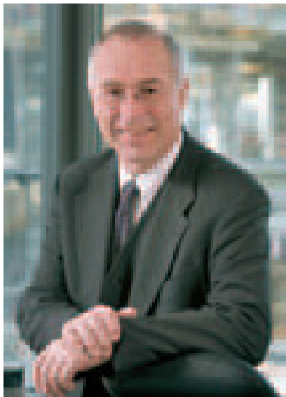
S. Van Raepenbusch, Judge; H. Kreppel, Judge; H. Tagaras, President of Chamber; P. Mahoney, President of the Tribunal; S. Gervasoni, President of Chamber; I. Boruta, Judge; M. I. Rofes i Pujol, Judge; W. Hakenberg, Registrar.

## 1. Members of the Civil Service Tribunal

*(in order of their entry into office)*



**Paul J. Mahoney**
Born in 1946; law studies (Master of Arts, Oxford University, 1967; Master of Laws, University College London, 1969); Lecturer, University College London (1967 to 1973); Barrister (London, 1972 to 1974); Administrator/Principal Administrator, European Court of Human Rights (1974 to 1990); Visiting Professor at the University of Saskatchewan, Saskatoon, Canada (1988); Head of Personnel, Council of Europe (1990 to 1993); Head of Division (1993 to 1995), Deputy Registrar (1995 to 2001), Registrar of the European Court of Human Rights (2001 to September 2005); President of the Civil Service Tribunal since 6 October 2005.



**Horstpeter Kreppel**
Born in 1945; university studies in Berlin, Munich, Frankfurt-am-Main (1966 to 1972); First State examination in law (1972); Court trainee in Frankfurt-am-Main (1972 to 1973 and 1974 to 1975); College of Europe, Bruges (1973 to 1974); Second State examination in law (Frankfurt-am-Main, 1976); specialist adviser in the Federal Labour Office and lawyer (1976); Presiding Judge at the Labour Court (Land Hesse, 1977 to 1993); lecturer at the Technical College for Social Work, Frankfurt-am-Main, and at the Technical College for Administration, Wiesbaden (1979 to 1990); national expert to the Legal Service of the Commission of the European Communities (1993 to 1996 and 2001 to 2005); Social Affairs Attaché at the Embassy of the Federal Republic of Germany in Madrid (1996 to 2001); Presiding Judge at the Labour Court of Frankfurt-am-Main (February to September 2005); Judge at the Civil Service Tribunal since 6 October 2005.

**Irena Boruta**
Born in 1950; law graduate of the University of Wrocław (1972), doctorate in law (Łodz, 1982); Lawyer at the Bar of the Republic of Poland (since 1977); visiting researcher (University of Paris X, 1987 to 1988; University of Nantes, 1993 to 1994); expert of 'Solidarność' (1995 to 2000); Professor of labour law and European social law at the University of Łodz (1997 to 1998 and 2001 to 2005), Associate Professor at Warsaw School of Economics (2002), Professor of labour law and social security law at Cardinal Stefan Wyszynski University, Warsaw (2000 to 2005); Deputy Minister of Labour and Social Affairs (1998 to 2001); member of the negotiation team for the accession of the Republic of Poland to the European Union (1998 to 2001); representative of the Polish Government to the International Labour Organisation (1998 to 2001); author of a number of works on labour law and European social law; Judge at the Civil Service Tribunal since 6 October 2005.

**Heikki Kanninen**

Born in 1952, graduate of the Helsinki School of Economics and of the faculty of law of the University of Helsinki; Legal Secretary at the Supreme Administrative Court of Finland; General Secretary to the committee for Reform of Legal Protection in Public Administration; Principal administrator at the Supreme Administrative Court; General Secretary to the Committee for Reform of Administrative Litigation, Counsellor in the legislative department of the Ministry of Justice; Assistant Registrar at the EFTA Court; Legal Secretary at the Court of Justice of the European Communities; Judge at the Supreme Administrative Court (1998 to 2005); member of the Asylum Appeal Board; Vice-Chairman of the Committee on the Development of the Finnish Courts; Judge at the Civil Service Tribunal from 6 October 2005 to 6 October 2009.

**Haris Tagaras**

Born in 1955; graduate in law (University of Thessaloniki, 1977); special diploma in European law (Institute for European Studies, Free University of Brussels, 1980); doctorate in law (University of Thessaloniki, 1984); Lawyer-linguist at the Council of the European Communities (1980 to 1982); Researcher at the Thessaloniki Centre for International and European Economic Law (1982 to 1984); Administrator at the Court of Justice of the European Communities and at the Commission of the European Communities (1986 to 1990); Professor of Community law, international private law and human rights at Athens Panteion University (since 1990); external consultant for European matters at the Ministry of Justice and member of the Permanent Committee of the Lugano Convention (1991 to 2004); member of the national Postal and Telecommunications Commission (2000 to 2002); member of the Thessaloniki Bar, Lawyer to the Court of Cassation; founder member of the Union of European Lawyers (UAE); associate member of the International Academy of Comparative Law; Judge at the Civil Service Tribunal since 6 October 2005.

**Sean Van Raepenbusch**

Born in 1956; graduate in law (Free University of Brussels, 1979); special diploma in international law (Brussels, 1980); Doctor of Laws (1989); Head of the Legal Service of the Société anonyme du canal et des installations maritimes (Canals and Maritime Installations company), Brussels (1979 to 1984); official of the Commission of the European Communities (Directorate-General for Social Affairs, 1984 to 1988); member of the Legal Service of the Commission of the European Communities (1988 to 1994); Legal Secretary at the Court of Justice of the European Communities (1994 to 2005); Lecturer at the University of Charleroi (international and European social law, 1989 to 1991), at the University of Mons Hainault (European law, 1991 to 1997), at the University of Liège (European civil service law, 1989 to 1991; institutional law of the European Union, 1995 to 2005; European social law, 2004 to 2005); numerous publications on the subject of European social law and constitutional law of the European Union; Judge at the Civil Service Tribunal since 6 October 2005.

**Stéphane Gervasoni**

Born in 1967; graduate of the Institute for Political Studies of Grenoble (1988) and the École nationale d'administration (1993); member of the Conseil d'État (Rapporteur in the contentious proceedings division, 1993 to 1997, and in the social affairs division, 1996 to 1997); maître des requêtes, 1996 to 1998); Councillor of State (since 2008); maître de conférences at the Institut d'études politiques, Paris (1993 to 1995); commissaire du gouvernement attached to the special pensions appeal commission (1994 to 1996); legal adviser to the Ministry of the Civil Service and to the City of Paris (1995 to 1997); Secretary General of the Prefecture of the Départment of the Yonne, Sub-Prefect of the district of Auxerre (1997 to 1999); General Secretary to the Prefecture of the Département of Savoie, Sub-Prefect of the district of Chambéry (1999 to 2001); Legal Secretary at the Court of Justice of the European Communities (September 2001 to September 2005); titular member of the NATO appeals commission (2001 to 2005); Judge at the Civil Service Tribunal since 6 October 2005.

**Maria Isabel Rofes i Pujol**

Born in 1956; study of law (law degree, University of Barcelona, 1981); specialisation in international trade (Mexico, 1983); study of European integration (Barcelona Chamber of Commerce, 1985) and of Community law (School of Public Administration, Catalonia, 1986); official of the Government of Catalonia (member of the Legal Service of the Ministry for Industry and Energy, April 1984 to August 1986); member of the Barcelona Bar (1985–87); Administrator, then Principal Administrator, in the Research and Documentation Division of the Court of Justice of the European Communities (1986–94); Legal Secretary at the Court of Justice (Chamber of Advocate General Ruiz-Jarabo Colomer, January 1995 to April 2004; Chamber of Judge Lõhmus, May 2004 to August 2009); Lecturer on Community cases, Faculty of Law, Autonomous University of Barcelona (1993–2000); numerous publications and courses on European social law; Member of the Board of Appeal of the Community Plant Variety Office (2006–09); Judge at the Civil Service Tribunal since 7 October 2009.

