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

Luxembourg 2006

www.curia.eu.int

Court of Justice of the European Communities
L-2925 Luxembourg
Telephone: (352) 43 03-1
Telex (Registry): 2510 CURIA LU
Telefax (Court): (352) 43 03-2600
Telefax (Information Service): (352) 43 03-2500

Court of First Instance of the European Communities
L-2925 Luxembourg
Telephone: (352) 43 03-1
Telefax (Court): (352) 43 03-2100

Civil Service Tribunal of the European Union
L-2925 Luxembourg
Telephone: (352) 43 03-1

Internet: http://www.curia.eu.int

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Foreword

While 2004 was a historic year because of the enlargement of the European Union and the arrival at the Court of judges and staff from the 10 new Member States, 2005 was marked above all by an important change in the structure of the European Union's judicial system. The European Union Civil Service Tribunal, whose members entered into office in October 2005, is the first specialised judicial panel created in pursuance of the amendments introduced by the Treaty of Nice.

The past year may also be described as a year of consolidation. First, the Court had to adapt to the new reality of 25 Member States and 20 official languages. Also, the various internal measures adopted by the Court in 2004 in order to improve the effectiveness of its working methods began to display their full effect in 2005. The substantial shortening of the periods for taking steps in proceedings, particularly in the case of references for a preliminary ruling, is particularly revealing in this regard. Finally, the very appreciable increase in the number of cases completed by the Court of First Instance in 2005 compared with 2004 is worthy of note.

The following pages contain an account of changes for the institution in 2005, a record of the main judicial activity of the Court of Justice and the Court of First Instance, accompanied by statistics, and details of the organisational measures adopted by the Civil Service Tribunal in the three months following the entry into office of its members.

V. Skouris
President of the Court of Justice

Chapter I

The Court of Justice of the European Communities

A — The Court of Justice in 2005: changes and proceedings

By Mr Vassilios Skouris, President of the Court of Justice

This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2005. It describes, first, how the Court developed during that year, with the emphasis on the institutional changes which have affected the operation of the Court and also on the changes in its internal organisation and working methods (section 1). It includes, second, a statistical analysis of developments regarding the Court's workload and the average duration of proceedings (section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject matter (section 3).

1. The main development in 2005 for the Court as an institution was that the European Union Civil Service Tribunal began operating (section 1.1). Also deserving of attention are the amendments to the Protocol on the Statute of the Court of Justice and to the Rules of Procedure (section 1.2).

1.1. The creation of the European Union Civil Service Tribunal by Council decision of 2 November 2004 and the entry of its seven members into office were important moments for the institution. They follow on from the changes made by the Treaty of Nice to the European Union's judicial structure. The Civil Service Tribunal is the first specialised panel set up pursuant to the second paragraph of Article 220 EC and Article 225a EC.

Staff cases have constituted a significant part of the workload of the Court of First Instance, to which the new tribunal is attached. For the Court of Justice, appeals brought against decisions of the Court of First Instance in staff cases have, proportionally, represented a less heavy load. The creation of the new tribunal is therefore principally designed to lighten the workload of the Court of First Instance, which was increased following the transfer to it in 2004, pursuant to the Treaty of Nice, of jurisdiction to hear certain categories of direct actions which previously fell within the Court of Justice's jurisdiction.

The third part of this report contains a detailed account by the President of the Civil Service Tribunal of the first steps taken by it in 2005.

1.2. As regards amendments to instruments governing procedural matters, it should be noted, first, that creation of the Civil Service Tribunal made it necessary to insert into the Protocol on the Statute of the Court of Justice certain specific provisions relating to the procedure for review by the Court of Justice of decisions given by the Court of First Instance on appeal. Thus, by Council decision of 3 October 2005, Article 62a and Article 62b were inserted into the Protocol on the Statute of the Court of Justice; in particular, these articles lay down general rules relating to the urgent nature of that procedure, to the written and oral phases of the procedure and to the possibility of its having suspensory effect.

Also, the thought given by the Court to the conduct of proceedings and to its working methods had prompted it in 2004 to propose certain amendments to its Rules of Procedure, with a view to shortening the duration of proceedings. Following a discussion within the Council, those amendments were adopted on 12 July 2005 and entered into force on 1 October 2005. They relate, first, to Article 37(7) of the Rules of Procedure which now ena-

bles the Court to determine the criteria for deeming a procedural document sent by electronic means to be the original of that document. Second, they concern Article 104(1) of the Rules of Procedure which henceforth enables the Court not to translate, into all the official languages, orders for reference in their entirety where they are particularly long. In such a case, the translation of the order for reference in its entirety is replaced by the translation of a summary into the official language of the States to which the summaries are sent. Third, the amendment of Articles 44a, 104(4) and 120 of the Rules of Procedure, reducing the time limit for submitting an application requesting a hearing from one month to three weeks, should also be noted.

Finally, another set of amendments to the Rules of Procedure proposed by the Court in 2005 was approved by the Council on 18 October 2005 and entered into force on 1 December 2005. These amendments include, in particular, the abolition of 'Chambers of inquiry', a formation which had become obsolete (amendment of Articles 9(2), 44(5), 45(3), 46, 60, 74(1) and 76(3)), the amendment of Articles 11b(1) and 11c(1), which seek to ensure that judges' participation in the Grand Chamber and other formations of the Court is shared more equitably, and, lastly, the designation of two substitute judges in cases which are assigned to the Grand Chamber between the beginning of a year in which there is a partial replacement of judges and the moment when that replacement takes place.

2. The cumulative impact of the measures adopted to improve the effectiveness of the Court's working methods and of the arrival of 10 new judges following enlargement remains very evident in the statistics concerning the Court's judicial activity in 2005. A reduction of approximately 12 % in the number of cases pending and a very substantial decrease in the duration of proceedings before the Court may be noted.

The Court completed 512 cases in 2005 (net figure, that is to say, taking account of the joinder of cases). Of those cases, 362 were dealt with by judgments and 150 gave rise to orders. The number of judgments delivered in 2005 corresponds roughly with the number delivered in 2004 (375 judgments); the number of orders made went down.

The Court had 474 new cases brought before it (531 in 2004, gross figures). The number of cases pending at the end of 2005 was 740 (gross figure), compared with 840 at the close of 2004 and 974 at the close of 2003. In other words, the Court has managed to reduce the number of cases pending by approximately 24 %, in just two years.

The reduction of the duration of proceedings, already observed in 2004, is even clearer in 2005 for references for a preliminary ruling: the average time taken to deal with a reference went down from 23.5 months to 20.4 months. The average time taken to deal with direct actions and appeals was 21 months. It should be noted that in 2003 the average time taken was 25 months for references for a preliminary ruling and direct actions and 28 months for appeals.

In the course of the past year the Court has made judicious use of the various instruments at its disposal to expedite the treatment of certain cases (priority treatment, the accelerated or expedited procedure, the simplified procedure, and the possibility of giving judgment without an Opinion of the Advocate General). Use of the expedited or accelerated procedure was requested in six cases, but the requirement of exceptional urgency laid

down by the Rules of Procedure was not satisfied. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court.

The Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for a preliminary ruling. It made 12 orders on the basis of that provision, bringing a total of 29 cases to a close.

In addition, the Court made fairly frequent use of the possibility offered to it by Article 20 of the Statute of determining cases without an Opinion of the Advocate General where they do not raise any new point of law. About 35 % of the judgments delivered in 2005 were delivered without an Opinion (compared with 30 % in 2004).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber and the full Court dealt with nearly 13 %, and Chambers of five judges with 54 %, of the cases brought to a close in 2005, while Chambers of three judges dealt with 33 % of the cases. Apart from a marginal increase in cases dealt with by the Grand Chamber, the respective percentage of cases dealt with by each type of formation of the Court remained unchanged from 2004.

For further information regarding the statistics for the 2005 judicial year, the reader is referred to Chapter V of this report.

3. This section presents the main developments in the case-law, arranged by subject as follows:

- law of the institutions
- prohibition of all discrimination on grounds of nationality, and citizenship of the Union
- free movement of goods
- agriculture
- freedom of movement for workers
- freedom of establishment and freedom to provide services
- free movement of capital
- competition rules
- harmonisation of laws
- social law
- company law
- environment.

It should be pointed out that a judgment, classified under a given subject, may broach issues of great interest in relation to another subject.

3.1. Six of the judgments dealing with constitutional or institutional issues are worthy of note: two of them concerned framework decisions under Title VI of the Treaty on European

Union ('third pillar'), while the four others concerned (i) the effects of a partnership agreement between the Community and a non-Member State, (ii) the division of implementing powers as between the Council and the Commission, (iii) the conditions governing the admissibility of an application for annulment and (iv) the powers of the Court in an action against a Member State which has not complied with a judgment establishing a breach of obligations on the part of that Member State.

In Case C-105/03 *Pupino* (judgment of 16 June 2005, not yet published in the ECR), the Court was requested by the judge in charge of preliminary enquiries at the Tribunale di Firenze (District Court, Florence, Italy) to give a preliminary ruling on Title VI of the Treaty on European Union. A criminal case had been brought before the Tribunale di Firenze concerning a school teacher, Mrs Pupino, who was accused of mistreating minors, who, at the material time, were under five years of age.

At the preliminary enquiry stage, the judge making the reference had gathered evidence from the victims, who were minors. Under Italian procedural law, material gathered during the preliminary enquiry stage is considered evidence in the technical sense only when it is subjected to cross-examination during the second stage of the proceedings, the trial. However, Articles 392(1) and 398(5) of the Italian Code of Criminal Procedure ('CCP') provide for an exception where minors under 16 years of age have been the victim of certain crimes (which are restrictively set out in the legislation), such as sexual abuse. In such cases, in order to protect the victims the witness statements taken during the first stage of the proceedings constitute evidence without it being necessary to subject them to the adversarial principle. On that basis the Public Prosecutor's Office requested that this exception should apply to Mrs Pupino's case so that the minors, in view of their psychological trauma, would not have to face the accused.

The articles of the CCP laying down the exception in the matter of evidence were adopted after Framework Decision 2001/220/JHA ([1]), which provides for recognition of the rights of victims (Article 2), for the possibility for victims to be heard (Article 3) and also for the protection of victims, in particular from the effects of giving evidence in public (Article 8).

The referring court decided to stay the proceedings and to ask the Court for a preliminary ruling on the scope of Articles 2, 3 and 8 of the framework decision, in order to examine the possibility of extending the exception from the CCP to the present case and of interpreting Italian law in the light of the Community framework decision.

Following an initial analysis of its jurisdiction to give a preliminary ruling under Article 35(2) EU, the Court considered the objection of inadmissibility raised by the French and Italian Governments, which alleged that the Court's answer would not be useful in resolving the dispute in the main proceedings. The French Government argued that the national court was seeking to apply the framework decision directly, whereas framework decisions do not have direct effect, in accordance with Article 34(2)(b) EU. The Court observed in this regard that there is a presumption of relevance attaching to questions referred for a preliminary ruling, which may be rebutted only in exceptional cases, where the interpretation

([1]) Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1, 'the Framework Decision').

sought bears no relation to the actual facts of the main action or to its purpose, or 'where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted'.

The Court rejected the objection of inadmissibility, holding that the wording of Article 34(2)(b) EU confers a binding character on framework decisions, which entails an obligation for national authorities to interpret national law in conformity, as in the case of directives, under the third paragraph of Article 249 EC. Therefore, when applying national law, 'the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues'. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is, however, limited 'by general principles of law, particularly those of legal certainty and non-retroactivity'. Likewise, 'the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*'. 'That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.'

Therefore, although framework decisions are intergovernmental in character inasmuch as they are part of the third pillar and although they do not have direct effect, the national law incorporating them can be interpreted in the light of their wording and purpose. That is in keeping with the intention of the Member States to create an 'ever closer union', which has recourse to legal instruments with effects similar to those provided for by the EC Treaty which are concerned with further integration (paragraph 36).

The Court concluded that the provisions of the Framework Decision had to be interpreted as meaning that the competent national court had to be able to authorise young children, who claimed to have been victims of mistreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it took place.

In Case C-176/03 *Commission* v *Council* (judgment of 13 September 2005, not yet published in the ECR) an action for annulment of Framework Decision 2003/80/JHA ([2]) was brought before the Court.

Framework Decision 2003/80/JHA was adopted on the basis of Title VI of the Treaty on European Union, in particular Articles 29 EU, 31(e) EU and 34(2)(b) EU, as worded prior to the entry into force of the Treaty of Nice, in order to respond with concerted action to the disturbing increase in offences posing a threat to the environment. Articles 2 and 3 provide that the Member States are to prescribe criminal penalties for seven types of environmental offences committed either intentionally or negligently. Article 4 provides for the classification as offences of forms of participating in, and of instigating, offending conduct. Under Article 5 of the framework decision, the criminal penalties laid down must be 'effective, proportionate and dissuasive'. Article 5(1) of the framework decision provides

([2]) Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 5.2.2003, p. 55).

that serious offences are to be punished with penalties involving deprivation of liberty which can give rise to extradition. Article 6 governs the liability, for an act or omission, of legal persons in respect of the offences set out in Articles 2 to 4, whilst Article 7 makes them subject to ‘effective, proportionate and dissuasive’ penalties. Article 7 sets out five specific criminal penalties where legal persons are found liable for those offences.

Before the contested framework decision was adopted, the Commission had presented a proposal for a directive of the European Parliament and of the Council on the basis of Article 175(1) EC on the protection of the environment through criminal law. The European Parliament had expressed its view on both pieces of legislation and had called on the Council (i) to use the framework decision as a measure complementing the directive that would take effect in relation to the protection of the environment through criminal law solely in respect of judicial cooperation and (ii) to refrain from adopting the framework decision before adoption of the proposed directive. The Council did not adopt the proposed directive but instead adopted the framework decision, mentioning the proposal for a directive in the fifth and seventh recitals and stating that a majority of its members had taken the view that the proposal went beyond the powers attributed to the Community, since its objective was to require the Member States to provide for criminal sanctions. The Commission had expressed its disagreement on this point.

Before the Court, in support of its application for annulment of the framework decision, the Commission challenged the choice of the abovementioned provisions of the Treaty on European Union as the legal basis for Articles 1 to 7 of the framework decision. It pointed out that, under Article 2 EC, the Community is competent to require the Member States to impose penalties at national level — including criminal penalties if appropriate — where that proves necessary in order to attain a Community objective.

The Council replied that the division of powers in criminal matters as between the Member States and the European Community is clearly established and that the Court has never obliged the Member States to adopt criminal penalties.

The Court began by observing that it is its task to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.

In relation to the specific problem before it, the Court noted that protection of the environment constitutes one of the objectives of the Community, fundamental in nature and extending across Community policies and activities. The Court also noted that Articles 174 to 176 EC provide the appropriate instruments for achieving that objective, pointing out that the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of the Community institutions in areas such as fiscal policy, energy policy or town and country planning policy, in which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required.

The Court then applied its settled case-law, according to which the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure, and noted

that the objective of the framework decision was the protection of the environment and that Articles 2 to 7 thereof entailed partial harmonisation of the criminal laws of the Member States, a sphere in which, as a general rule, the Community does not have competence. The Court held that the last-mentioned finding does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules that it lays down on environmental protection are fully effective. Since those conditions were specifically met in the present case, Articles 1 to 7 of the framework decision could have been properly adopted on the basis of Article 175 EC and therefore the entire framework decision, being indivisible, infringed Article 47 EU as it encroached on the powers which Article 175 EC confers on the Community. The framework decision had to be annulled.

In a similar vein to Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, Case C-265/03 *Simutenkov* (judgment of 12 April 2005, not yet published in the ECR) gave the Court an opportunity to rule, for the first time, on the effects of a partnership agreement between the European Community and a non-Member State.

Igor Simutenkov was a Russian national who had a residence permit and a work permit in Spain. Employed as a professional football player under an employment contract entered into with Club Deportivo Tenerife, he held a federation licence as a non-Community player issued by the Spanish Football Federation.

According to the Federation's rules, clubs may field in competitions at national level only a limited number of players from countries which do not belong to the European Economic Area. Mr Simutenkov requested that his licence be replaced by a licence as a Community player, basing his application on the EC–Russian Federation Partnership Agreement, which, in relation to working conditions, prohibits discrimination of a Russian national based on nationality. The Federation rejected Mr Simutenkov's application. The Spanish court dealing with the case referred a question to the Court for a preliminary ruling in order to ascertain whether the rules of the Spanish Football Federation were compatible with the agreement.

Having established that the principle of non-discrimination laid down by Article 23(1) of the EC–Russia Partnership Agreement could be relied on by an individual before the national courts, the Court considered the scope of that principle.

It noted, first, that the agreement in question establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty. That right precludes any limitation based on nationality, such as that in issue, as the Court established in similar circumstances in its judgments in *Bosman* and *Deutscher Handballbund*.

The Court went on to note that the limitation based on nationality did not relate to specific matches between teams representing their respective countries but applied to official

matches between clubs and thus to the essence of the activity performed by professional players. Such a limitation was therefore not justified on sporting grounds.

Therefore, Article 23(1) of the EC–Russian Federation Partnership Agreement precluded the application to a professional sportsman of Russian nationality, who was lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provided that clubs could field in competitions organised at national level only a limited number of players from countries which were not parties to the Agreement on the European Economic Area.

In Case C-257/01 *Commission* v *Council* (judgment of 18 January 2005, not yet published in the ECR), the Court adjudicated on an application for annulment brought by the Commission against two Council regulations reserving to the Council implementing powers in respect of certain detailed provisions and practical procedures, first, for examining visas (Regulation (EC) No 789/2001) ([3]) and, second, for carrying out border checks and surveillance (Regulation (EC) No 790/2001) ([4]).

In relation to the division of powers between the Council and the Commission with regard to the issue of visas and border control, the Treaty of Amsterdam provided, in Articles 62 and 67, for a transitional period of five years following its entry into force, for the Council to define the Commission's implementing powers in certain areas of the third pillar. At the time of the integration of the third pillar, and in particular of the Schengen *acquis*, into the Community framework, Council Decision 1999/468/EC ('the second comitology decision') was adopted as the legal basis for the delineation of the implementing powers conferred on the Commission. The Common Manual as regards border checks ('CM') and the Common Consular Instructions as regards visa applications ('CCI'), which lay down the practical procedures for application of the Convention implementing the Schengen Agreement ([5]) ('CISA'), and the annexes thereto, were integrated into the Community framework. It was in order to provide a framework for amendments to the CM and the CCI, and the annexes thereto, that the Council adopted the regulations at issue in the present case.

The two contested regulations are identical in structure, the objective being to reserve power to the Council, first, in respect of implementing measures with regard to border checks and visas and, second, for the purpose of amending and updating the CM, the CCI and the annexes to them. The eighth recital in the preamble to Regulation (EC) No 789/2001 and the fifth recital in the preamble to Regulation (EC) No 790/2001 provide that, because of the enhanced role of the Member States in respect of visa policy and border

([3]) Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ L 116, 26.4.2001, p. 2).

([4]) Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ L 116, 26.4.2001, p. 5).

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

policy, the Council reserves the 'right to adopt, amend and update the detailed provisions and practical procedures'. Those provisions are listed in Article 1 of each regulation. Article 2 of each of the regulations establishes a procedure by which the Member States are to communicate to the Council such amendments as they wish to make to certain parts of the annexes to the CM and the CCI.

The Commission sought annulment of the regulations on the ground that they infringed Article 202 EC and Article 1 of the second comitology decision, which establish the principle that it is the Commission which exercises implementing powers. In that connection, it submitted that the Council had provided a 'generic statement of reasons' in the preambles to the regulations at issue, whilst it was required to state specifically the nature and the content of the implementing powers which it was reserving to itself. In such a case there was an obligation to state detailed reasons by virtue of Article 253 EC and the case-law of the Court (Case 16/88 *Commission* v *Council* [1989] ECR 3457, paragraph 10). Moreover, matters such as external borders and immigration had been brought within the Community framework and consequently were now covered by the procedure in Article 202 EC. However, Article 2 of each of the regulations conferred power on the Member States to amend certain provisions of the CCI, the CM and the annexes to them. The Council responded that the areas which had recently been brought within the Community framework were sensitive areas in which the Member States wished to retain their powers. Moreover, Article 1 of each regulation clearly and exhaustively defined the areas in which the Council alone had implementing powers. Finally, with regard to the updating of the information in the CM, the CCI and the annexes thereto, only the Member States were in a position to provide the information needed to update those documents, which was why power was reserved.

The Court, which did not follow the Opinion of the Advocate General, approved the Council's reasoning and dismissed the Commission's application for annulment.

In the first place, the Court observed that, under Article 202 EC and Article 1 of the second comitology decision, the Commission has power to adopt measures implementing a basic instrument. By contrast, the Council 'must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, [any] exception … to [that] rule'. In this respect, the preambles to Regulations (EC) Nos 789/2001 and 790/2001 referred specifically to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-Member States. The Council could thus 'reasonably consider itself to be concerned with a specific case and … duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of provisions exhaustively listed in the CCI and the CM'.

In relation to Article 2 of each of the regulations, the Court confirmed, in the second place, that since the CM and the CCI had been adopted at a time when the area concerned was a matter for intergovernmental cooperation, 'their integration into the framework of the European Union with effect from the entry into force of the Treaty of Amsterdam did not, of itself, result in the Member States being immediately stripped of the powers which they were entitled to exercise under those instruments in order to ensure their proper implementation'.

Consequently, the Court concluded that 'in that quite specific and transitional situation, prior to the evolution of the Schengen *acquis* within the legal and institutional framework of the European Union, no objection could be made to the Council having established a procedure for the transmission by the Member States of amendments which they are authorised to make, unilaterally or in collaboration with the other Member States, to certain provisions of the CCI or the CM, the contents of which depend exclusively on information which they alone possess,' since it had not been established that that it was appropriate to use a uniform updating procedure in order to secure effective or correct implementation.

In Case C-141/02 P *Commission* v *T-Mobile Austria GmbH* [2005] ECR I-1283, the Court heard an appeal brought by the Commission against the judgment of the Court of First Instance in Case T-54/99 *max.mobil Telekommunikation Service* v *Commission* [2002] ECR II-313, by which the Court of First Instance had declared admissible the application brought by the company max.mobil Telekommunikation Service GmbH, which had since become T-Mobile Austria GmbH, for annulment of a Commission letter by which the Commission refused to institute infringement proceedings against the Republic of Austria. The max.mobil company had lodged a complaint with the Commission seeking, among other things, a finding that the Republic of Austria had infringed the combined provisions of Articles 86 and 90(1) of the EC Treaty (now Articles 82 EC and 86(1) EC). That complaint related essentially to the lack of any distinction between the fee charged to max.mobil and that charged to one of its competitors and to the fee payment advantages enjoyed by the competitor.

After the Commission had informed max.mobil by letter that it was rejecting its complaint in part, max.mobil brought an action against that letter. The Commission then raised an objection of inadmissibility in relation to that action on the basis of Article 114(1) of the Rules of Procedure of the Court of First Instance. Although the Court of First Instance upheld the admissibility of the action brought by max.mobil, it dismissed the case on the merits. The Commission nonetheless decided to appeal against the judgment of the Court of First Instance seeking to have it set aside in so far as it declared admissible the action brought by max.mobil. The max.mobil company, however, took the view that, as the Commission had been successful, the second paragraph of Article 49 of the EC Statute of the Court of Justice applied and precluded the admissibility of the Commission's appeal.

The Court rejected the objection of inadmissibility raised by max.mobil against the Commission's appeal. It recalled, in that respect, that decisions which dispose of a procedural issue concerning a plea of inadmissibility, within the terms of the first paragraph of Article 49 of the EC Statute of the Court of Justice, adversely affect one of the parties when they uphold or reject that plea of inadmissibility and thus held admissible an appeal by the Commission against the part of a judgment of the Court of First Instance expressly rejecting the plea of inadmissibility raised by the Commission against an action challenging its rejection of a complaint addressed to it: that is the case even where the Court of First Instance ultimately dismissed the action as unfounded. The Court also considered the Court of First Instance to have erred in declaring max.mobil's action admissible and held that consequently its judgment had to be set aside. The case gave the Court an opportunity to be more specific about the scope of its decision in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, according to which the Commission is empowered to determine, using the powers conferred on it by Article 90(3) of the Treaty (now Article 86(3) EC), that a given State measure is incompatible with the rules of the Treaty

and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law. It observed that it followed from that judgment that individuals may, in certain circumstances, be entitled to bring an action for annulment against a decision which the Commission addresses to a Member State on the basis of Article 90(3) of the Treaty if the conditions laid down in the fourth paragraph of Article 173 of the EC Treaty (now, following amendment, the fourth paragraph of Article 230 EC) are satisfied. The Court held, however, that it follows from the wording of Article 90(3) of the Treaty and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense. It held that the fact that max.mobil had a direct and individual interest in annulment of the Commission's decision to refuse to act on its complaint was not such as to confer on it a right to challenge that decision: nor could the applicant claim a right to bring an action pursuant to Regulation No 17, which is not applicable to Article 90 of the Treaty. According to the Court, that finding was not at variance with the principle of sound administration or with any other general principle of Community law. No general principle of Community law requires that an undertaking be recognised as having standing before the Community judicature to challenge a refusal by the Commission to bring proceedings against a Member State on the basis of Article 90(3) of the Treaty.

In Case C-304/02 *Commission* v *France* (judgment of 12 July 2005, not yet published in the ECR), an action was brought before the Court for failure of the French Republic to fulfil its obligations under Article 228(2) EC, which concerns failures to comply with judgments of the Court. It was alleged that the French Republic had failed to comply with the judgment of 11 June 1991 in Case C-64/88 *Commission* v *France* [1991] ECR I-2727, in which it had been found that France had failed to fulfil its obligations under regulations concerning fishing and the control of fishing activities. The Commission concluded, following large numbers of inspections in various French ports, first, that there continued to be inadequate controls and, second, that it was widely known that the action taken in respect of infringements was inadequate. Consequently, in its submission, France's failure to fulfil its obligations persisted after the judgment had been delivered, in breach of the common fisheries policy, even though the French Government had made efforts to implement the Community provisions.

The Court began by recalling the importance of complying with Community rules in the area of the common fisheries policy, since compliance with such obligations is to 'ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their exploitation on a sustainable basis in appropriate economic and social conditions'. The Court found, following an examination of the facts submitted to it in the Commission's inspection reports, that the French Republic had not carried out controls of fishing activities in accordance with the Community rules and had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France*.

As regards the second complaint raised by the Commission maintaining that France was taking insufficient action in respect of infringements of the common fisheries policy, the Court pointed out that, if 'the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application

of the common fisheries policy would be jeopardised.' Since France had not done what was necessary to take action systematically against offenders, the Court concluded that there was a failure to fulfil obligations on the part of France, which had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France*.

In relation to the financial penalties which could be imposed on France and in the light of the Advocate General's Opinion of 29 April 2004, the Court raised the issue, first, of its ability to impose a lump sum penalty, although the Commission had requested a penalty payment and, second, of its right to impose both a lump sum penalty and a penalty payment, and it reopened the oral procedure, since there had been no argument in the proceedings on those questions which concerned the interpretation of Article 228(2) EC.

In relation to the possibility of imposing both a penalty payment and a lump sum, the Court observed that Article 228(2) EC has the objective 'of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied'. The Court considered the measures provided for by that provision (the lump sum and the penalty payment) to pursue the same objective. The purpose of a penalty payment is to induce a Member State to put an end as soon as possible to a breach of obligations which, in the absence of the measure, would tend to persist (persuasive effect), whilst the lump sum 'is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it' (deterrent effect). The Court concluded that where the breach of obligations both has continued for a long period and is inclined to persist, it is possible to have recourse to both types of penalty. Therefore, the conjunction 'or' in Article 228(2) EC, 'may … have an alternative or a cumulative sense and must therefore be read in the context in which it is used'. The fact that both measures were not imposed in previous cases cannot constitute an obstacle, if imposing both measures appears appropriate, regard being had to the circumstances of the case. Thus, 'it is for the Court, in each case, to assess in light of its circumstances the financial penalties to be imposed', since the Court is not bound by the Commission's suggestions.

Finally, the Court considered its discretion as to the financial penalties that can be imposed. When a penalty payment is to be imposed on a Member State in order to penalise non-compliance with a judgment establishing a breach of obligations, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned. For that purpose, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

The Court found that France's breach of obligations had persisted over a long period and imposed a dual financial penalty, EUR 57 761 250 by way of a penalty payment for each period of six months from delivery of the judgment at the end of which the judgment in

Case C-64/88 *Commission* v *France* had not yet been fully complied with, and EUR 20 000 000 as a lump sum penalty.

3.2. In the areas of discrimination on grounds of nationality and of European citizenship, three cases merit special mention.

In Case C-209/03 *Bidar* [2005] ECR I-2119 the Court examined whether the conditions for granting student support in England and Wales complied with Community law. Student support is financial assistance granted to students by the State in the form of a loan at a preferential rate of interest to cover maintenance costs. The loan is repayable after the student completes his studies, provided he is earning in excess of a certain sum. A national of another Member State is eligible to receive such a loan if he is 'settled' in the United Kingdom and has been resident there throughout the three-year period preceding the start of the course. However, under United Kingdom law a national of another Member State cannot, in his capacity as a student, obtain the status of being settled in the United Kingdom.