**Waltraud Hakenberg**

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

## 2. Change in the composition of the Civil Service Tribunal in 2009

*Formal sitting of 6 October 2009*

By decision of 9 June 2009, Maria Isabel Rofes i Pujol was appointed as a Judge of the European Union Civil Service Tribunal for the period from 1 September 2009 to 31 August 2015, following the resignation of Heikki Kanninen.

## 3. Order of precedence

### from 1 January to 6 October 2009

P. MAHONEY, President of the Tribunal
H. KANNINEN, President of Chamber
S. GERVASONI, President of Chamber
H. KREPPEL, Judge
I. BORUTA, Judge
H. TAGARAS, Judge
S. VAN RAEPENBUSCH, Judge

W. HAKENBERG, Registrar

### from 7 October 2009 to 31 December 2009

P. MAHONEY, President of the Tribunal
H. TAGARAS, President of Chamber
S. GERVASONI, President of Chamber
H. KREPPEL, Judge
I. BORUTA, Judge
S. VAN RAEPENBUSCH, Judge
M. I. ROFES i PUJOL, Judge

W. HAKENBERG, Registrar

## 4. Former Member of the Civil Service Tribunal

Heikki Kanninen (2005–09)

## C — Statistics concerning the judicial activity

1. New cases, completed cases, cases pending (2005–09)

***New cases***

2. Percentage of the number of cases per principal defendant institution (2005–09)
3. Language of the case (2005–09)

***Completed cases***

4. Judgments and orders — Bench hearing action (2009)
5. Outcome (2009)
6. Interim measures adopted — outcome
7. Duration of proceedings in months (2009)

***Cases pending as at 31 December***

8. Bench hearing action (2006–09)
9. Number of applicants (2009)

***Miscellaneous***

10. Decisions of the Civil Service Tribunal on appeal to the General Court (2006–09)
11. Results of appeals to the General Court (2006–09)

# 1. *General activity of the Civil Service Tribunal —* New cases, completed cases, cases pending (2005–09)

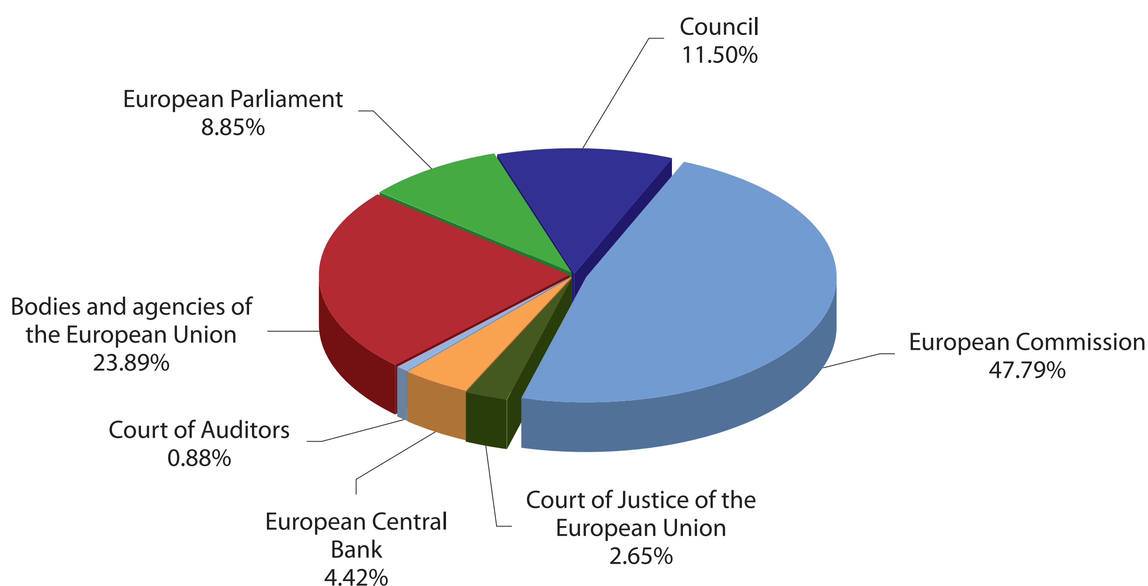
| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| New cases | 130 | 148 | 157 | 111 | 113 |
| Completed cases | - | 50 | 150 | 129 | 155 (1) |
| Cases pending | 130 | 228 | 235 | 217 | 175 (2) |

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).

(1) Including 32 cases brought to a close following the judgment of 22 December 2008 in Case C-443/07 P *Centeno Mediavilla and Others* v *Commission* (18 cases are still pending).

(2) Including 27 cases in which proceedings were stayed.

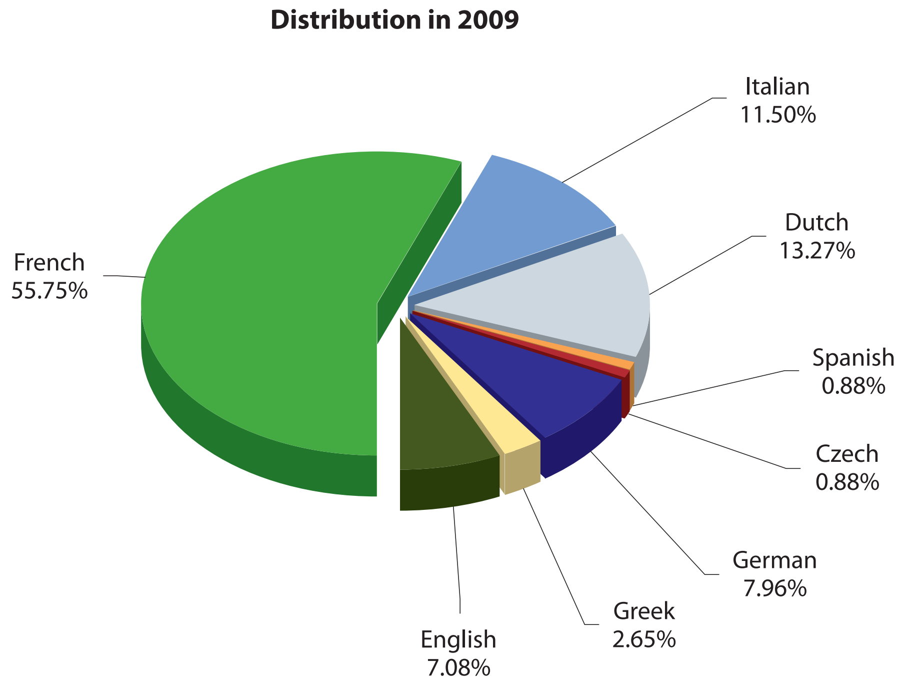
## 2. *New cases* — Percentage of the number of cases per principal defendant institution (2005–09)




| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| European Parliament | 7.69% | 7.14% | 13.38% | 14.41% | 8.85% |
| Council | 6.92% | 6.07% | 3.82% | 4.50% | 11.50% |
| European Commission | 77.69% | 75.00% | 50.96% | 54.95% | 47.79% |
| Court of Justice of the European Union | 2.31% | 3.57% | 3.82% | - | 2.65% |
| European Central Bank | 2.31% | 1.07% | 1.27% | 2.70% | 4.42% |
| Court of Auditors | 0.77% | 1.79% | 1.91% | 5.41% | 0.88% |
| Bodies and agencies of the European Union | 2.31% | 5.36% | 24.84% | 18.02% | 23.89% |
| **Total** | **100%** | **100%** | **100%** | **100%** | **100%** |