Thus, Dany Bidar, a young French national who had completed the last three years of his secondary education in the United Kingdom, living as a dependant of a member of his family without ever having recourse to social assistance, was refused financial assistance to cover his maintenance costs, which he applied for when he started a course in economics at University College London, on the grounds that he was not settled in the United Kingdom for the purposes of United Kingdom law. He brought proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), which referred three questions to the Court of Justice for a preliminary ruling.

The first of those questions sought to determine whether, as Community law currently stands, assistance such as that at issue in the present case falls outside the scope of the Treaty, in particular Article 12 EC. It should be noted that the Court held in Case 39/86 *Lair* [1988] ECR 3161 and Case 197/86 *Brown* [1988] ECR 3205 that assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty for the purposes of Article 12 EC. In the present case, the Court held that Article 12 EC must be read in conjunction with the provisions on citizenship of the Union and noted that a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law, in particular those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC. In the case of students who move to another Member State to study there, there is nothing in the text of the Treaty to suggest that they lose the rights which the Treaty confers on citizens of the Union. The Court added that a national of a Member State who, as in the present case, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of Article 18 EC and Directive 90/364 ([6]). With regard to *Lair* and *Brown*, the Court stated that since judgment had been given in those cases the Maastricht Treaty had introduced citizenship of the Union

([6]) Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L 180, 13.7.1990, p. 26).

and inserted a chapter devoted to education and training into the Treaty. In the light of those factors, it had to be held that assistance such as that at issue falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in Article 12 EC.

The Court then considered whether, where the requirements for granting assistance are linked to the fact of being settled or to residence and are likely to place at a disadvantage primarily nationals of other Member States, the difference in treatment between them and nationals of the Member State concerned can be justified. It observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for them to ensure that the granting of that type of assistance does not become an unreasonable burden. In the case of assistance covering the maintenance costs of students, it is thus legitimate to seek to ensure a certain degree of integration by checking that the student in question has resided in the host Member State for a certain length of time. However, a link with the employment market, as in the case of allowances for persons seeking employment which were at issue in Case C-224/98 *D'Hoop* [2002] ECR I-6191 and Case C-138/02 *Collins* [2004] ECR I-2703, cannot be required.

In principle, a requirement that an applicant should be settled in the host Member State may therefore be allowed. However, in so far as it precludes any possibility for a student who is a national of another Member State to obtain the status of settled person, and hence to receive the assistance even if he has established a genuine link with the society of the host Member State, the legislation in question is incompatible with Article 12 EC.

In Case C-147/03 *Commission* v *Austria* (judgment of 7 July 2005, not yet published in the ECR), the Commission of the European Communities sought a declaration from the Court that Austria had failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC because the conditions of access to Austrian higher education imposed on holders of secondary education diplomas awarded in the other Member States were different from those applicable to holders of Austrian diplomas. The Austrian Law on University Studies provides that, in addition to satisfying the general requirements for access to higher or university studies, holders of qualifications awarded in other Member States must prove that they meet the specific requirements governing access to the chosen course which are laid down by the State which issued those qualifications and give entitlement to direct admission to those studies, such as success in an entrance examination or obtaining a sufficient grade to be included in the *numerus clausus*.

The Court observed that the opportunities offered by the Treaty in relation to free movement are not fully effective if a person is penalised merely for using them. That is particularly important in the field of education, where one of the specific aims pursued is to encourage the mobility of students and teachers.

The Court held that the differential treatment introduced both to the detriment of students who have obtained their secondary education diplomas in a Member State other than Austria and between those same students according to the Member State in which they obtained their diploma, although applied without distinction to all students, whatever their nationality, is liable to affect nationals of other Member States more than Aus-

trian nationals. It therefore gives rise to indirect discrimination against them, which is prohibited by the Treaty.

The Court then rejected the arguments relied upon by Austria to justify the contested legislation. First of all it invoked the need to safeguard the homogeneity of the Austrian education system, by avoiding the structural, staffing and financial problems that would be caused by a possible mass influx of students who had not been admitted to higher education in more restrictive Member States. Austria was referring in particular to German students who did not meet the conditions required for access to certain university courses in Germany.

On that point, the Court considered that excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade. It added that that problem was not exclusive to Austria; other Member States, such as Belgium, had faced or were facing it too. The Court observed that Belgium had introduced similar restrictions to those in the present case and that it had been the subject of an infringement action which was held to be well founded (Case C-65/03 *Commission* v *Belgium* [2004] ECR I-6427). The Court held that in any event Austria had not shown in specific terms that the Austrian education system was at risk.

The Austrian Government also put forward the justification that it was necessary to prevent abuse of Community law, drawing attention to the legitimate interest that a Member State might have in preventing certain of its nationals, by means of facilities created under the Treaty, from improperly evading the application of their national legislation as regards training for a trade or profession. That argument was rejected outright. The Court held that, for a student from the European Union who has obtained his secondary education diploma in a Member State, access to higher or university education in another Member State under the same conditions as holders of diplomas awarded in that other Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right.

Case C-403/03 *Schempp* (judgment of 12 July 2005, not yet published in the ECR), which concerned the deductibility for tax purposes of maintenance paid to a recipient resident in another Member State, provided the Court with the opportunity to clarify the limits of the material scope of the Treaty with regard to citizenship of the Union. In Germany, income tax legislation provides that maintenance payments to a divorced spouse are deductible. That advantage is also granted where recipients have their principal or habitual residence in another Member State, provided that taxation of the recipient's maintenance payments is proved by a certificate from the tax authorities of that other Member State. Egon Schempp, a German national resident in Germany, was refused the deduction of maintenance payments made to his former spouse resident in Austria, as Austrian tax law excludes taxation of maintenance payments.

When a question was referred to it from the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling on whether the German system complied with Articles 12 EC and 18 EC, the Court considered first of all whether such a situation falls within the scope of Community law. The governments which had submitted observations contended that Mr Schempp had not

made use of his right of free movement, and the only external factor was the fact that Mr Schempp was paying maintenance in another Member State. The Court observed that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law. However, the situation of a national of a Member State who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation. Here, the exercise by Mr Schempp's former spouse of a right conferred under the Community legal order to move freely to and reside in another Member State had an effect on his right to deduct in Germany, so there was no question of it being an internal situation with no connection with Community law.

The Court then considered, with regard to the principle of non-discrimination, whether Mr Schempp's situation could be compared with that of a person who was paying maintenance to a former spouse resident in Germany and was entitled to deduct the maintenance payments made to her, and it found that that was not the case. It observed that the unfavourable treatment of which Mr Schempp complained derived from the difference between the German and Austrian tax systems with regard to the taxing of maintenance payments. It is settled case-law that Article 12 EC is not concerned with any disparities in treatment, for persons and undertakings subject to the jurisdiction of the Community, which may result from divergences existing between the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.

As regards the application of Article 18 EC, the Court found that the German legislation did not in any way obstruct Mr Schempp's right to move to and reside in other Member States. The transfer of his former spouse's residence to Austria did entail tax consequences for him. However, the Court observed that the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstances. That principle applies *a fortiori* to a situation where the person concerned has not himself made use of his right of movement, but claims to be the victim of a difference in treatment following the transfer of his former spouse's residence to another Member State.

3.3. With regard to the free movement of goods, mention should be made of Case C-320/03 *Commission* v *Austria* (judgment of 15 November 2005, not yet published in the ECR), concerning a regulation adopted by the First Minister of the Tyrol on 27 May 2003 limiting transport on the A 12 motorway in the Inn valley (sectoral prohibition on road transport). That regulation prohibits lorries of more than 7.5 tonnes carrying certain goods, such as waste, stone, soil, motor vehicles, timber and cereals, from being driven on a 46 km section of the A 12 motorway in the Inn valley. The aim of the contested regulation is to improve air quality so as to ensure lasting protection of human, animal and plant health.

The Court of Justice, hearing an infringement action brought by the Commission, found that by adopting the contested regulation the Republic of Austria had failed to fulfil its obligations under Articles 28 EC and 29 EC.

The sectoral prohibition on road transport obstructed the free movement of goods, in particular their free transit, and was therefore to be regarded as constituting a measure

having equivalent effect to quantitative restrictions which was incompatible with the Community law obligations under the abovementioned articles and which could not moreover be justified by overriding requirements relating to protection of the environment because it was disproportionate.

The Court held that before adopting a measure so radical as that ban the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established. More particularly, given the declared objective of transferring transportation of the goods concerned from road to rail, those authorities were required to ensure that there was sufficient and appropriate rail capacity to allow such a transfer before deciding to implement a measure such as that laid down by the Tyrolean regulation. The Court observed that it had not been conclusively established in the present instance that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes. Moreover, the Court considered that a transition period of only two months between the date on which the contested regulation was adopted and the date fixed by the Austrian authorities for implementation of the sectoral traffic ban was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances.

3.4. Of the three judgments considered in the field of agriculture, the first concerns the Community rules relating to organic production, the second concerns the Community rules relating to protected geographical names and indications and the third concerns the transposition in the wine sector of commitments entered into by the Community with Hungary in an agreement of 1993.

Case C-135/03 *Commission* v *Spain* (judgment of 14 July 2005, not yet published in the ECR) concerns obligations on Member States under Regulation (EEC) No 2092/91 [7], as subsequently amended several times.

That regulation provides that a product is to be regarded as bearing indications referring to the organic production method where, in the labelling, advertising material or commercial documents it is described by the indications in use in each Member State suggesting to the purchaser that it has been obtained according to organic production methods. In its 1991 version, the regulation contains a list giving one or two terms in each of the 11 languages that were the official languages of the Community at that time. In Spanish, the only term listed is 'ecológico', together with its derivative 'eco'.

An amendment to the regulation introduced in 2004 by Regulation (EC) No 392/2004 [8] provides that the terms set out in the list, or their usual derivatives or diminutives (such as 'bio', 'eco', etc.), alone or combined with other terms, are to be regarded as indications

(7) Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ L 198, 22.7.1991, p. 1).

(8) Council Regulation (EC) No 392/2004 of 24 February 2004 amending Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto in agricultural products and foodstuffs (OJ L 65, 3.3.2004, p. 1).

referring to the organic production method throughout the Community and in any Community language.

The Spanish rules reserve the terms 'ecológico', 'eco' and their derivatives for the organic production method, but authorise the use of the terms 'biológico', 'bio' and their derivatives for products which do not satisfy those requirements. The Commission took the view that those rules were contrary to the Community regulation and, in 2003, brought infringement proceedings before the Court of Justice.

The Court began with the observation that the list of indications referring to the organic production method given in Article 2 of Regulation (EEC) No 2092/91, as amended, is by no means exhaustive and that therefore the Member States may, where current usage changes in their territory, add expressions other than those set out in that list to their national legislation to refer to the organic production method.

In the case of Spanish in particular, the Court held that the Spanish Government could not be criticised for failing to prevent producers of products which were not organically produced from using other expressions such as 'biológico' or 'bio' since, in the version in force prior to 2004, only the term 'ecológico', including the derivative 'eco', was mentioned in the list contained in Article 2 of the regulation. Nor did it follow from the wording of that article that because the derivative 'bio' was mentioned in Article 2 as a usual derivative it had to be accorded specific protection in all Member States and in all languages, including those in respect of which, on the list in that article, terms were mentioned which did not correspond to the French expression 'biologique'. As the question whether a Member State has failed to fulful its obligations under Community law must be assessed by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, the Court could only find that there had been no such failure. In the present case, the assessment had to be made in relation to the version of the Community regulation at issue that applied prior to 2004.

In any event, the Commission had not established that the terms 'biológico' or 'bio' suggest to Spanish consumers in general that the products concerned have been produced using the organic method of production.

The Court therefore dismissed the Commission's action.

In Joined Cases C-465/02 and C-466/02 *Germany and Denmark* v *Commission* (judgment of 25 October 2005, not yet published in the ECR), the Court decided an action for annulment of Regulation (EC) No 1829/2002 ([9]) ('the contested regulation').

The Commission included the Greek cheese 'feta' as a designation of origin in the Community register of protected designations of origin and protected geographical indications on 12 June 1996 under Regulation (EC) No 1107/96 ([10]). However, in Joined Cases C-289/96,

([9]) Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name 'feta' (OJ L 277, 15.10.2002, p. 10).

([10]) Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ L 148, 21.6.1996, p. 1).

C-293/96 and C-299/96 *Denmark and Others* v *Commission* [1999] ECR I-1541 the Court annulled that registration on the grounds that the Commission had not taken account of the fact that that name had been used for a considerable time in certain Member States other than the Hellenic Republic. It was for that reason that the Commission re-examined the designation 'feta' in the light of questionnaires sent to Member States on the manufacture and consumption of cheeses known as 'feta' and on how well known that name was amongst consumers in each of the States. Following the procedure laid down by Regulation (EEC) No 2081/92 ([11]), the Commission adopted the contested regulation, thereby including 'feta' again as a designation of origin in the Community register of protected designations.

The German and Danish Governments subsequently brought an action challenging the new regulation, raising three pleas in law. The first plea was based on failure to send documents to the German Government in German. That plea was rejected by the Court because such an irregularity was insufficient to lead to annulment of a regulation. The second plea was based on a challenge to the definition of the geographic area as the region of origin of 'feta'. The third plea was divided into two parts: the first alleging that the name 'feta' had become a generic name and the second based on the inadequate reasoning supplied by the Commission, which, in granting designation of origin protection to 'feta', based its decision on the finding that the name 'feta' had not been established as generic.

The German and Danish Governments claimed that there had been infringement of Article 2(3) of the basic regulation ((EEC) No 2081/92), in that the term 'feta' came from the Italian 'fetta' meaning 'slice' and that that name had become generic. Since the word was a non-geographical term the Commission should have established that it had acquired a geographic meaning which did not extend to the whole of the territory of a Member State. Feta did not owe its quality or its characteristics essentially or exclusively to a geographical environment. Moreover, no objective reason had been put forward to explain why the geographical area indicated for registration purposes excluded certain areas of Greece. Lastly, the Danish Government stated that feta came from throughout the Balkans and not just from Greece.

The Court recalled the conditions under which products or foodstuffs can be protected by a designation of origin under Article 2(3) of the basic regulation. A traditional non-geographical name must in particular designate a product or a foodstuff 'originating in a region or a specific place'. That provision, moreover, in referring to the second indent of Article 2(2)(a) of the same regulation, requires that 'the quality or characteristics of the agricultural product or foodstuff be essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and that the production, processing and preparation of that product take place in the defined geographical area'. 'The area of origin referred to must, therefore, present homogeneous natural factors which distinguish it from the areas adjoining it'.

The Court examined, in the light of the specified criteria, whether the region defined in the contested regulation complies with the requirements of Article 2(3) of the basic regulation. Since the geographical area adopted as the area of origin and of production of feta covers essentially mainland Greece, which has a geomorphology and natural features which distinguish

([11]) Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L 208, 24.7.1992, p. 1).

it from the adjoining areas, the Court concluded that 'the area in question in the present case was not determined in an artificial manner' and rejected the applicants' plea.

With regard to the plea alleging that 'feta' had become a generic name, the German Government submitted that there was the likelihood of consumer confusion because Member States other than Greece manufactured and consumed 'feta'. The Danish Government for its part submitted that the contested regulation infringed Article 3(1) and Article 17(2) of the basic regulation, since, when a name is generic in nature or has subsequently become so, it remains so permanently and irrevocably. The Danish Government added that Danish production and marketing of feta complied with traditional practices.

The Court reiterated the conditions laid down in Article 3(1) of the basic regulation for assessing whether a name has become generic. It accordingly stated that 'the fact that a product has been lawfully marketed under a name in some Member States may constitute a factor which must be taken into account in the assessment of whether that name has become generic within the meaning of Article 3(1)' of the basic regulation. However, taking into account the production situation in Greece and production in other Member States, the Court concluded that the production of 'feta' has remained concentrated in Greece. Moreover, the Court analysed the consumption of 'feta' in the various Member States and concluded that '85 % of Community consumption of "feta", per capita and per year, takes place in Greece'. Lastly, the Court found that 'feta' sold in Member States other than Greece is marketed as a cheese associated with the Hellenic Republic, even if in reality it has been produced in another Member State. The Court therefore rejected the argument that 'feta' had become a generic name.

As regards the German Government's argument that the statement of reasons in the contested regulation was insufficient, the Court observed that 'the statement of reasons required by Article 253 EC must be appropriate to the nature of the measure in question and must show clearly and unequivocally the reasoning of the institution which enacted the measure, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review'. The institution which adopts the act is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections. Therefore, the Commission's statement, contained in the contested regulation, of the reasons which led it to the conclusion that the name 'feta' was not generic within the meaning of Article 3 of the basic regulation constituted a sufficient statement of reasons for the purposes of Article 253 EC.

The Court therefore dismissed the actions, thereby holding the regulation adding the denomination 'feta' to the register of protected designations of origin to be lawful.

In Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* (judgment of 12 May 2005, not yet published in the ECR), a reference was made to the Court for a preliminary ruling on the validity and interpretation of Decision 93/724/EC ([12]) concerning the conclusion of the EC–Hungary Agreement on wines and of Regulation (EC) No 753/2002 ([13]).

([12]) Council Decision 93/724/EC of 23 November 1993 concerning the conclusion of an Agreement between the European Community and Republic of Hungary on the reciprocal protection and control of wine names (OJ L 337, 31.12.1993, p. 93).

([13]) Commission Regulation (EC) No 753/2002 of 29 April 2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products (OJ L 118, 4.5.2002, p.1).

'Tocai friulano' or 'Tocai italico' is a vine variety traditionally grown in the region of Friuli-Venezia Giulia (Italy) and used in the production of white wines marketed inter alia under geographical indications such as 'Collio' or 'Collio goriziano'. In 1993 the European Community and the Republic of Hungary concluded the EC–Hungary Agreement on wines, which prohibits the use of the term 'Tocai' to describe the abovementioned Italian wines after a transitional period expiring on 31 March 2007, in order to protect the Hungarian geographical indication 'Tokaj'. The Regione Autonoma Friuli-Venezia Giulia (the autonomous region of Friuli-Venezia Giulia) and the Agenzia regionale per lo sviluppo rurale (ERSA) (the Regional Agency for Rural Development) ('the applicants') brought proceedings before the Tribunale Amministrativo Regionale per il Lazio (the Regional Administrative Court, Lazio) seeking annulment of national legislation which reflects that prohibition. The applicants argued essentially that the Community had no competence to enter into that agreement with Hungary, that the prohibition at issue conflicted with other provisions in the agreement, that the agreement was based on a misrepresentation of reality so that the relevant provision was null and void as a matter of international law, that the prohibition had been superseded by the Agreement on Trade-Related Aspects of Intellectual Property Rights, set out in Annex 1C to the Agreement establishing the World Trade Organisation ('the TRIPs Agreement'), and that the prohibition was inconsistent with the right to property protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

The Tribunale Amministrativo Regionale per il Lazio decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling.

The national court asked first of all, in essence, whether the appropriate legal basis for the adoption of Decision 93/724/EC, and for the conclusion of the EC–Hungary Agreement on wines by the Community alone, was the EC–Hungary Association Agreement, concluded prior to the agreement on wines, or Article 133 EC. The Court stated that an act falls within Article 133 EC 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. In the present instance, the EC–Hungary Agreement on wines is among the agreements provided for in Article 63 of Regulation (EEC) No 822/87 ([14]) on the common organisation of the market in wine and its principal objective is to promote trade between the contracting parties by facilitating on a reciprocal basis, on the one hand, the marketing of wines originating in Hungary by guaranteeing those wines the same protection as that provided for in respect of quality wines produced in a specified region that are of Community origin and, on the other, the marketing in that country of wines originating in the Community. The Community therefore had sole competence to conclude the agreement because it fell within its exclusive competence.

The next question referred to the Court was whether, in the event that the EC–Hungary Agreement on wines is lawful, the prohibition of the use in Italy after 31 March 2007 of the name 'Tocai' is invalid and of no effect because it is inconsistent with the rules governing homonyms laid down in Article 4(5) of the agreement, which allow, under certain conditions, the coexistence of two homonyms. In that regard, the Court observed that the rules

([14]) Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ L 84, 27.3.1987, p. 1).

governing homonyms laid down in Article 4(5) of the EC–Hungary Agreement on wines concern geographical indications protected by virtue of that agreement. Since the names 'Tocai friulano' and 'Tocai italico', unlike the names 'Tokaj' and 'Tokaji' of the Hungarian wines, are the name of a vine or vine variety recognised in Italy as being suitable for the production of certain quality wines produced in a specified region, they cannot be described as geographical indications within the meaning of that agreement. Thus, the prohibition of use of the name 'Tocai' in Italy after the expiry of the transitional period provided for in the EC–Hungary Agreement on wines is not contrary to the rules governing homonyms laid down in Article 4(5) of that agreement.

Another question referred to the Court was whether Articles 22 to 24 of the TRIPs Agreement are to be interpreted as meaning that, in the case of homonymity, each of the names may continue to be used in the future under certain conditions. The Court referred to the content of the provisions of the TRIPs Agreement and again stated that, unlike the Hungarian name, the Italian names do not constitute a geographical indication within the meaning of the EC–Hungary Agreement on wines. Thus it answered the question referred by ruling that Articles 22 to 24 of the TRIPs Agreement are to be interpreted as meaning that, in a case such as that in the main proceedings, those provisions do not require that a name may continue to be used in the future notwithstanding the twofold circumstance that it has been used in the past by the producers concerned either in good faith or for at least 10 years prior to 15 April 1994 and that it clearly identifies the country, region or area of origin of the protected wine in such a way as not to mislead the consumer.

At the request of the referring court, the Court of Justice also considered whether the right to property set out in the ECHR and in the Charter of Fundamental Rights includes intellectual property and thus the right for the operators concerned to use the name 'Tocai' after the transitional period despite the prohibition contained in the EC–Hungary Agreement on wines. The Court held that the right to property does not preclude the prohibition, at the end of that transitional period, on use by the operators concerned in an Italian autonomous region of the word 'Tocai' in the term 'Tocai friulano' or 'Tocai italico' for the description and presentation of certain Italian quality wines produced in a specified region. That prohibition, in so far as it does not exclude any reasonable method of marketing the Italian wines concerned, does not constitute a deprivation of possessions as referred to in the first paragraph of Article 1 of Protocol No 1 to the ECHR. Moreover, even if the restriction constitutes a restriction of the fundamental right to property, it may be justified in so far as, by prohibiting the use of that name, which is a homonym of the geographical indication 'Tokaj' of Hungarian wines, it pursues an aim of general interest in promoting trade between the contracting parties by facilitating on a reciprocal basis the marketing of wines described or presented using a geographical indication.

3.5. In the area of freedom of movement for workers, attention should be drawn to Case C-258/04 *Ioannidis* (judgment of 15 September 2005, not yet published in the ECR), in which the Court was required to examine the case of a Greek national who arrived in Belgium in 1994 after completing his secondary education in Greece and having obtained recognition of the equivalence of his certificate of secondary education. After a three-year course of study in Liège, he obtained a graduate diploma in physiotherapy and then registered as a job-seeker. He went to France to follow a paid training course from October 2000 to June 2001 and then returned to Belgium, where he submitted an application for a 'tideover allowance', an unemployment benefit provided for under Belgian legislation for

young people seeking their first job. His application was refused because he did not fulfil the relevant requirements at that time, which were that he should have completed his secondary education in Belgium or else have pursued education or training of the same level and equivalent thereto in another Member State and been the dependent child of migrant workers for the purposes of Article 39 EC who were residing in Belgium.

The proceedings arising out of the action brought by Mr Ioannidis against that refusal led the Cour du travail de Liège (Higher Labour Court, Liège) to refer a question to the Court of Justice regarding the compatibility of the Belgian system with Community law.

The Court observed, first of all, that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision.

The remainder of the Court's answer drew on case-law set out in recent judgments delivered by the Court, in particular those in Case C-224/98 *D'Hoop* [2002] ECR I-6191 and Case C-138/02 *Collins* [2004] ECR I-2703.

It observed that in *Collins* it held that, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. In addition, the Court has already found in *D'Hoop* that the tideover allowances provided for by the Belgian legislation are social benefits, the aim of which is to facilitate, for young people, the transition from education to the employment market. Mr Ioannidis was therefore justified in relying on Article 39 EC to claim that he could not be discriminated against on the basis of nationality as far as the grant of a tideover allowance was concerned. The condition that secondary education must have been completed in Belgium can be met more easily by Belgian nationals and can therefore place, above all, nationals of other Member States at a disadvantage.

As for possible justification of that difference in treatment, the Court again referred to *D'Hoop*, in which it held that although it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for a tideover allowance and the geographic employment market concerned, a single condition concerning the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature and goes beyond what is necessary to attain the objective pursued. Lastly, as regards the fact that the Belgian legislation nonetheless affords a right to a tideover allowance to an applicant if he has obtained an equivalent diploma in another Member State and if he is the dependent child of migrant workers who are residing in Belgium, the Court considered, by converse implication, that a person who pursues higher education in a Member State and obtains a diploma there, having previously completed secondary education in another Member State, may well be in a position to establish a real link with the employment market of the first State, even if he is not the dependent child of migrant workers residing in that State. The Court noted that, in any event, dependent children of migrant workers who are residing in Belgium derive their right to a tideover allowance from Article 7(2) of Regulation (EEC) No 1612/68 ([15]), regardless of whether there is a real link with the employment market.

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

3.6. The requirements of Community law with regard to freedom of establishment and freedom to provide services were central to five cases that are worthy of mention. The first two of these cases relate to public-service concessions, the third to the interplay between the freedoms and national tax legislation, the fourth to the requirements of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and the fifth to telecommunications.

In Case C-231/03 *Coname* (judgment of 21 July 2005, not yet published in the ECR), the Court was requested to give a preliminary ruling on the interpretation of Articles 43 EC, 49 EC, 81 EC and 86 EC and of the prohibition of discrimination, the principle of transparency and the principle of equal treatment.

The facts of this case were that Coname (Consorzio Aziende Metano) had concluded with the Comune di Cingia de' Botti (municipality of Cingia de' Botti) a contract for the award of the service covering the maintenance, operation and monitoring of the methane gas network for the period from 1 January 1999 to 31 December 2000. Subsequently, the municipal council entrusted, by direct award, to the company Padania the service covering the management, distribution and maintenance of methane gas distribution installations for the period from 1 January 2000 to 31 December 2005. Coname challenged the award on the grounds that it should have been made following an invitation to tender. The Tribunale Administrativo Regionale per la Lombardia (Lombardy Regional Administrative Court) decided to stay the proceedings brought and to refer a question to the Court for a preliminary ruling. The question concerns whether Articles 43 EC, 49 EC and 81 EC preclude the direct award, without an invitation to tender, of the management of the public gas distribution service to a company with predominantly public capital in which that municipality holds a 0.97 % share.

The Court pointed out, first, that the directives on public contracts do not govern the award of a concession, which must therefore be examined in the light of the fundamental freedoms provided for by the Treaty. The Court also found that Article 81 EC could not apply since that provision concerns only agreements between undertakings.

In so far as a concession may also be of interest to an undertaking established in a Member State other than the Member State of the contracting municipality, the award, in the absence of any transparency, of that concession to an undertaking established in the latter Member State amounts to a difference in treatment to the detriment of the undertaking established in the other Member State. In the absence of any transparency, an undertaking located in another Member State has no real opportunity of expressing its interest in obtaining the concession. That amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC. It is for the national courts to satisfy themselves that the disputed award complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are such as to ensure that an undertaking located in the territory of another Member State can have access to appropriate information regarding the concession before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

The Court analysed whether, in the present case, objective circumstances nevertheless existed that could justify the difference in treatment. It stated that the fact that the mu-

nicipality of Cingia de' Botti had a 0.97 % holding in the share capital of Padania did not constitute one of those objective circumstances. The holding was so small as to preclude any control by the municipality over Padania.

Finally, the Court observed that it was apparent from the file that Padania was a company open in part to private capital, which precluded it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which formed part of it.

A case in the same line of case-law that should be noted is *Parking Brixen* (judgment of 13 October 2005 in Case C-458/03, not yet published in the ECR), concerning a problem similar to that in *Coname*.

In Case C-446/03 *Marks & Spencer* (judgment of 13 December 2005, not yet published in the ECR), the Court was requested to give a preliminary ruling on the interpretation of Articles 43 EC and 48 EC.

Marks & Spencer, a company resident in the United Kingdom, is the principal trading company of a retail group specialising in the sale of off-the-peg clothing, food, homeware and financial services. It had subsidiaries in the United Kingdom and in a number of other Member States, including Germany, Belgium and France. In 2001 it ceased trading in continental Europe because of losses incurred from the mid-1990s. On 31 December 2001 the French subsidiary was sold to a third party, while the German and Belgian subsidiaries ceased operating.

In 2000 and 2001, Marks & Spencer submitted claims to the United Kingdom tax authorities for group tax relief in respect of the losses incurred by the German, Belgian and French subsidiaries. United Kingdom tax legislation (the Income and Corporation Taxes Act 1988; 'ICTA') allows the parent company of a group, under certain circumstances, to effect an offset between its profits and losses incurred by its subsidiaries. However, those claims were rejected on the ground that the rules governing group relief do not apply to subsidiaries not resident or trading in the United Kingdom. Marks & Spencer appealed against that refusal to the Special Commissioners of Income Tax, who dismissed the appeal. Marks & Spencer then brought an appeal before the High Court of Justice of England and Wales, Chancery Division, which decided to stay proceedings and to refer questions to the Court of Justice for a preliminary ruling. The national court was uncertain whether the United Kingdom provisions, which prevent a UK-resident parent company from deducting from its taxable profits losses incurred in other Member States by its subsidiaries established there although they allow it to deduct losses incurred by a resident subsidiary, were compatible with Articles 43 EC and 48 EC on freedom of establishment.