## 3. *New cases* — Language of the case (2005–09)

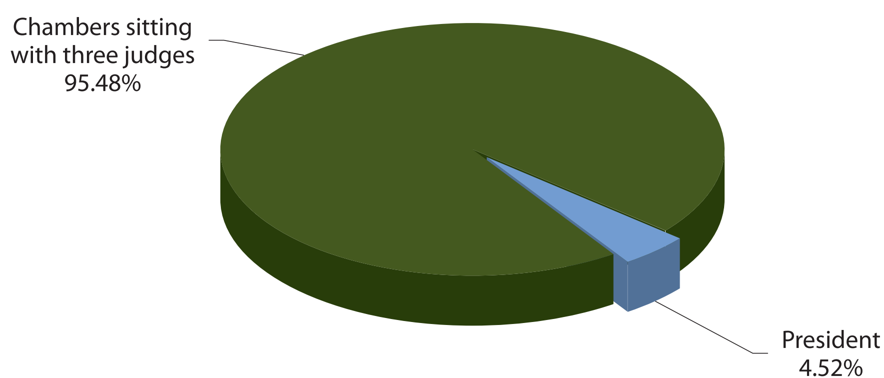
**Distribution in 2009**




| Language of the case | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Bulgarian | - | - | 2 | - | - |
| Spanish | 1 | 1 | 2 | 1 | 1 |
| Czech | - | - | - | - | 1 |
| Danish | 1 | - | - | - | - |
| German | 3 | 2 | 17 | 10 | 9 |
| Greek | 2 | 3 | 2 | 3 | 3 |
| English | 5 | 8 | 8 | 5 | 8 |
| French | 113 | 113 | 102 | 73 | 63 |
| Italian | 4 | 10 | 17 | 6 | 13 |
| Lithuanian | - | - | 2 | 2 | - |
| Hungarian | - | 2 | 1 | 1 | - |
| Dutch | 1 | 7 | 3 | 8 | 15 |
| Polish | - | - | - | 1 | - |
| Portuguese | - | - | - | 1 | - |
| Romanian | - | - | 1 | - | - |
| Slovenian | - | 1 | - | - | - |
| Finnish | - | 1 | - | - | - |
| **Total** | **130** | **148** | **157** | **111** | **113** |

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

# 4. *Completed cases* — Judgments and orders — Bench hearing action (2009)




| | Judgments | Orders terminating proceedings (1) | Cases brought to a close in other ways | Total |
|---|---|---|---|---|
| Full court | - | - | - | **-** |
| President | - | 7 | - | **7** |
| Chambers sitting with three judges | 73 | 75 | - | **148** |
| Single judge | - | - | - | **-** |
| **Total** | **73** | **82** | **-** | **155** |

(1) Including 2 cases brought to a close by amicable settlement.

## 5. *Completed cases* — Outcome (2009)

| | Judgments | | | Orders | | | | Total |
|---|---|---|---|---|---|---|---|---|
| | Actions upheld in full | Actions upheld in part | Actions dismissed in full, no need to adjudicate | Actions/applications [manifestly] inadmissible or unfounded | Amicable settlements following intervention by the bench hearing the action | Removal from the register on other grounds, no need to adjudicate or referral back | Applications upheld in full or in part (special forms of procedure) | |
| Assignment/Reassignment | - | - | - | - | - | - | - | **-** |
| Competitions | 1 | 1 | 6 | 1 | - | 2 | - | **11** |
| Working conditions/Leave | - | - | 1 | 1 | - | - | - | **2** |
| Appraisal/Promotion | 7 | 2 | 11 | 2 | 1 | 1 | - | **24** |
| Pensions and invalidity allowances | - | - | 4 | 3 | - | 1 | - | **8** |
| Disciplinary proceedings | 1 | 1 | - | - | - | - | - | **2** |
| Recruitment/Appointment/ Classification in grade | 4 | 1 | 12 | 3 | - | 34 | - | **54** |
| Remuneration and allowances | 2 | 2 | 3 | 1 | 1 | 4 | - | **13** |
| Termination of an agent's contract | 1 | 1 | 3 | - | - | - | - | **5** |
| Social security/Occupational disease/ Accidents | - | 1 | 2 | 6 | - | 1 | - | **10** |
| Other | - | 1 | 5 | 14 | - | 1 | 5 | **26** |
| **Total** | **16** | **10** | **47** | **31** | **2** | **44** | **5** | **155** |

## 6. *Interim measures adopted* — Outcome (2006–09)

| Number of applications for interim measures granted | | Outcome | |
|---|---|---|---|
| | | Granted in full or in part | Dismissal |
| **2006** | **2** | - | 2 |
| **2007** | **4** | - | 4 |
| **2008** | **4** | - | 4 |
| **2009** | **1** | 1 | - |
| **Total** | **11** | **1** | **10** |

## 7. *Completed cases* — Duration of proceedings in months (2009)

| | | Duration of full procedure | Duration of procedure, not including duration of any stay of proceedings |
|---|---|---|---|
| **Judgments** | | **Average duration** | **Average duration** |
| New cases before the Civil Service Tribunal | 70 | 17.7 | 17.5 |
| Cases initially brought before the General Court ([1]) | 3 | 51.3 | 44.8 |
| **Total** | **73** | **19.1** | **18.6** |

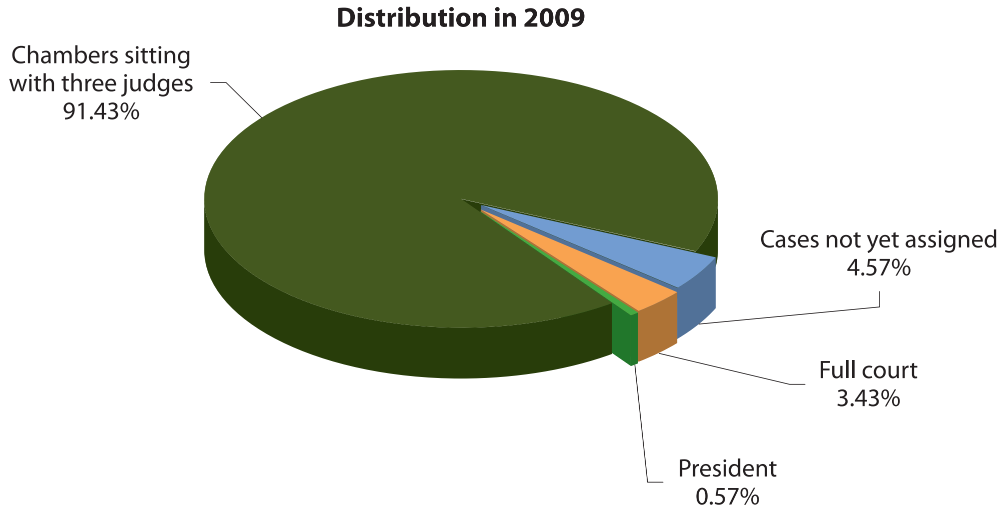
| | | Duration of full procedure | Duration of procedure, not including duration of any stay of proceedings |
|---|---|---|---|
| **Orders** | | **Average duration** | **Average duration** |
| New cases before the Civil Service Tribunal | 61 | 14.1 | 10.2 |
| Cases initially brought before the General Court ([1]) | 21 | 48.2 | 16.9 |
| **Total** | **82** | **22.9** | **11.9** |

| **OVERALL TOTAL** | **155** | **21.2** | **15.1** |
|---|---|---|---|

The durations are expressed in months and tenths of months.