The Court recalled first of all that, although direct taxation falls within the competence of Member States, national authorities must nonetheless exercise that competence consistently with Community law.

The Court held that the United Kingdom legislation constitutes a restriction on freedom of establishment, in breach of Articles 43 EC and 48 EC, in that it applies different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-

resident subsidiary. This would deter parent companies from setting up subsidiaries in other Member States.

However, the Court acknowledged that such a restriction may be permitted if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it.

Thus, the Court set out the relevant objective criteria relied upon by Member States and analysed whether the United Kingdom legislation justifies the differing treatment applied by it. The criteria put forward were, first, protection of a balanced allocation of the power to impose taxation between the various Member States concerned, so that profits and losses are treated symmetrically in the same tax system, second, the fact that the legislation provides for avoidance of the risk of double use of losses which would exist if the losses were taken into account in the Member State of the parent company and in the Member State of the subsidiaries and, finally, escaping the risk of tax avoidance which would exist if the losses were not taken into account in the subsidiaries' Member States, as within a group of companies losses might be transferred to the companies established in the Member States which apply the highest rates of taxation and in which the tax value of the losses is the highest.

The Court held in the light of those criteria that the United Kingdom legislation pursues legitimate objectives which are compatible with the EC Treaty and constitute overriding reasons in the public interest.

However, the Court held that the United Kingdom legislation does not comply with the principle of proportionality and goes beyond what is necessary to attain the objectives pursued where, first, the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and, second, there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

Consequently, the Court held that where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

The Court's judgment in Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733 relates to the rules which may, in the light of Directive 96/71/EC ([16]) concerning the posting of workers in the framework of the provision of services, be enacted by Member States with regard to the employment of workers posted from another Member State.

([16]) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

In 2002 the Commission brought an action against Germany for failure to fulfil obligations, questioning the compatibility with Directive 96/71/EC of the method applied by Germany for the purpose of comparing the minimum wage fixed by national German provisions with the remuneration actually paid by an employer established in another Member State.

In its action, the Commission criticised Germany for not recognising, as constituent elements of the minimum wage, all of the allowances and supplements paid by employers established in other Member States to their employees in the construction industry posted to Germany, with the exception of the bonus granted to workers in that industry. According to the Commission, the failure to take these allowances and supplements into account resulted — by reason of the different methods of calculating remuneration in other Member States — in higher wage costs for employers established in other Member States, who were thus prevented from offering their services in Germany. While the Commission acknowledged that the Member State to the territory of which a worker is posted is allowed to determine, under Directive 96/71/EC, the minimum rate of pay, the fact nonetheless remains that that Member State cannot, in comparing that rate and the wages paid by employers established in other Member States, impose its own payment structure.

The German Government contested that argument, contending that hours worked outside the normal working hours, which involve requirements of a particularly high degree in terms of quality of results or which involve special constraints or dangers, have a greater economic value than normal working hours and that the bonuses relating to such hours must not be taken into account in the calculation of the minimum wage. If those amounts were taken into account for the purposes of that calculation, the worker would be deprived of the economic countervalue corresponding to those hours of work and the relationship between the remuneration payable by the employer and the service to be provided by the worker would thus be altered to the worker's detriment.

The Court began by taking note that the parties were in agreement that, in accordance with Directive 96/71/EC, account need not be taken, as component elements of the minimum wage, of payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross amounts of wages that must be taken into account.

The Court then stated that, in the course of the proceedings for failure to fulfil obligations, Germany had adopted and proposed a number of amendments to its rules, which the Court considered appropriate for removing several of the inconsistencies between German law and the directive. These included, among others, the taking into account of allowances and supplements paid by an employer which, in the calculation of the minimum wage, do not alter the relationship between the service provided by the worker and the consideration which he receives in return, and the taking into account, under certain conditions, of the bonuses in respect of the 13th and 14th salary months. However, those amendments were made after the expiry of the period laid down in the reasoned opinion, that is to say too late to be taken into consideration by the Court. Therefore, the Court had to declare that Germany had failed to fulfil its obligations.

Finally, the Court observed that it is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation should be provided to the worker for those additional services without its being taken into account for the purpose of calculating the minimum wage. Directive 96/71/EC does not require that such forms of compensation, which, if taken into account in the calculation of the minimum wage, alter the relationship between the service provided and the consideration received in return, be treated as elements of the minimum wage. The Court accordingly dismissed the Commission's action on that point.

In Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* (judgment of 8 September 2005, not yet published in the ECR), a preliminary ruling was sought from the Court on two questions, concerning the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3c of Directive 90/388/EEC ([17]) as amended, with regard to the implementation of full competition in telecommunications markets, by Directive 96/19/EC ([18]). The reference was made by the Belgian Conseil d'État (Council of State) in actions brought by mobile telelephony operators established in Belgium, namely Mobistar SA and Belgacom Mobile SA. In the main proceedings those two operators sought the annulment of taxes adopted by the commune of Fléron (Belgium) on transmission pylons, masts and antennae for GSM and by the commune of Schaerbeek (Belgium) on external antennae. The operators each submitted, among the pleas for annulment put forward by them in support of their respective actions, that the regulations imposing the contested taxes restricted the development of their mobile telephony network and that that was prohibited by Article 3c of Directive 90/388/EEC.

Since the Conseil d'État found in both the actions before it, first, that it was not in a position to rule on the merits of such a plea without applying a measure of Community law which raised a problem of interpretation and, second, that an issue also arose as to whether the contested taxes were compatible with Article 49 EC, it decided to stay the proceedings and to refer the matter to the Court of Justice. By its first question, the national court sought to ascertain whether Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructure used to carry on activities provided for in licences and authorisations. By its second question, the national court essentially sought to ascertain whether tax measures applying to mobile communications infrastructure are covered by Article 3c of Directive 90/388/EEC.

These joined cases, first, gave the Court occasion to recall that Article 59 of the EC Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State and that a national tax measure restricting exercise of the freedom to provide services may, in that regard, constitute a prohibited measure, whether it was adopted by the State itself or by a local authority. It explained, however, that meas-

([17]) Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10).

([18]) Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ L 74, 22.3.1996, p. 13).

ures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State do not fall within the scope of Article 59 of the EC Treaty.

As regards the first question, the Court held that Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructure used to carry on activities provided for in licences and authorisations which applies without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.

The Court held on the second question that tax measures applying to mobile communications infrastructure are not covered by Article 3c of Directive 90/388/EEC, except where those measures favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators and appreciably affect the competitive situation.

3.7. Certain implications of the free movement of capital were explained in Case C-376/03 *D.* (judgment of 5 July 2005, not yet published in the ECR), where the Court had to consider the Netherlands wealth-tax regime that was applicable until 2000. That regime granted resident taxpayers an allowance for which non-residents established in other Member States qualified only if at least 90 % of their wealth was in the Netherlands. On a reference for a preliminary ruling from the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's Hertogenbosch, Netherlands), the Court of Justice gave a decision on the compatibility of that regime with the Treaty provisions on the free movement of capital.

Finding that the situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects, the Court drew a parallel with its case-law concerning income tax, in particular the fundamental judgment in Case C-279/93 *Schumacker* [1995] ECR I-225. Thus, the Court held that, as in the case of income tax, the situation of a non-resident, as regards wealth tax, is different from that of a resident in so far as not only the major part of the latter's income but also the major part of his wealth is normally concentrated in the State where he is resident. Consequently, that Member State is best placed to take account of the resident's overall ability to pay by granting him, where appropriate, the allowances prescribed by its legislation. The Court therefore concluded that, as in the case of income tax, a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State. Accordingly, the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not constitute discrimination against him that is prohibited by Articles 56 and 58 EC.

The Court also had to rule on another question. Under the double taxation convention between the Netherlands and Belgium, entitlement to the allowance in question was extended to Belgian nationals under the same conditions as for resident taxpayers, whatever the proportion of their total net assets that was represented by their assets in the Netherlands. Was the difference in treatment thus created between Belgian nationals and nationals of other Member States consistent with Articles 56 and 58 EC?

The Court pointed out that the Member States are at liberty, in the framework of bilateral conventions, to determine the connecting factors for the purposes of allocating powers of taxation and that it has accepted that a difference in treatment between nationals of the two contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC. It is true that the Court held in Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161 that, in the case of a double taxation convention concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies. However, that was justified by the equivalence of the situation of a non-resident taxable person having a permanent establishment in a Member State and of a taxable person resident in that State. The Court found in the present case that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. The fact that the reciprocal rights and obligations laid down by the Belgium–Netherlands Convention apply only to persons resident in one of the two contracting Member States is specifically an inherent consequence of bilateral double taxation conventions.

3.8. In the area of competition, there are three judgments to which attention is drawn, one concerning a merger and two concerning State aid.

In Case C-12/03 P *Commission* v *Tetra Laval BV* [2005] ECR I-987**,** the Commission brought an appeal before the Court, seeking the setting aside of the judgment of the Court of First Instance of the European Communities in Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, by which that Court had annulled Decision 2004/124/EC.

By Decision 2004/124/EC, the Commission had declared incompatible with the common market and the functioning of the EEA Agreement the acquisition of Sidel SA by Tetra Laval BV. The latter is a holding company of a group which also includes the company which is the world leader in the carton-packaging sector and is regarded as holding a dominant position in aseptic packaging on that market. The former is a leading company in the sector of production and supply of 'SBM machines', which are machines that form empty bottles from a simple plastic tube made of polyethylene terephthalate (PET) or high-density polyethylene (PEHD). The Commission had taken the view that the notified merger would encourage Tetra Laval BV to 'leverage' its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who were switching to PET in order to package certain sensitive products (milk and liquid dairy products, fruit juices and nectars, fruit-flavoured still drinks and tea and coffee drinks) to choose Sidel's SBM machines, thereby excluding much smaller competitors and turning Sidel's leading position on the market for SBM machines for sensitive products into a dominant position. The Commission had also considered that the notified merger would strengthen the dominant position of Tetra Laval BV on the carton-packaging markets and reduce its incentive to adjust its prices and innovate to face the threat which PET posed to its position. Lastly, the Commission had taken the view that the commitments given by Tetra Laval BV were insufficient to resolve the structural competition concerns raised by the notified merger and had argued that it would be virtually impossible to monitor compliance with them.

In an action for annulment brought by Tetra Laval BV against the Commission decision, the Court of First Instance held, however, that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of the dominant position of Tetra Laval BV in the carton sector and therefore annulled its decision. The Court of Justice dismissed the appeal brought by the Commission against the judgment of the Court of First Instance.

First of all, this case provided the Court of Justice with an opportunity to confirm the criteria for judicial review of Commission merger decisions which it had laid down in *Kali & Salz* (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375). It observed that the substantive rules on the review of concentrations between companies, contained at that time in Regulation (EEC) No 4064/89 ([19]), and in particular in Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations. The Court, however, made clear that whilst it recognises that the Commission has a margin of discretion with regard to economic matters that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature establish inter alia whether the evidence relied on is factually accurate, reliable and consistent, it must also establish whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is, in the Court's view, all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.

The Court also held that a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted. Such an analysis, which consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition, makes it necessary, in the Court's view, to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. In the case of an analysis of a 'conglomerate-type' concentration in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if

([19]) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

such a decision were not adopted, the economic development envisaged by it would be plausible.

The Court further held that, when the Commission analyses the effects of a conglomerate-type concentration, the likelihood of the adoption of anti-competitive conduct liable to result in leveraging must be examined comprehensively, that is to say, taking account both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. It also held, however, that it would run counter to the purpose of prevention of Regulation (EEC) No 4064/89 to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Such analysis would make it necessary to carry out an exhaustive and detailed examination of the rules of the various legal systems which might be applicable and of the enforcement policy practised in them and that, if it is to be relevant, it calls for a high probability of the occurrence of the acts envisaged as capable of giving rise to objections on the ground that they are part of anti-competitive conduct. The Court concluded from this that at the stage of assessing a proposed merger, an assessment intended to establish whether an infringement of Article 82 EC is likely and to ascertain that it will be penalised in several legal systems would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur.

The Court also reaffirmed the principle laid down by the Court of First Instance in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753 with regard to commitments offered by the undertakings concerned that would render a notified concentration compatible with the common market. It observed that such commitments must enable the Commission to conclude that the concentration at issue will not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of Regulation (EEC) No 4064/89 and inferred from this that the categorisation of a proposed commitment as behavioural or structural is immaterial and that the possibility cannot therefore automatically be ruled out that commitments which are prima facie behavioural, for instance a commitment not to use a trade mark for a certain period or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may also be capable of preventing the emergence or strengthening of a dominant position.

Lastly, having observed that it is clear from Article 2(1) of Regulation (EEC) No 4064/89 that the Commission, when assessing the compatibility of a concentration with the common market, must take account of a number of factors, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand, the Court concluded therefrom that, although constituting an important factor, the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition

which that undertaking must face constitutes a strengthening of its position. In the Court's view, the potential competition represented by a producer of substitute products on a segment of the relevant market is only one of the set of factors which must be taken into account when assessing whether there is a risk that a concentration might strengthen a dominant position, and it cannot be ruled out that a reduction in that potential competition might be compensated by other factors, with the result that the competitive position of the already dominant undertaking remains unchanged.

In Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861, two questions concerning the interpretation of Article 87 EC and Directive 96/92/EC ([20]), in particular Articles 7 and 8 thereof, were referred to the Court for a preliminary ruling by the Consiglio di Stato (Council of State, Italy), in proceedings between two hydroelectric and geothermal power stations and the Italian Electricity and Gas Authority concerning an increase in the charge for access to and use of the national electricity transmission system. The applicants in the main proceedings had brought proceedings before the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court, Lombardy) challenging two decisions of that authority, under which electricity attracted an increased charge for use of the system covering the power services, and the preparatory, basic and related measures. When those actions were dismissed, the applicants lodged appeals before the Consiglio di Stato to set aside the decisions of dismissal. They claimed that the increased charge came entirely within the regime of aid for the functioning of certain undertakings or for generation financed by levies on supplies by undertakings in the sector, which amounted to State aid within the meaning of Article 87(1) EC, granted in disregard of the procedure laid down in the EC Treaty. They also submitted that dissimilar charges for access to the transmission system, with a heavier burden on certain undertakings, constituted an infringement of one of the fundamental principles of Directive 96/92/EC as regards universal access without discrimination to that system.

It was against that background that the Consiglio di Stato asked the Court, in essence, first, whether a measure based on the need to offset the undue advantages and to counter the competitive imbalances which have arisen in the first period of liberalisation of the electricity market following implementation of Directive 96/92/EC, whereby a Member State imposes only on certain electricity generating and distributing undertakings using the electricity transmission system an increased charge for access to and use of that system, constitutes State aid within the meaning of Article 87 EC and, second, whether Article 7(5) and Article 8(2) of Directive 96/92/EC, inasmuch as they prohibit all discrimination between users of the national electricity transmission system, preclude a Member State from adopting such a measure for a transitional period.