([1]) When the Civil Service Tribunal commenced work, the Court of First Instance (now the General Court) transferred 118 cases to it.

## 8. *Cases pending as at 31 December* — Bench hearing action (2006–09)




| | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|
| Full court | 6 | 3 | 5 | 6 |
| President | 4 | 2 | 2 | 1 |
| Chambers sitting with three judges | 207 | 205 | 199 | 160 |
| Single judge | - | - | - | - |
| Cases not yet assigned | 11 | 25 | 11 | 8 |
| **Total** | **228** | **235** | **217** | **175** |

# 9. *Cases pending as at 31 December* — Number of applicants (2009)

**The 10 pending cases with the greatest number of applicants in a single case**

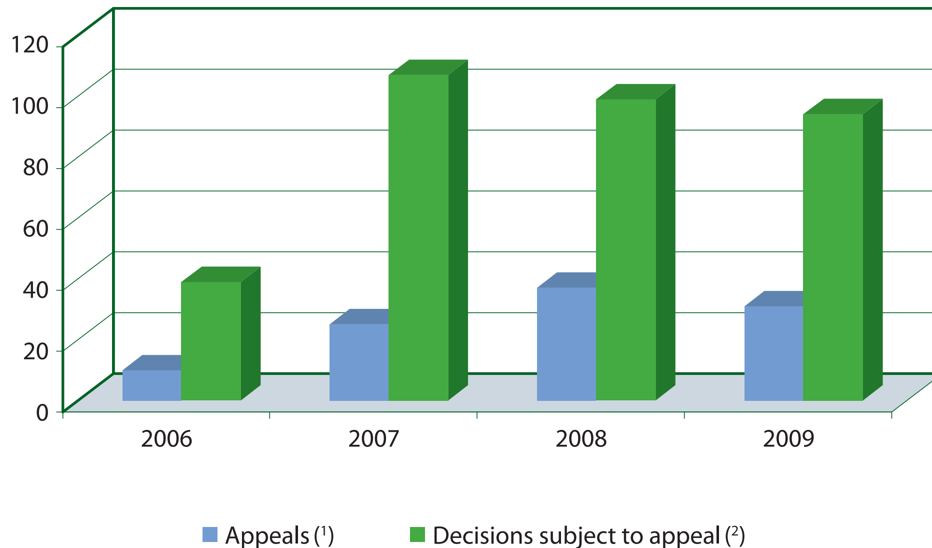
| Number of applicants per case | Fields |
|---|---|
| 114 | Staff Regulations — Application of a legal status different from that of members of the temporary staff — Compensation for material damage sustained |
| 59 | Staff Regulations — Promotion — Promotion year 2005 — Additional grades provided for by the new Staff Regulations |
| 20 | Staff Regulations — Reclassification — Candidates placed on the reserve list in an internal competition for change of category before the entry into force of the new Staff Regulations — Decision on classification in grade under less favourable provisions — Transitional provisions in Annex XIII to the Staff Regulations — Loss of promotion points |
| 14 | Staff Regulations — Members of the contract staff — Clause terminating a contract where the member of staff is not included on a reserve list of a competition — Termination of the contract of a member of staff |
| 13 | Staff Regulations — Member of the auxiliary staff — Member of the temporary staff — Conditions of engagement — Duration of contract |
| 13 | Staff Regulations — Reclassification in grade following the entry into force of the new Staff Regulations — Transitional provisions in Annex XIII to the Staff Regulations |
| 10 | Staff Regulations — Members of the contract staff — Members of the temporary staff — Conditions of engagement — Duration of the contract |
| 10 | Staff Regulations — Appointments — Lawyer-linguists placed on a reserve list before the new Staff Regulations entered into force — Discrimination compared with lawyer-linguists recruited by other institutions |
| 6 | Staff Regulations — Promotion — Promotion year 2005 — Illegality of Article 2 of Annex XIII to the Staff Regulations — Additional grades provided for by the new Staff Regulations |
| 6 | Staff Regulations — Reclassification — Candidates placed on the reserve list in an internal competition before the new Staff Regulations — Classification in grade under less favourable provisions — Transitional provisions in Annex XIII to the Staff Regulations — Loss of promotion points |

The term 'Staff Regulations' below means the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

**Total number of applicants for all pending cases**

| | Total applicants | Total pending cases |
|---|---|---|
| **2006** | 1 652 | 228 |
| **2007** | 1 267 | 235 |
| **2008** | 1 161 | 217 |
| **2009** | 461 | 175 |

## 10. *Miscellaneous* — Decisions of the Civil Service Tribunal on appeal to the General Court (2006–09)




| | **Appeals** (1) | **Decisions subject to appeal** (2) | **Percentage of appeals** (3) | ***Percentage of appeals including amicable settlements*** (4) |
|---|---|---|---|---|
| **2006** | 10 | 39 | 25.64% | *22.22%* |
| **2007** | 25 | 107 | 23.36% | *21.93%* |
| **2008** | 37 | 99 | 37.37% | *34.91%* |
| **2009** | 31 | 94 | 32.98% | *32.29%* |

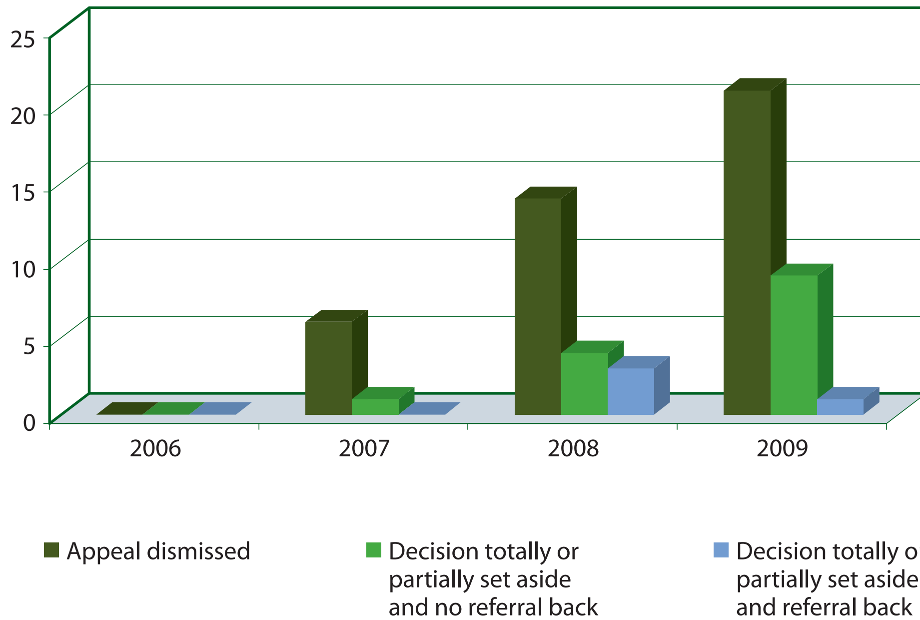
(1) Decisions appealed against by several parties are taken into account only once. In 2007, two decisions were each the subject of two appeals.

(2) Judgments, orders — declaring the action inadmissible, clearly inadmissible or clearly unfounded, orders for interim measures, orders that there is no need to adjudicate and orders refusing leave to intervene — made or adopted during the reference year.

(3) For a given year this percentage may not correspond to the decisions subject to appeal given in the reference year, since the period allowed for appeals may span two years.

(4) The Civil Service Tribunal endeavours to answer the legislature's appeal for the facilitation of the amicable settlement of disputes. A certain number of cases is closed in this way each year. Those cases do not give rise to 'decisions subject to appeal' on the basis of which the 'percentage of appeals' is traditionally calculated in the Annual Report, inter alia for the Court of Justice and the General Court. In so far as the 'percentage of appeals' may be considered to represent the 'rate of challenge' of the decisions of a court, that percentage would reflect the position better if it was calculated so as to take account not only of decisions subject to appeal but also those which are not precisely because they have brought the dispute to a close by amicable settlement. The result of that calculation appears in this column.

## 11. *Miscellaneous* — Results of appeals before the General Court (2006–09)




| | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|
| Appeal dismissed | - | 6 | 14 | 21 |
| Decision totally or partially set aside and no referral back | - | 1 | 4 | 9 |
| Decision totally or partially set aside and referral back | - | - | 3 | 1 |
| **Total** | **-** | **7** | **21** | **31** |

# Chapter IV

## Meetings and visits

# A — Official visits and events at the Court of Justice, the General Court and the Civil Service Tribunal

## Court of Justice

| | |
|---|---|
| 15 January | Ms M. Pröhl, Director-General of the European Institute of Public Administration |
| 22 January | HE Mr R. Aryasinha, Ambassador of Sri Lanka to Belgium and to Luxembourg |
| 26 January | Mr O. Scholz, Federal Minister for Labour and Social Affairs of the Federal Republic of Germany, and Mr F. Biltgen, Minister for Labour and Employment of the Grand Duchy of Luxembourg |
| 3 February | Delegation from the Parliament of the Kingdom of Sweden |
| 4 February | Mr G. Napolitano, President of the Italian Republic |
| 12 March | Mr H.-G. Pöttering, President of the European Parliament |
| 16 and 17 March | Delegation from the Committee on Legal Affairs of the Cypriot House of Representatives |
| 19 March | HE Mr T. Băsescu, President of Romania, accompanied by HE Mr E. Boc, Prime Minister, and by HE Mr G. Pogea, Minister for Finance |
| 23 March | HE Mr M. Benzo, Ambassador of the Kingdom of Spain to the Grand Duchy of Luxembourg |
| 30 and 31 March | Symposium 'Reflections on the preliminary ruling procedure'. Meeting with the Presidents of the Constitutional Courts and Supreme Courts of the Member States of the European Union |
| 30 March | Exhibition 'Court Buildings in Europe' |
| 20 April | Delegation from the German Bundestag |
| 27 April | Signature of an administrative arrangement between the Court and the Kingdom of Spain for use of official languages other than Castilian |
| 28 April | Delegation from the European Union Affairs Committee of the Senate of the Parliament of the Czech Republic |
| 29 April | Ms C. Bandion-Ortner, Minister for Justice of the Republic of Austria |
| 4 May | Mr S.-H. Song, President of the International Criminal Court |
| 8 June | Ms N.-L. Arold, Professor at the Raoul Wallenberg Institute in Sweden |
| 15 June | General Assembly of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union |
| 29 June | HE Ms A. A. Asya, Ambassador of the Republic of Turkey to the Grand Duchy of Luxembourg |
| 30 June and 1 July | Delegation from the Supreme Administrative Court of Bulgaria |
| 17 September | Mr L. Romero Requena, Director-General of the Legal Service of the European Commission |
| 28 and 29 September | Delegation from the Supreme Court of the People's Republic of China |
| 19 and 20 October | Delegation from the Court of Cassation of the Republic of Bulgaria |
| 26 October | Mr A. Vosskuhle, Vice-President of the Constitutional Court of the Federal Republic of Germany |

| | |
|---|---|
| 29 and 30 October | Conference of the Principal Presidents of the Courts of Appeal of the French Republic |
| 16 and 17 November | Forum of the judiciary of the Member States (Czech Republic, Spain, France, Ireland, Italy, Hungary, Malta, Austria, Romania, Slovenia, Slovakia, Finland, Sweden) |
| 7 and 8 December | 'Luxemburger Expertenforum' |

**General Court**

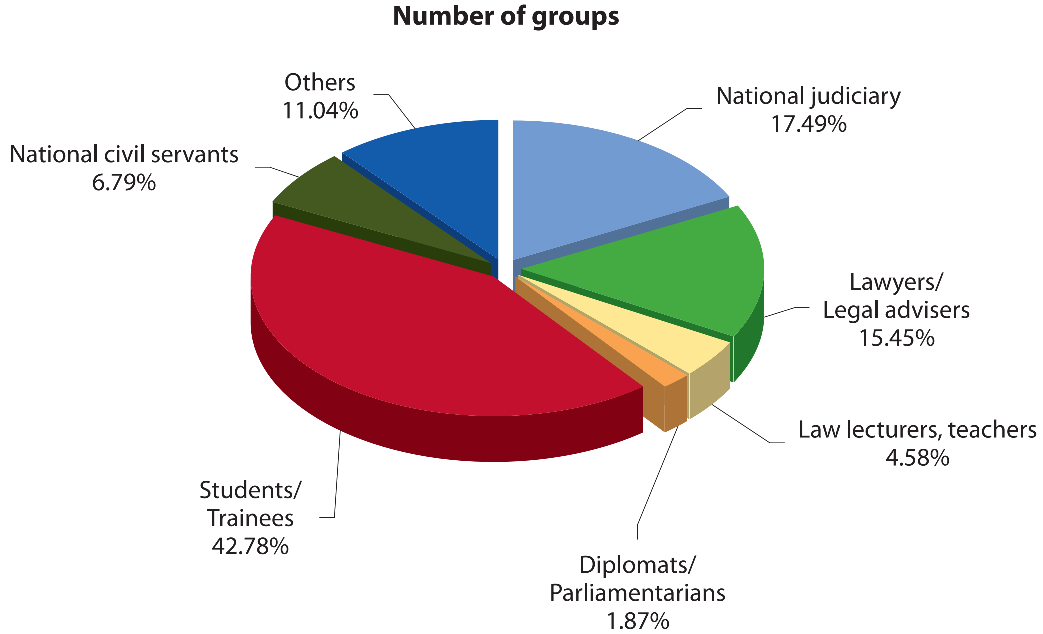
| | |
|---|---|
| 12 March | Mr H.-G. Pöttering, President of the European Parliament |
| 6 May | Delegation from the Council of Bars and Law Societies of Europe (CCBE) |
| 29 June | HE Ms A. A. Asya, Ambassador of the Republic of Turkey to the Grand Duchy of Luxembourg |
| 25 September | Colloquium on the occasion of the 20th anniversary of the Court of First Instance: 'From 20 to 2020 — Building the CFI of tomorrow on solid foundations' |
| 28 and 29 September | Delegation from the Supreme Court of the People's Republic of China |

**Civil Service Tribunal**

| | |
|---|---|
| 19 March | Visit of Ms M. De Sola Domingo, principal adviser in the European Commission Mediation Service |
| 21 April | Visit of Ms C.-F. Durand, Director-General of the European Commission Legal Service |
| 18 and 19 November | Visit of the Registry of the United Nations Dispute Tribunal |
| 7 December | Visit of the Judges and Registrars of the United Nations Dispute Tribunal |