With regard to the first question, the Court held that a measure which imposes an increased charge for a transitional period for access to and use of the national electricity transmission system only on undertakings generating and distributing electricity from hydroelectric or geothermal installations to offset the advantage created for those undertakings, during the transitional period, by the liberalisation of the market in electricity following the implementation of Directive 96/92/EC constitutes different treatment of undertakings

([20]) Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

in relation to charges which is attributable to the nature and general scheme of the system of charges in question and which is not therefore per se State aid within the meaning of Article 87 EC. It also stated that aid cannot be considered separately from the effects of its method of financing and that if there is hypothecation of the increased charge for access to and use of the national electricity transmission system to a national scheme of aid, in the sense that the revenue from the increase is necessarily allocated for the financing of the aid, that increase is an integral part of that scheme and must therefore be considered together with the latter.

With regard to the second question, the Court held that the rule of non-discriminatory access to the national electricity transmission system laid down in Directive 96/92/EC does not preclude a Member State from adopting a measure which imposes an increased charge for a transitional period for access to and use of that system only on certain electricity generation and distribution undertakings to offset the advantage created for those undertakings, during the transitional period, by the altered legal framework following the liberalisation of the market in electricity as a result of the implementation of that directive. It added, however, that it was a matter for the referring court to satisfy itself that the increased charge did not go beyond what was necessary to offset that advantage.

In Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, the Commission asked the Court to declare that, by failing to take within the prescribed period, in accordance with Article 3 of Decision 2003/372/EC ([21]), all the measures necessary for repayment of the aid found in that decision to be unlawful and incompatible with the common market, or, in any event, by failing to inform it of the measures taken pursuant to that decision, the Hellenic Republic had failed to fulfil its obligations.

In 1996 the Commission had initiated against the Hellenic Republic the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC), which led to the adoption of Decision 1999/332/EC ([22]). Under that decision, the grant of aid was coupled with a revised restructuring plan for the period from 1998 to 2002 and was subject to special conditions.

Following further complaints about the grant of more aid to Olympic Airways, the Commission initiated a new procedure under Article 88(2) EC, on the ground that the company's restructuring plan had not been implemented and that some of the conditions laid down in its earlier decision had not been fulfilled, in particular the requirement to provide the Commission with information pursuant to Article 10 of Council Regulation (EC) No 659/1999 ([23]).

At the end of that procedure, the Commission adopted Decision 2003/372/EC, which was based in particular on the findings that most of the objectives of the Olympic Airways re-

([21]) Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways (OJ L 132, 28.5.2003, p. 1).

([22]) Commission Decision 1999/332/EC of 14 August 1998 on aid granted by Greece to Olympic Airways (OJ L 128, 21.5.1999, p. 1).

([23]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

structuring plan had not been attained, that the conditions imposed by the approval decision had not been fully met and that the approval decision had been wrongly implemented. In addition, the Commission referred to the existence of new operating aid, which consisted, in essence, in the toleration by the Greek State of the non-payment of, or deferment of the payment dates for, social security contributions, value added tax on fuel and spare parts, rent payable to airports, airport charges and a tax imposed on passengers on departure from Greek airports, called 'spatosimo'.

The Commission required the Hellenic Republic to take the necessary measures to recover the aid concerned from the beneficiary and inform the Commission within a period of two months from the date of notification of its decision on the measures taken to comply with it. Since the Greek Government refused to comply and the Commission was not satisfied with the explanations provided by it, the Commission brought the case now under discussion. The Court found that the Commission's application was well founded.

It observed that the only defence available to a Member State in opposing an application by the Commission under Article 88(2) EC for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it properly to implement the decision ordering recovery of the aid in question. The condition that it is absolutely impossible to implement a decision is not fulfilled, in the case of a Commission decision on State aid, where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could enable those difficulties to be overcome. Where the implementation of such a decision encounters no more than a number of difficulties at national level, the Commission and the Member State concerned must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and the Community institutions to work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, in particular the provisions on State aid.

The Court moreover confirmed that, in an action concerning the failure to implement a decision on State aid which has not been referred to the Court by the Member State to which it was addressed, the latter is not justified in challenging the lawfulness of that decision.

Lastly, the Court also observed that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling its recipient to work out himself, without overmuch difficulty, that amount.

The Commission may therefore legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid. Moreover, the operative part of a decision on State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption; therefore, the amounts to be repaid pursuant to the Commission decision can be established by reading the operative part in conjunction with the relevant grounds.

3.9. In the diverse area of harmonisation of laws, there are two judgments of particular interest relating to public procurement, one judgment relating to telecommunications, one relating to copyright and related rights and one relating to consumer protection.

In Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, two series of questions were referred to the Court by the Oberlandesgericht Naumburg (Higher Regional Court, Naumburg) in the course of an appeal brought by the City of Halle (Germany) and RPL Lochau against the company TREA Leuna concerning the lawfulness, from the point of view of the Community rules, of the award by the City of Halle, without a public tender procedure, of a contract for services concerning the treatment of waste to RPL Lochau, a majority of whose capital is held by the City of Halle and a minority by a private company. The questions concerned, first, the interpretation of Article 1(1) of Directive 89/665/EEC ([24]), as amended, and second, the interpretation of Article 1(2) and Article 13(1) of Directive 93/38/EEC ([25]), as amended.

By the first series of questions, the Oberlandesgericht Naumburg essentially asked whether Article 1(1) of Directive 89/665/EEC should be interpreted as meaning that the Member States' obligation to provide for effective and rapid remedies against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision as to whether a particular contract falls within the personal or material scope of Directive 92/50/EEC ([26]), and from what moment during a procurement procedure the Member States are obliged to make a remedy available to a tenderer, candidate or interested party.

By the second series of questions, the national court essentially asked whether, where a contracting authority intends to conclude with a company governed by private law, legally distinct from the authority but in which it has a majority capital holding and exercises a certain control, a contract for pecuniary interest relating to services within the material scope of Directive 92/50/EEC, it is always obliged to apply the public award procedures laid down by that directive, merely because a private company has a holding, even a minority one, in the capital of the company with which it concludes the contract. If that question were to be answered in the negative, the national court also asked what the criteria were by reference to which it should be considered that the contracting authority was not subject to such an obligation.

In respect of the first series of questions, the Court held that Article 1(1) of Directive 89/665/EEC, as amended, must be interpreted as meaning that the obligation on the Member States to provide for effective and rapid remedies against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within

([24]) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

([25]) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

([26]) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

the personal and material scope of Directive 92/50/EEC, as amended. The Court also made clear that that possibility of review is available to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects, and that the Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

In respect of the second series of questions, the Court held that where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50/EEC, as amended by Directive 97/52/EC ([27]), with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.

In Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, two series of questions were referred to the Court by the Belgian Conseil d'État (Council of State). They concerned the interpretation of Directive 92/50/EEC ([28]), as amended by Directive 97/52/EC ([29]), and, more particularly, of Article 3(2) thereof, of Directive 93/36/EEC ([30]), as amended by Directive 97/52/EC, and, more particularly, of Article 5(7) thereof, of Directive 93/37/EEC ([31]), as amended by Directive 97/52/EC, and, more particularly, of Article 6(6) thereof, and of Directive 93/38/EEC ([32]), as amended by Directive 98/4/EC ([33]), and, more particularly, of Article 4(2) thereof, in conjunction with the principle of proportionality, freedom of trade and industry and the right to property. The questions referred also concerned the interpretation of Directive 89/665/EEC ([34]), and, more particularly, of Articles 2(1)(a) and 5 thereof, and of Directive 92/13/EEC ([35]), and, more particularly, of Articles 1 and 2 thereof.

([27]) European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1).

([28]) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

([29]) European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ L 328, 28.11.1997, p. 1).

([30]) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1).

([31]) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).

([32]) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).

([33]) Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 101, 1.4.1998, p. 1).

([34]) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

([35]) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

Those questions were intended to enable the national court to decide two cases between Fabricom SA, a contractor which is regularly required to submit tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors, and the Belgian State concerning the legality of national provisions, especially Articles 26 and 32 of the Royal Decree of 25 March 1999 amending the Royal Decrees of 8 and 10 January 1996. Under certain conditions both those articles, in essence worded in similar terms, preclude a person who has been instructed to carry out preparatory work in connection with a public contract or an undertaking connected to such a person from participating in that contract. In both the cases before the national court the contractor claimed that the articles were, inter alia, contrary to the principle of equal treatment of all tenderers, to the principle of the effectiveness of judicial review as guaranteed by Directive 92/13/EEC, to the principle of proportionality, to freedom of trade and industry and to the right to property as laid down in Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

Being of the view that interpretation of certain provisions of the abovementioned public procurement directives was required in order to decide the cases before it, the Conseil d'État decided to stay proceedings and to refer to the Court three questions in each case, which, in view of their essentially similar content, the Court was able to consider as a total of three questions. Finding that the second of those questions was based on a hypothesis which could not be accepted, the Court answered only the first and third questions. By the first question it raised in both cases before it, the Conseil d'Etat was seeking essentially to ascertain whether the provisions of Community law to which it referred preclude a rule, such as that laid down in the abovementioned national provisions, which states that any person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not allowed to participate in or to submit a tender for a public contract for those works, supplies or services, and is not permitted to prove that, in the circumstances of the case, the experience which he has acquired is not capable of distorting competition. By the third question, the Conseil d'Etat was seeking essentially to ascertain whether Directive 89/665/EEC, more particularly Articles 2(1)(a) and 5 thereof, and Directive 92/13/EEC, more particularly Articles 1 and 2 thereof, preclude the contracting entity from being able to refuse, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has carried out certain preparatory works from participating in the procedure or from submitting a tender, even though, when questioned on that point by the awarding authority, the undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.

With regard to the first question, the Court held that Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, each as amended by Directive 97/52/EC, and Directive 93/38/EEC, as amended by Directive 98/4/EC, and, more particularly, the provision of each of those directives which states that contracting authorities are to ensure equal treatment between tenderers, preclude a national rule whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services, and is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition. In the view of the Court, if, taking account of the favourable situation in which a person who

has carried out such preparatory work may find himself, it cannot be maintained that the principle of equal treatment requires that he be treated in the same way as any other tenderer, a rule which does not afford him any possibility to demonstrate that in his particular case that situation would not distort competition goes beyond what is necessary to attain the objective of equal treatment for all tenderers.

With regard to the third question, Directive 89/665/EEC, more particularly Articles 2(1)(a) and 5 thereof, and Directive 92/13/EEC, more particularly Articles 1 and 2 thereof, preclude the contracting authority from being able to refuse, up to the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or submit an offer, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition. In the view of the Court, the possibility that the contracting authority might delay, until the procedure has reached a very advanced stage, taking a decision as to whether such an undertaking may participate in the procedure or submit a tender, when the authority has before it all the information which it needs in order to take that decision, deprives the undertaking of the opportunity to rely on the Community rules on the award of public contracts as against the awarding authority for a period which is solely within that authority's discretion and which, in some circumstances, may be extended until a time when the infringements can no longer be usefully rectified. Such a situation is therefore not only capable of depriving Directives 89/665/EEC and 92/13/EEC of all practical effect as it is susceptible of giving rise to an unjustified postponement of the possibility for those concerned to exercise the rights conferred on them by Community law, it is also contrary to the objective of Directives 89/665/EEC and 92/13/EEC, which seek to protect tenderers vis-à-vis the awarding authority.

Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net* (judgment of 20 October 2005, not yet published in the ECR) concern the telecommunications sector. Adopted in the context of the liberalisation of the sector, Directive 97/13/EC ([36]) seeks to establish in that area, as regards the granting by Member States of general authorisations and individual licences, a single framework, based on the principles of proportionality, transparency and non-discrimination. To that end, it specifies in particular the restrictions and charges of a fiscal nature that can be imposed on undertakings as part of authorisation procedures, irrespective of whether general authorisations or individual licences are involved. In respect of the latter, Article 11 of the directive limits the fees that can be imposed on undertakings to those intended to cover administrative costs. Article 11(2), however, authorises the imposition of charges where 'scarce resources' are to be used, in order to ensure the optimal use of such resources. Those charges must be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.

The Court was required to rule on the scope of that provision in answer to questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) in pro-

([36]) Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ L 117, 7.5.1997, p. 15).

ceedings between Isis Multimedia Net and Firma 02 and the German State. The undertakings in question, which are new telecommunications providers, applied to the national regulatory authority to be allocated telephone numbers to pass on to their customers. The allocation of those numbers gave rise, under the legislation in force, to charges 15 times higher than the administrative costs generated by the allocation. On the other hand, Deutsche Telekom, the undertaking that was the successor of the historic operator which had previously held a monopoly on the German market, had at its disposal a stock of 400 million telephone numbers which it obtained free of charge.

In order to assess whether the charges thus imposed on the new operators complied with Article 11(2) of Directive 97/13/EC, the Court considered in turn each of the three conditions laid down in the directive. As regards the first condition, regarding optimal management of a scarce resource, the Court held that there is only a limited quantity of telephone numbers and that they therefore constitute a scarce resource. As regards the condition of non-discrimination, the Court could only conclude that Deutsche Telekom and its competitors were not being treated equally: whereas ISIS Multimedia and Firma O2, like all new operators, had to pay the contested charge in order to obtain telephone numbers and gain entry into the market, Deutsche Telekom had a large stock of numbers available to it which enabled it to operate on that market and for which it did not pay any charge. As regards possible justification for such difference in treatment, the Court, without excluding the possibility, disregarded for lack of supporting evidence, the German Government's arguments linked to the universal service tasks taken on by Deutsche Telekom and its obligations to the staff it has taken over. The Court held lastly that, be that as it may, the third condition, concerning the need to foster the development of innovative services and competition, was not met. On the contrary, since it was a burden on the budgets of new operators right from the initial setting-up stage and new operators were therefore not placed on an equal footing with the undertaking in a dominant position, the charge imposed by the German legislation constituted a barrier to entry of new operators into the market and therefore acted as a brake on the development of competition and the fostering of innovative services, contrary to what is required by Article 11(2) of Directive 97/13/EC.

Case C-192/04 *Lagardère Active Broadcast* (judgment of 14 July 2005, not yet published in the ECR) concerned the scope and effect, as regards copyright and related rights, of Directives 92/100/EEC ([37]) and 93/83/EEC ([38]). The facts of the case were as follows. Lagardère Active Broadcast is a broadcasting company established in France, the successor in title to Europe 1. Its programmes are transmitted from its Paris studios, where they are created, to a satellite, which returns the signals to repeater stations, which then broadcast the programmes to the public. Although most of the repeater stations are in France, one of them, although it broadcasts programmes to France, is however based in Germany (in Saarland), and managed by a German subsidiary of Lagardère. The programmes, broadcast in the French language, can, technically, be received within a limited area in Germany, but they are not the subject of commercial exploitation there. With regard to intellectual property,

([37]) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61).