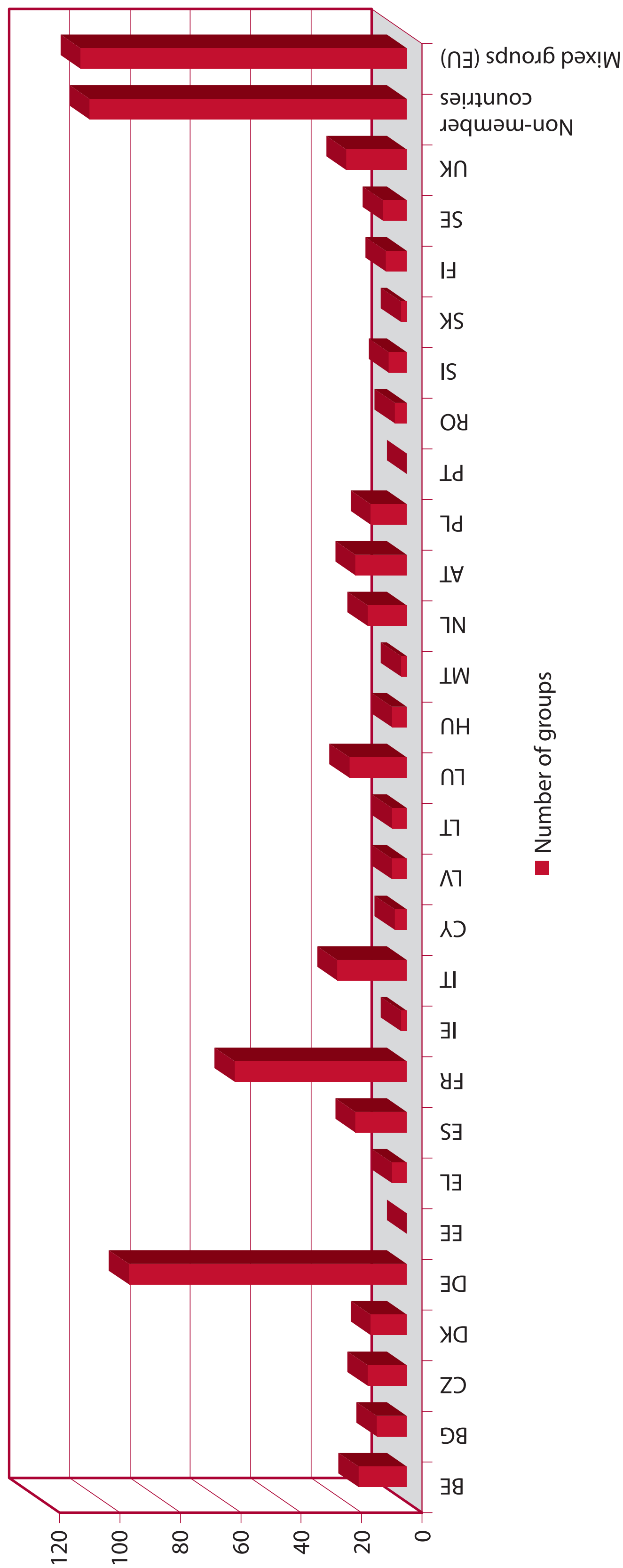
# B — Study visits (2009)

## 1. Distribution by type of group




| | National judiciary | Lawyers/Legal advisers | Law lecturers, teachers | Diplomats/ Parliamentarians | Students/ Trainees | National civil servants | Others | Total |
|---|---|---|---|---|---|---|---|---|
| **Number of groups** | 103 | 91 | 27 | 11 | 252 | 40 | 65 | 589 |

## 2. *Study visits* — Distribution by Member State (2009)

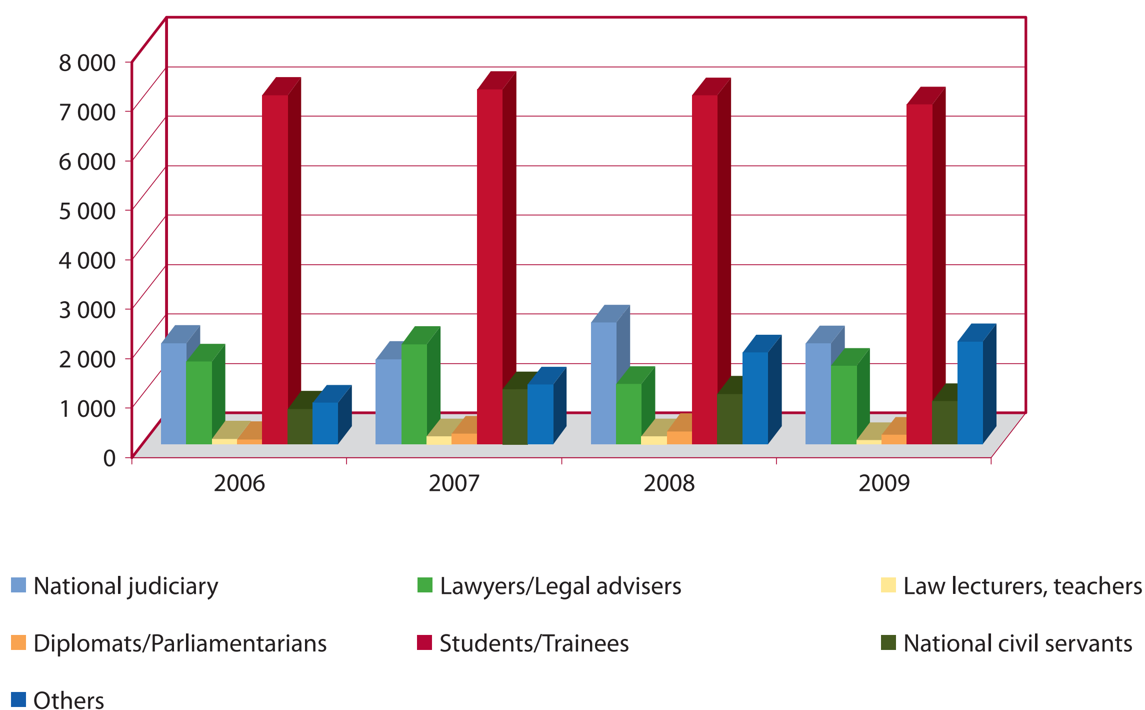


| | Number of visitors | | | | | | | | Number of groups |
|---|---|---|---|---|---|---|---|---|---|
| | National judiciary | Lawyers/ Legal advisers | Law lecturers, teachers | Diplomats/ Parliamentarians | Students/ Trainees | National civil servants | Others | Total | |
| **BE** | | 20 | | 26 | 296 | 55 | 172 | **569** | **16** |
| **BG** | 105 | | | | 24 | | | **129** | **10** |
| **CZ** | 52 | 46 | 7 | | 54 | | | **159** | **13** |
| **DK** | | | | | 281 | 28 | 52 | **361** | **12** |
| **DE** | 528 | 349 | | 87 | 690 | 217 | 613 | **2 484** | **92** |
| **EE** | | | | | | | | **0** | **0** |
| **EL** | 14 | | | | 40 | | 49 | **103** | **5** |
| **ES** | 150 | 20 | | | 245 | | 29 | **444** | **17** |
| **FR** | 175 | 198 | | | 871 | 33 | 405 | **1 682** | **57** |
| **IE** | | | | | 59 | | | **59** | **2** |
| **IT** | | 22 | 2 | | 215 | | | **239** | **23** |
| **CY** | 10 | | | | 16 | | | **26** | **4** |
| **LV** | | | | 10 | 45 | 6 | | **61** | **5** |
| **LT** | | | 10 | | | | | **10** | **5** |
| **LU** | 51 | | 1 | | 139 | 49 | 404 | **644** | **19** |
| **HU** | | | 8 | 4 | 73 | | | **85** | **5** |
| **MT** | | 20 | | | 21 | | | **41** | **2** |
| **NL** | 42 | 58 | | | 152 | 25 | 54 | **331** | **13** |
| **AT** | 48 | 42 | 11 | | 277 | 20 | | **398** | **17** |
| **PL** | 57 | 56 | | | 40 | | | **153** | **12** |
| **PT** | | | | | | | | **0** | **0** |
| **RO** | 7 | | 12 | | | | | **19** | **4** |
| **SI** | | 5 | | | 49 | | | **54** | **6** |
| **SK** | | | | | 28 | | | **28** | **2** |
| **FI** | 45 | 35 | | | 24 | | 55 | **159** | **7** |
| **SE** | 66 | 19 | | | 20 | 14 | 34 | **153** | **8** |
| **UK** | 46 | 65 | | | 169 | | | **280** | **20** |
| **Non-member countries** | 168 | 96 | 2 | 66 | 1 291 | 26 | 66 | **1 715** | **105** |
| **Mixed groups (EU)** | 473 | 535 | 31 | | 1 748 | 397 | 145 | **3 329** | **108** |
| **Total** | **2 037** | **1 586** | **84** | **193** | **6 867** | **870** | **2 078** | **13 715** | **589** |