([38]) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

two royalties are paid for the use of protected phonograms to the performers and producers of the phonograms: one in France, by Lagardère, the other in Germany, by the abovementioned subsidiary. Two questions arose in that context, which the Court was ultimately called upon to settle following a reference for a preliminary ruling from the French Cour de Cassation (Court of Cassation). First, can the fee be governed not only by French law but also by German law? Second, is the broadcasting company entitled to deduct from the amount of the royalty payable in France the amount of the royalty paid or claimed in Germany?

Directive 93/83/EEC is relevant as regards the answer to the first question. That directive is intended, as regards copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 'to avoid the cumulative application of several national laws to one single act of broadcasting'. According to the directive, the royalty should be governed solely by the law of the State from which the signal is transmitted, hence, by French law. That presupposes, however, that that directive is applicable, and therefore that the broadcast at issue in the present case constitutes a 'communication to the public by satellite' within the meaning of the directive. The Court found that not to be the case after considering the characteristics of the broadcast (the coded signals emanating from the satellite can be received only by equipment available to professionals, the signals, unlike programmes, are not intended for reception by the public, there is a terrestrial digital audio circuit enabling signals to be transmitted in the event of malfunction of the satellite). Since there is no 'communication to the public by satellite' within the meaning of Directive 93/83/EEC, that directive does not apply and therefore does not preclude the fee in this case being governed both by France and by Germany.

As regards the possibility of deducting the royalty paid or claimed in Germany from the royalty payable in France, Article 8(2) of Directive 92/100/EEC ([39]), which requires that remuneration should be equitable, is relevant. The Court stated that rights related to copyright are of a territorial nature. In the present case, as the broadcasting operations are carried out in the territory of two Member States, those rights are based on the legislation of two States. The Court also observed that it is not for it to lay down specific methods for determining what constitutes uniform equitable remuneration. It is for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring adherence to the Community concept of equitable remuneration. However, in order to assess whether the remuneration is equitable, it is necessary to take into account the value of the use of a phonogram in trade, and in particular, to take account of all the parameters of the broadcast, such as, in particular, the actual audience, the potential audience and the language version of the broadcast. In the present case, the Court added, broadcasting in Germany does not reduce the value of that use in France. Furthermore, actual commercial exploitation takes place only within French territory. However, an actual or potential audience in Germany is not entirely absent, so a certain, albeit low, economic value attaches to the use of protected phonograms even in that State. Consequently, payment of remuneration may be required in Germany. The fact that the economic value is low affects only the rate of that royalty, not its principle. That royalty constitutes payment for the use of phonograms in Germany; the payment cannot be taken into account in order to calculate equitable remuneration in France and be deducted from it.

([39]) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61).

In Case C-350/03 *Schulte* and C-229/04 *Crailsheimer Volksbank* (judgments of 25 October 2005, not yet published in the ECR) the Court answered questions referred to it by two German courts, the Landgericht Bochum (Regional Court, Bochum) and the Hanseatisches Oberlandesgericht in Bremen (Hanseatic Higher Regional Court, Bremen), concerning the interpretation of the 1985 'doorstep selling' directive (Directive 85/577/EEC) ([40]). Both national courts had before them disputes between property investors and banks concerning investment schemes for which the pre-contractual negotiations took place in a doorstep-selling situation. Those schemes consisted of a contract for the purchase of a property concluded with a property company and a credit agreement concluded with a bank, which served to finance the purchase. They were offered to the consumers during a visit to their home by an agent of the property company or an independent broker.

The Court found, first, that the directive does not give a consumer the right to cancel an agreement for the purchase of property, even if it forms part of an investment scheme financed by a loan and the pre-contractual negotiations for both the property purchase agreement and the loan agreement to finance the purchase have been conducted in a doorstep-selling situation. Although the directive is intended to protect consumers from the risks inherent in the conclusion of an agreement, in particular when it is concluded during a visit by a trader to the home of the consumer, by giving them a right to cancel under certain conditions, it expressly and unequivocally excludes contracts for the sale of immovable property from its scope.

Moreover, the directive does not preclude national rules which provide that the sole effect of cancellation of a loan agreement is the annulment of that agreement, even where the investment scheme is such that the loan would never have been granted in the absence of the property purchase.

Nor, moreover, does the directive preclude in principle, where a consumer has been informed by the bank of his right to cancel the credit agreement, national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the contract but also to pay to the lender interest at the market rate.

However, the Court held that, in circumstances such as those in this case, where the consumer has not been informed of his right to cancel the credit agreement, it is for the bank to bear the risk inherent in the investment at issue. If he had been informed of that right in time by the bank, the consumer could have changed his mind about concluding the agreement and he may then not have concluded the purchase agreement before a notary. He would thus have been able to avoid exposure to the risks that the property was over-valued at the time of purchase, that the anticipated rental receipts might fail to materialise and that expectations concerning the development of property prices might prove mistaken. It is for the national legislature and courts to guarantee the protection of consumers from the effects of the materialisation of those risks.

3.10. In the area of social law, three judgments are of particular interest, relating, respectively, to the safeguarding of employees' rights in the event of transfers of undertakings,

([40]) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

the protection of pregnant women under the prohibition of discrimination between male and female employees, and the prohibition of discrimination against older workers.

In Case C-478/03 *Celtec* [2005] ECR I-4389 the House of Lords referred a question to the Court concerning the application of Directive 77/18/EEC [41] to the privatisation of vocational training services in Wales.

In the course of administrative reform undertaken in 1989, the United Kingdom Government established Training and Enterprise Councils (TECs), which were to take over from the government-funded local agencies run by civil servants which were responsible for programmes for the training of young people and the unemployed. In order to bring about that gradual privatisation, the TECs were allowed to use Department of Employment premises and were given free access to the information systems and databases. For an initial three-year period, staff from the local agencies were seconded to the TECs, while retaining their status as civil servants. The Department of Employment employees continued to perform the same tasks in the same buildings, under the supervision of the TECs. It was, however, anticipated, as stated in a letter of 16 December 1991 from the Secretary of State to the Chairmen of the TECs' Staffing Group, that the TECs would ultimately become the employers of those staff. At the end of their secondment, employees were given the choice either of returning to the Department of Employment, and being redeployed, or of continuing to carry on the same activity as employees of the TECs. Against that background, the Department of Employment entered into an agreement with the TECs in 1992, which set out their respective obligations upon a civil servant changing his or her status in order to become an employee of a TEC.

The questions referred for a preliminary ruling related to the interpretation of the term 'date of a transfer', within the meaning of Article 3(1) of Directive 77/187/EEC, when the transfer is structured as a complex transaction taking place in a number of stages.

The Court made clear first of all that the privatisation of vocational training activities falls within the scope of Directive 77/187/EEC, and went on to reply to the national court that the transfer of the contracts of employment and employment relationships, pursuant to Article 3(1) of Directive 77/187/EEC, necessarily takes place on the same date as that of the transfer of the undertaking. The date of such transfer is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.

It follows therefore that, under Article 3(1) of Directive 77/187/EEC, contracts of employment or employment relationships existing on the date of the transfer referred to by that provision between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between those parties in that respect.

(41) Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61, 5.3.1977, p. 26).

In Case C-191/03 *McKenna* (judgment of 8 September 2005, not yet published in the ECR), the Court was required once again to consider the question of the rights of pregnant employees within the Community legal system and the principle of non-discrimination between male and female employees.

Ms McKenna found that she was pregnant in January 2000. She was obliged to take sick leave on medical advice, on account of a pregnancy-related illness that lasted for nearly the whole term of her pregnancy. As from 6 July 2000, because she had exhausted her right to full pay during sick leave, her pay was reduced to half-pay. From 3 September to 11 December 2000 Ms McKenna was on maternity leave and received her pay at the full rate. When that leave expired, because Ms McKenna was still unfit for work on medical grounds, her pay was once more reduced by half. Ms McKenna also had her period of incapacity for work on account of her pregnancy set against her rights to sick leave.

The issue at the crux of this case is whether incapacity for work caused by a pregnancy-related illness and occurring during the period of pregnancy may, in accordance with Community law, be treated in the same way as incapacity for work caused by any other illness and be set against the number of days during which, under the sick-leave scheme applicable in the particular instance, employees are entitled to have their pay maintained in full, and then in part.

By the questions it referred, the Irish Labour Court asked, first, whether the national rules at issue fell within the ambit of Article 141(1) and (2) EC and of Directive 75/117/EEC ([42]), or of Directive 76/207/EEC ([43]). Secondly, the national court sought to ascertain whether, in the light of the provisions of Community law applicable, such rules must be regarded as discriminatory.

With regard to the provisions of Community law applying here, the Court replied that a sick-leave scheme which treats in the same way female workers suffering from a pregnancy-related illness and other workers suffering from an illness unrelated to pregnancy comes within the scope of Article 141 EC and Directive 75/117/EEC.

A scheme such as that in issue defines the conditions governing maintenance of the worker's pay in the event of absence on grounds of illness. It makes the maintenance of full pay subject to the condition that a maximum annual period of sick leave is not exceeded and, if that period is exceeded, it provides for the maintenance of pay at 50 % of its level for a maximum total period determined over the course of four years. Such a scheme, which results in a reduction in pay and subsequently in an exhaustion of entitlement to pay, operates automatically on the basis of an arithmetical calculation of the days of absence on grounds of illness.

As regards the second aspect of the questions referred, the Court considered that the sick-leave scheme at issue was not discriminatory.

([42]) Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45, 19.2.1975, p. 19).

([43]) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40).

The Court held that Article 141 EC and Directive 75/117/EEC must be construed as meaning that the following do not constitute discrimination on grounds of sex:

– a rule of a sick-leave scheme which provides, in regard to female workers absent prior to maternity leave by reason of an illness related to their pregnancy, as also in regard to male workers absent by reason of any other illness, for a reduction in pay in the case where the absence exceeds a certain duration, provided that the female worker is treated in the same way as a male worker who is absent on grounds of illness and provided that the amount of payment made is not so low as to undermine the objective of protecting pregnant workers;

– a rule of a sick-leave scheme which provides for absences on grounds of illness to be offset against a maximum total number of days of paid sick-leave to which a worker is entitled over a specified period, whether or not the illness is pregnancy-related, provided that the offsetting of the absences on grounds of pregnancy-related illness does not have the effect that, during the absence affected by that offsetting after the maternity leave, the female worker receives pay that is lower than the minimum amount to which she was entitled during the illness which arose while she was pregnant.

Case C-144/04 *Mangold* (judgment of 22 November 2005, not yet published in the ECR) sheds an interesting light on protection against age-related discrimination in the area of social policy. In this case, the Arbeitsgericht München (Labour Court, Munich, Germany) referred a series of questions to the Court for a preliminary ruling in the course of proceedings between an employee and his employer concerning the application of the German Law on part-time working and fixed-term contracts. That law authorises until the end of December 2006, without restrictions relating to reason, duration or renewal, the conclusion of fixed-term contracts of employment where an employee has reached the age of 52, unless there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. The purpose of Directive 2000/78/EC ([44]), whose interpretation the reference for a preliminary ruling sought, is to lay down a general framework for combating certain forms of discrimination, including discrimination on grounds of age, as regards employment and occupation. Differences of treatment on grounds directly related to age are therefore, as a rule, prohibited. However, Article 6(1) of that directive authorises Member States to provide that such differences of treatment do not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, relating in particular to employment policy or the labour market, and if the means of achieving that aim are appropriate and necessary. The directive envisages, for example, on that basis, special conditions on access to employment, employment and occupation, including dismissal conditions, for older workers in order to promote their vocational integration or ensure their protection.

The Court found that the purpose of the German law is plainly to promote the vocational integration of unemployed older workers. In the Court's view, the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, so it must as a rule be regarded as justifying, 'objectively and reasonably', within the meaning of the abovementioned provison, a

([44]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

difference of treatment on grounds of age. It is also necessary for the means used to achieve that legitimate objective to be 'appropriate and necessary'. In that respect, it is unarguable in the view of the Court that the Member States enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. However, in the case of the German legislation, a situation occurs in which all workers who have reached the age of 52 may, without distinction, until they retire, be offered fixed-term contracts of employment which may be renewed an indefinite number of times, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment. The risk is that such workers may, during a substantial part of their working life, be excluded from the benefit of stable employment which, however, constitutes a major element in the protection of workers. In the view of the Court, such legislation goes beyond what is appropriate and necessary to attain the objective pursued and cannot therefore be justified under Article 6(1) of Directive 2000/78/EC.

The case also raised another issue. As authorised by Directive 2000/78/EC, the period prescribed for transposing that directive into domestic law had, as regards Germany, been extended until 2 December 2006, so that it had not expired when the contract of employment at issue in the case was concluded. The Court was led to conclude that that fact was immaterial. According to the case-law of the Court, during the period prescribed for transposition of a directive the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. Moreover, the Court stresses that it is not Directive 2000/78/EC which lays down the principle of equal treatment in the field of employment and occupation. That is a principle whose source is to be found in various international instruments and in the constitutional traditions common to the Member States, so the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. Observance of that principle cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age. Thus, a national court hearing a dispute involving that principle must provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law, even where the period prescribed for transposition of the directive has not yet expired.

With regard to company law, mention should be made of Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, relating to criminal proceedings in which several natural persons were prosecuted before Italian courts for offences relating to false accounting committed prior to 2002, the year in which new criminal provisions covering those offences entered into force in Italy.

According to the Italian courts, application of those new provisions, which are more favourable than the previous provisions, would prevent criminal prosecutions being brought against the accused. The provisions set out a significantly shorter limitation period (four and a half years instead of seven and a half years maximum), make the bringing of a prosecution subject to the requirement that a complaint be lodged by a member or creditor who considers that he has been adversely affected by the false accounts, and exclude any penalty in respect of false accounting which has no significant effect or is of minimal importance and does not exceed certain thresholds.

It was in this context that the Tribunale di Milano (Milan District Court) and the Corte d'appello di Lecce (Lecce Appeal Court) asked the Court of Justice whether the offence of false accounting is covered by the First Companies Directive (First Directive 68/151/EEC) ([45]) and whether the new Italian provisions are compatible with the Community-law requirement that penalties provided for under national legislation for breaches of Community provisions must be appropriate (that is to say, effective, proportionate and dissuasive).

The Court found, first of all, that penalties for false accounting are designed to punish serious infringements of the fundamental principle of the Fourth and Seventh Companies Directives (Fourth Directive 78/660/EEC ([46]) and Seventh Directive 83/349/EEC ([47])), that the annual accounts of companies must provide a true and fair view of a company's assets and liabilities, financial position and profit or loss.