## 3. *Study visits* — National judiciary (2009)

| | CZ | ES | FR | IE | IT | HU | MT | AT | RO | SI | SK | FI | SE | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Judges' Forum** | 5 | 8 | 21 | 4 | 18 | 8 | 2 | 6 | 9 | 2 | 4 | 4 | 6 | 97 |

## 4. Trend in number and type of visitors (2006–09)




National judiciary
Lawyers/Legal advisers
Law lecturers, teachers
Diplomats/Parliamentarians
Students/Trainees
National civil servants
Others

**Number of visitors**

| | National judiciary | Lawyers/Legal advisers | Law lecturers, teachers | Diplomats/ Parliamentarians | Students/ Trainees | National civil servants | Others | Total |
|---|---|---|---|---|---|---|---|---|
| **2006** | 2 044 | 1 673 | 108 | 101 | 7 056 | 714 | 840 | 12 536 |
| **2007** | 1 719 | 2 025 | 157 | 213 | 7 178 | 1 111 | 1 206 | 13 609 |
| **2008** | 2 463 | 1 219 | 156 | 262 | 7 053 | 1 016 | 1 854 | 14 023 |
| **2009** | 2 037 | 1 586 | 84 | 193 | 6 867 | 870 | 2 078 | 13 715 |

## C — Formal sittings

| | |
|---|---|
| 2 February | Formal sitting for the giving of a solemn undertaking by Baroness Ashton, new Member of the European Commission |
| 25 September | Formal session on the occasion of the 20th anniversary of the Court of First Instance |
| 6 October | Formal sitting on the occasion of the partial renewal of the membership of the Court of Justice and of the entry into office of new Members of the Court of First Instance and of the Civil Service Tribunal |
| 26 October | Formal sitting for the giving of a solemn undertaking by Mr A. G. Šemeta, Mr P. Samecki, Mr K. De Gucht and Mr M. Šefčovič, new Members of the European Commission |
| 14 December | Formal sitting on the occasion of the entry into office of Mr P. Cruz Villalón as Advocate General at the Court of Justice |

## D — Visits and participation in official functions

**Court of Justice**

| | |
|---|---|
| 1 January | Representation of the Court at the exchange of wishes ceremony organised by Mr Fenech Adami, President of Malta, in Valletta |
| 7 January | Representation of the Court at the formal sitting of the Court of Cassation, in Paris |
| 20 January | Representation of the Court at the Rechtspolitischer Neujahrsempfang organised by Ms Brigitte Zypries, Minister for Justice of the Federal Republic of Germany, in Berlin |
| 30 January | Participation of a delegation from the Court at the celebration of the 50th anniversary of the European Court of Human Rights |
| 30 January | Representation of the Court at the ceremony inaugurating the judicial year of the Supreme Court of Cassation, in Rome |
| 5 and 6 February | Representation of the Court at the European Ministerial Conference on Family Policy, in Prague |
| 9 February | Participation of a delegation from the Court in an official visit to the Council of State, in Paris |
| 19 February | Representation of the Court on the working group organised by the European Parliament Committee on Budgetary Control which acts upon administrative investigations by the European Anti-Fraud Office (OLAF) in the Member States, in Brussels |
| 2 April | Representation of the Court at the Annual General Assembly of the Constitutional Court of the Republic of Poland, in Warsaw |
| 2 April | Participation of the President in the 'Discussion to mark the 10th anniversary of the euro' organised by the European Central Bank, in Frankfurt |
| 20 April | Representation of the Court at the funeral of Lord Gordon Slynn, at St Margaret's Westminster, in London |
| 3 May | Participation of a delegation from the Court at the special ceremony organised on the occasion of the National Holiday of the Republic of Poland at the seat of the Constitutional Court, in Warsaw |
| 6 May | Representation of the Court at the formal opening of the 17th Österreichischer Juristentag in the presence of the President of the Republic of Austria, in Vienna |
| 14 to 16 May | Representation of the Court at the seminar organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union in collaboration with the Council of State of the Hellenic Republic and with the scientific support of the Federal Administrative Court of the Federal Republic of Germany on the topic 'Administrative jurisdiction and e-justice', in Athens |
| 22 May | Representation of the Court at the official ceremony organised for the 60th anniversary of the German Basic Law, in Berlin |
| 14 and 15 June | Representation of the Court at the meeting of the Board of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union and at the annual meeting of the General Assembly of that association, in Luxembourg |

| | |
|---|---|
| 24 June | Representation of the Court at the ceremonies for the Slovene National Day and the reception given by the President of the Republic of Slovenia, in Ljubljana |
| 12 July | Representation of the Court at the formal ceremony for the swearing-in of Ms D. Grybauskaitė as President of the Republic of Lithuania, in Vilnius |
| 24 July | Participation of the President of the Court at the reception given by the President of the Hellenic Republic on the occasion of the 35th anniversary of the restoration of the Republic, in Athens |
| 29 to 31 July | Representation of the Court at the conference 'Legal boundaries, common problems and the role of the Supreme Court' organised by the Lord Chief Justice of England and Wales in cooperation with King's College, in London |
| 21 September | Representation of the Court at the ceremony opening the judicial year of the Supreme Court, presided over by His Majesty the King of Spain, in Madrid |
| 1 October | Representation of the Court at the celebration of 200 years of the Supreme Court of Finland, in Helsinki |
| 1 October | Participation of a delegation from the Court at the Verfassungstag (formal commemoration of the Austrian Constitutional Court), in Vienna |
| 1 October | Representation of the Court at the Opening of the Legal Year, at the invitation of the Lord Chancellor, in London |
| 3 October | Representation of the Court at the ceremonies organised on the occasion of the Tag der Deutschen Einheit, in Saarbrücken |
| 13 October | Representation of the Court at the funeral of Mr H. Jung, former Registrar of the Court of First Instance, in Berlin |
| 16 October | Participation of a delegation from the Court at the ceremony for the official opening of the Supreme Court, at the invitation of the President of the Supreme Court of the United Kingdom, in London |
| 19 October | Representation of the Court at the conference organised by the International Association of Refugee Law Judges on the topic 'Effective Interaction?: The Role of the European Court of Justice and National Courts and Tribunals in EU Asylum Law', in Berlin |
| 22 and 23 October | Representation of the Court at the sixth symposium of European trade mark judges, in Alicante |
| 26 and 27 October | Representation of the Court at the international symposium 'Vom harmonisierten Markenrecht zum harmoniserten Markenverfahren', in Munich |
| 29 and 30 October | Representation of the Court at the meeting of the heads of the Appeal Courts of the European Union, in Rome |
| 12 November | Participation of the President of the Court at the working lunch of the Permanent Representatives, at the Council, in Brussels |
| 16 and 17 November | Representation of the Court at the interparliamentary meeting 'Building a Citizens' Europe — The Stockholm Programme 2010–2014 — The Parliamentary dimension of a European area of Freedom, Security and Justice', in Brussels |

| | |
|---|---|
| 23 and 24 November | Participation of a delegation from the Court, at the invitation of the President of the Constitutional Court of the Republic of Hungary, at the celebration of the 20th anniversary of the Constitutional Court, in Budapest |
| 25 November | Representation of the Court at the celebration of the 150th anniversary of the founding of the Faculty of Law at the University of Bucharest, in Bucharest |
| 29 and 30 November | Representation of the Court at the meeting of the Board of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, in Brussels |
| 30 November | Representation of the Court at the seminar on the evaluation of the judiciary, organised by the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, in Brussels |
| 11 December | Participation of a delegation from the Court in an official visit to the European Court of Human Rights, in Strasbourg |
| 18 December | Representation of the Court at the ceremony organised on the occasion of Constitutionality Day, in Ljubljana |

**General Court**

| | |
|---|---|
| 7 January | Representation of the Court at the formal sitting of the Court of Cassation, in Paris |
| 13 January | Representation of the Court at the formal sitting of the European Court of Human Rights, in Strasbourg |
| 20 January | Representation of the Court at the Rechtspolitischer Neujahrsempfang at the Ministry of Justice, in Berlin |
| 30 January | Participation of the President of the Court in the seminar '50 years of the European Court of Human Rights viewed by its fellow international courts', in Strasbourg |
| 19 February | Representation of the Court at a meeting organised by the Committee on Budgetary Control on the topic of the Anti-Fraud Office, in Brussels |
| 19 to 21 February | Visit of a delegation from the Court to the Republic of Estonia, at the invitation of the Minister for Foreign Affairs and of the Minister for Justice, in Tallinn |
| 22 to 24 February | Visit of a delegation from the Court to the Republic of Finland, at the invitation of the Government, in Helsinki |
| 11 to 13 March | Participation in the colloquium 'Public and Private Enforcement of Antitrust in Europe — 5 years on' organised by the International Bar Association, in Brussels |
| 17 April | Representation of the Court at the official meeting on Europe, organised on the occasion of the visit of the President of the Reflection Group on the Future of Europe, in Rome |
| 26 to 28 April | Representation of the Court at the 14th international conference of the Bundeskartellamt, in Hamburg |
| 1 and 2 June | Visit of a delegation from the Court to the Comisión nacional de la Competencia, in Madrid |
| 1 to 4 October | Representation of the Court at the 5th European Jurists' Forum, in Budapest |

| | |
|---|---|
| 13 October | Representation of the Court at the funeral of Mr Hans Jung, former Registrar of the Court of First Instance, in Berlin |
| 15 to 16 October | Representation of the Court at the Opening of the Legal Year, in London |
| 15 to 18 October | Visit of a delegation from the Court to Romania marking 20 years of the Court of First Instance of the European Communities at the official invitation of the President of the Court of Appeal of Iaşi and of the Rector of Alexandru I. Cuza University, in Iaşi |
| 22 to 23 October | Delegation from the Court at the sixth symposium of European trade mark judges, in Alicante |
| 16 November | Representation of the Court at the seminar 'Building a citizens' Europe' organised by the European Parliament, in Brussels |
| 20 November | Visit of the President of the Court to the European Ombudsman and his departments, and conference on the topic 'The principle of good administration in Community case-law', in Strasbourg |
| 22 to 25 November | Representation and participation of the Court at the formal conference organised on the occasion of the 20th anniversary of the Constitutional Court, in Budapest |
| 9 December | Representation of the Court at the funeral of Advocate General Dámaso Ruiz-Jarabo Colomer, in Madrid |

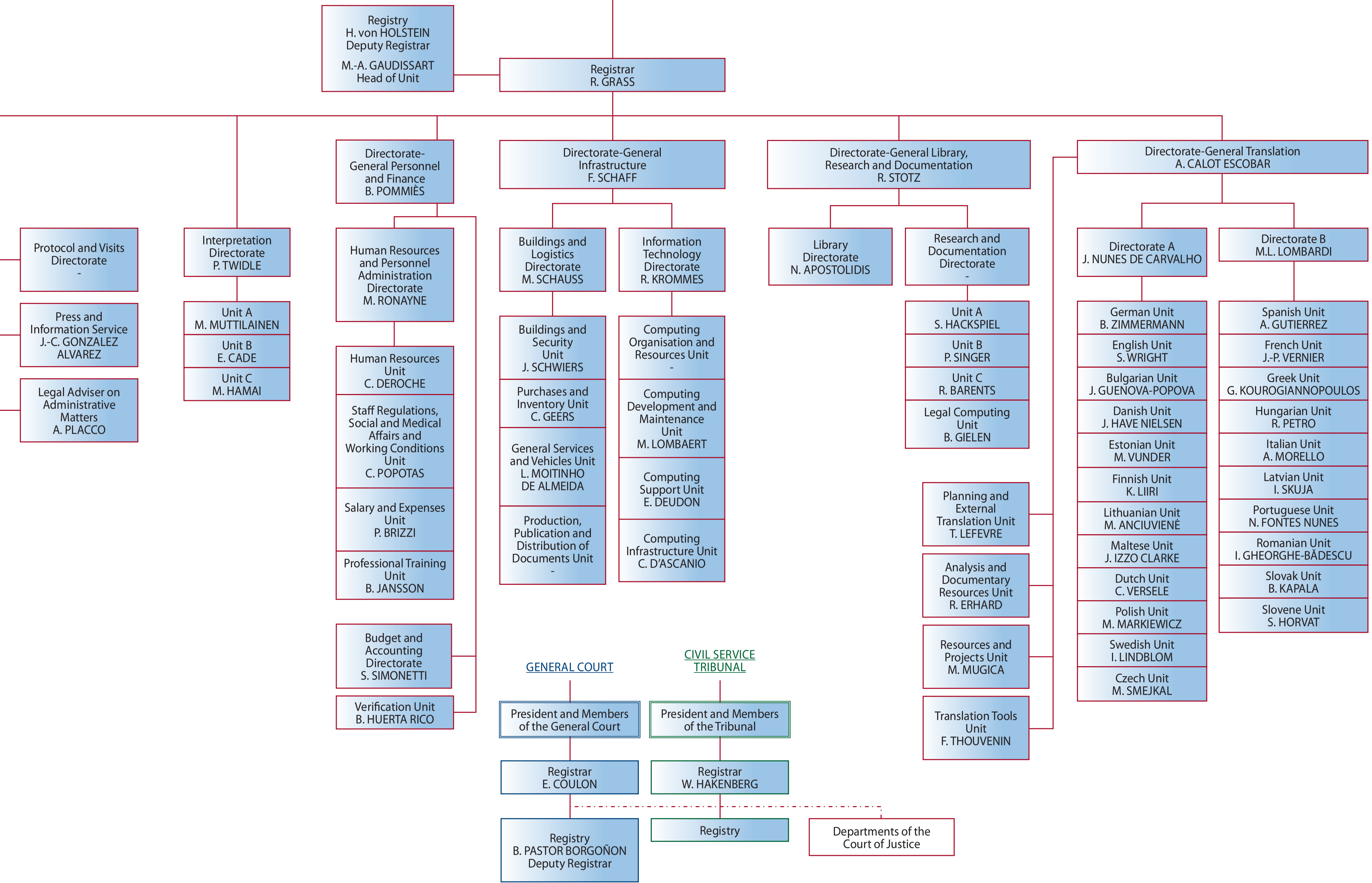
**Civil Service Tribunal**

| | |
|---|---|
| 1 and 2 October | Visit to the Greek Council of State |
| 23 and 24 November | Visit to the French Council of State and to the Constitutional Council |

# Abridged organisational chart

# Abridged organisational chart

January 2010



Court of Justice of the European Union

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