The Court then held that the system of penalties provided for, in the event of failure to disclose the annual accounts, under Article 6 of the First Directive is to be understood as covering not only the case of the absence of any disclosure of annual accounts but also the case of disclosure of annual accounts which have not been drawn up in accordance with the rules prescribed by the Fourth Directive, in other words, the disclosure of false accounts. Article 6 of the First Directive cannot however be treated as applying in the case of non-compliance with the obligations relating to consolidated accounts, laid down in the Seventh Directive, to which the First Directive makes no reference.

Having made that finding, the Court held that the principle of the retroactive application of the more lenient penalty forms part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly, the directives on company law.

The Court concluded, therefore, that the requirement relating to appropriate penalties in the event of failure to disclose the annual accounts, imposed by Article 6 of the First Directive, cannot be relied on as such against accused persons by the authorities of a Member State, within the context of criminal proceedings, for the purpose of assessing the compatibility with that requirement of criminal law provisions that are more favourable to the accused which have entered into force since the offences were committed, where their incompatibility could have the effect of setting aside application of the system of more lenient penalties provided for by those provisions. A directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

([45]) First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

([46]) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

([47]) Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

3.11. With regard to the environment, Case C-364/03 *Commission* v *Greece* (judgment of 7 July 2005, not yet published in the ECR) deserves a specific mention. By this judgment, the Court ruled in infringement proceedings brought against the Hellenic Republic by the Commission which alleged that it had not complied with its obligations under Directive 84/360/EEC [48].

Under that directive, the Member States had until 30 June 1987 to transpose its provisions (Article 16) and to adopt the necessary measures to prevent or reduce air pollution from industrial plants within the Community (Article 1). The plants concerned by the directive are listed in Annex I, which refers inter alia to the energy industry, within which thermal power stations fall, but excludes nuclear power stations. Article 13 of the directive provides that States are to implement policies, strategies and appropriate measures 'for the adaptation of existing plants to the best available technology', taking into account criteria such as the plant's technical characteristics, its rate of utilisation and the length of its life, the nature and volume of polluting emissions from it, and the limitation of cost.

In the case at issue, a thermal power station, located in Crete, Greece, was the subject of a complaint regarding environmental pollution, prompting the Commission to take an interest in the power station's operation and in the question whether the Greek authorities were complying with Directive 84/360/EEC. The Commission concluded that Article 13 of the directive was being infringed, in particular in that emissions of sulphur dioxide and nitrogen oxide from the power station had not diminished between 1992 and 2002 and Greece had not adopted limit values for emissions from industrial plants; it therefore decided to bring an action before the Court.

The Greek Government argued, however, that measures had been taken to extend the power station and to put in place a policy and strategy appropriate for adapting it to the best available technology. It also submitted that the quality of the environment in the area was excellent and that the low level of pollution would present no danger to public health.

The Court first of all noted the obligations which result from Article 13 of the directive and the need to adapt plants to developments in available technology. The Court then stated, not accepting the Greek Government's submissions, that Article 2(1) of Directive 84/360/EEC gives a definition of atmospheric pollution according to which it consists of 'the introduction into the atmosphere by man, directly or indirectly, of substances or energy having a harmful effect such as to imperil human health and to damage biological resources and ecosystems'.

The Court thereupon concluded that 'inasmuch as it is undisputed that emissions of certain substances have harmful effects on human health and on biological resources and ecosystems, the obligation on Member States to adopt the measures necessary to reduce the emissions of those substances is not dependent on the general environmental situation of the region in which the industrial plant in question is located'. A Member State

[48] Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ L 188, 16.7.1984, p. 20).

which does not determine policies or strategies for progressively adapting, in line with the best available technology, the steam turbine units and the gas turbine units of a power station fails to fulfil its obligations under Article 13 of Directive 84/360/EEC.

While Article 13 of Directive 84/360/EEC does not expressly oblige the Member States to adopt limit values for emissions from industrial plants, the adoption of limit values for the emissions from such plants would nonetheless constitute an extremely useful measure in the context of the implementation of a policy or strategy for the purposes of Article 13.

A reduction in the maximum level of harmful substances in the fuel may be regarded as a measure for adapting industrial plant such as a power station to the best available technology, since such a reduction is capable of bringing about an appreciable lowering in the level of atmospheric pollution originating from plant of that kind. That presupposes, however, that the level of the harmful substances in the fuel concerned corresponds to the lowest content available on the market. The progressive replacement of burners and — provided that they go hand in hand with other actions having a direct impact on the emissions of the power station concerned — supervisory measures and the monitoring of emissions are also capable of constituting measures for adapting a power station to the best available technology.

The Court concluded that the Hellenic Republic had failed to fulfil its obligations under Article 13 of Directive 84/360/EEC.

B — Composition of the Court of Justice

(Order of precedence as at 18 January 2005)

First row, from left to right:

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

Second row, from left to right:

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

Third row, from left to right:

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

Fourth row, from left to right:

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

1. Members of the Court of Justice

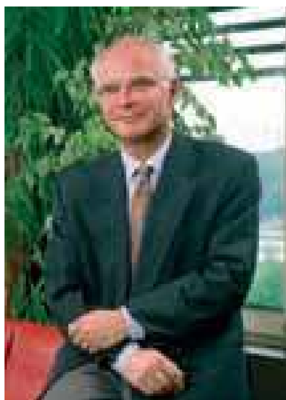
(in order of their entry into office)

Vassilios Skouris

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

Francis Geoffrey Jacobs

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



Claus Christian Gulmann

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

Antonio Mario La Pergola

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

Jean-Pierre Puissochet

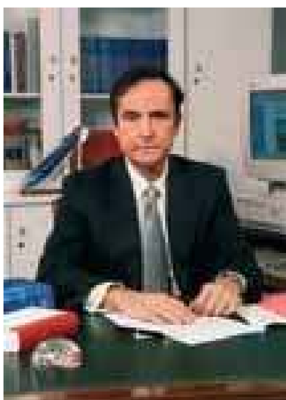
Born 1936; State Counsellor (France); Director, subsequently Director-General, of the Legal Service of the Council of the European Communities (1968–73); Director-General of the Agence nationale pour l'emploi (1973–75); Director of General Administration, Ministry of Industry (1977–79); Director of Legal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

Philippe Léger

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

Peter Jann

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



Dámaso Ruiz-Jarabo Colomer

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

Romain Schintgen

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

Ninon Colneric

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

Stig von Bahr

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

Antonio Tizzano

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

José Narciso da Cunha Rodrigues

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

Christiaan Willem Anton Timmermans

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

Leendert A. Geelhoed

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

Christine Stix-Hackl

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

Allan Rosas

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

Rosario Silva de Lapuerta

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

Koen Lenaerts

Born 1954; lic.iuris, 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 Chair of the Federal Government's Advisory Council on Global Change (WBGU, 1996); Professor of International Law, International Business Law and European Law at the University of St Gallen (1999); Director of the Institute for European and International Business Law at the University of St Gallen (2000); Deputy Director of the Master of Business Law programme at the University of St Gallen (2001); Advocate General at the Court of Justice since 7 October 2003.

Luís Miguel Poiares Pessoa Maduro

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

Konrad Hermann Theodor Schiemann

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

Jerzy Makarczyk

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

Pranas Kūris

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

Endre Juhász

Born 1944; graduated in law from the University of Szeged, Hungary (1967); Hungarian Bar Entrance Examinations (1970); post-graduate studies in comparative law, University of Strasbourg, France (1969–72); Official in the Legal Department of the Ministry of Foreign Trade (1966–74), Director for Legislative Matters (1973–74); First Commercial Secretary at the Hungarian Embassy, Brussels, responsible for European Community issues (1974–79); Director at the Ministry of Foreign Trade (1979–83); First Commercial Secretary, then Commercial Counsellor to the Hungarian Embassy in Washington DC, USA (1983–89); Director-General of the Ministry of Trade and Ministry of International Economic Relations (1989–91); chief negotiator for the Association Agreement between Hungary and the European Communities and their Member States (1990–91); Secretary-General of the Ministry of International Economic Relations, Head of the Office of European Affairs (1992); State Secretary at the Ministry of International Economic Relations (1993–94); State Secretary, President of the Office of European Affairs, Ministry of Industry and Trade (1994); Ambassador Extraordinary and Plenipotentiary, Chief of Mission of the Republic of Hungary to the European Union (January 1995 to May 2003); chief negotiator for the accession of the Republic of Hungary to the European Union (July 1998 to April 2003); Minister without portfolio for the coordination of matters of European integration (from May 2003); Judge at the Court of Justice since 11 May 2004.

George Arestis

Born 1945; graduated in law from the University of Athens (1968); 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 in Brno; Judge at the Constitutional Court of Czechoslovakia (1992); Envoy to the Council of Europe (1993–98); President of the Committee of Ministers' Deputies of the Council of Europe (1995); Senior Director at the Ministry of Foreign Affairs (1998–2000); President of the Czech and Slovak branch of the International Law Association (1999–2001); Judge at the Constitutional Court (2000–04); Member of the Legislative Council (1998–2000); Member of the Permanent Court of Arbitration at The Hague (2000); Professor of Public International Law at Masaryk University, Brno (2001); Judge at the Court of Justice since 11 May 2004.

Ján Klučka

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

Uno Lõhmus

Born 1952; Doctor of Law in 1986; Member of the Bar (1977–98); Visiting Professor of Criminal Law at Tartu University; Judge at the European Court of Human Rights (1994–98); Chief Justice of the Supreme Court of Estonia (1998–2004); Member of the Legal Expert 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; Advisor to Latvian Parliament on questions of international law, constitutional law and legislative reform; Latvian Ambassador to Germany and Switzerland (1992–93), Austria, Switzerland and Hungary (1994–95); Vice-Prime Minister and Minister for Justice, acting Minister for Foreign Affairs (1993–94); Conciliator at the Court of Conciliation and Arbitration within the OSCE (from 1997); Member of the Permanent Court of Arbitration (from 2001); elected as Judge to the European Court of Human Rights in 1995, re-elected in 1998 and 2001; numerous publications in the spheres of constitutional and administrative law, law reform and European Community law; Judge at the Court of Justice since 11 May 2004.

Aindrias Ó Caoimh

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

Roger Grass

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

2. Changes in the composition of the Court of Justice in 2005

In 2005 there was no change in the composition of the Court of Justice.

3. Order of precedence

from 1 January to 6 October 2005

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

R. Grass, Registrar

from 7 October to 31 December 2005

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

R. Grass, Registrar

4. Former Members of the Court of Justice

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

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

— Presidents

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

— Registrars

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

Chapter II

The Court of First Instance of the European Communities

A — Proceedings of the Court of First Instance in 2005

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

For the Court of First Instance, 2005 was a year marked by several significant developments in terms of the volume and nature of the disputes brought before it.

The statistics for 2005, first of all, show a clear rise in the number of cases disposed of. In 2005 the Court completed 610 cases, which represents an increase of 69 % compared with the previous year. This substantial increase must be viewed in context, as 117 of the cases completed by the Court during 2005 were brought to a close as a result of their transfer to the Civil Service Tribunal. Nevertheless, even if such transfers are left out of account, the number of cases disposed of has still increased significantly (37 %) compared with 2004. It is worthy of note that, as in previous years, the vast majority (83 %) of the cases decided in 2005 were decided by a Chamber of three judges. Of those cases, 10 % were decided by a Chamber of five judges and 1 % by the Court sitting as a single judge. In 2005 the Court delivered its first judgments by a Grand Chamber (composed of 11 judges) in six cases concerning actions for damages against the Community (section III).

Alongside this very marked increase in the number of cases decided, which is to a very great extent attributable to the arrival of 10 new judges in 2004, there was a drop in the number of cases lodged in 2005. There were 469 cases lodged, compared with 536 in 2004, which represents a decrease of 12 %. However, that decrease must be viewed in context as, in 2004, 21 cases were referred by the Court of Justice as a result of the transfer of jurisdiction which allows the Court of First Instance to rule in direct actions brought by the Member States. In fact the number of cases lodged this year is comparable with the number lodged in 2003 (466 cases). Moreover, the volume of litigation on the Community trade mark has stabilised, with 98 cases brought in 2005 (compared with 110 in 2004), which nonetheless represents, like last year, approximately 20 % of the number of cases brought. On the other hand, the number of staff cases continued to rise in absolute terms (151 cases compared with 146 in 2004) and in relative terms (32 % compared with 27 % the previous year).

In short, at the end of 2005, there are 1 033 cases pending, which represents a decrease of 141 cases, or 12 %, compared with the previous year. Following the transfer of 117 cases to the Civil Service Tribunal of the European Union, 152 staff cases are pending before the Court of First Instance, which corresponds to just over a year of the Court's work in this area.

Although the statistics concerning judicial activity for 2005 thus appear to reveal a very encouraging turnover of cases, the average duration of proceedings nonetheless increased fairly significantly in 2005, in that, apart from in staff cases and intellectual property cases, it is now 25.6 months (compared with 22.6 months in 2004).

It must also be borne in mind, when the statistics for this year are analysed, that the creation of the Civil Service Tribunal will, from next year onwards, greatly affect the volume and nature of the litigation before the Court of First Instance, thus allowing it to concentrate more specifically on certain areas of commercial litigation. The Civil Service Tribunal

of the European Union constitutes the first judicial panel to hear and determine at first instance certain classes of action or proceeding brought in specific areas, as permitted by Article 225a EC since the entry into force of the Treaty of Nice. The seven new judges of the Tribunal, attached to the Court of First Instance, took their oath on 5 October 2005. On 2 December 2005 the President of the Court of Justice recorded that the European Union Civil Service Tribunal had been constituted in accordance with law. That decision was published on 12 December 2005 in the *Official Journal of the European Communities* ([1]). As a result, on 15 December 2005, in accordance with Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal ([2]), 117 cases, originally brought before the Court of First Instance, in which the written procedure was not completed by that date, were transferred, by order, to the Civil Service Tribunal.

The establishment of the Civil Service Tribunal also led the Court of First Instance to amend its Rules of Procedure to insert provisions relating to appeals against decisions of the new tribunal ([3]). This amendment of the Rules of Procedure has, moreover, made it possible both to adapt the provisions relating to legal aid in the light of the provisions of Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes ([4]), and to clarify the scope or adapt the other provisions of the rules, in particular by increasing the flexibility of the expedited procedure provided for by Article 76a of the rules. As regards that provision, in 2005, 12 applications for an expedited procedure were made, which was granted in six cases. Apart from cases removed from the register, the Court of First Instance also disposed of three cases using that procedure in 2005 ([5]). The expedited procedure has once again demonstrated its effectiveness as each of those cases was decided within seven months ([6]).

In addition to the major change represented by the attachment to the Court of First Instance of the first of the judicial panels provided for by the Treaty of Nice, on 6 October 2005 the Court of First Instance turned another important page in its history. Hans Jung left his post as Registrar of the Court of First Instance, which he had held since the establishment of that court in 1989. The formal sitting held in honour of his departure provided an opportunity to pay tribute to his invaluable contribution to the establishment and subsequently the development of the Court of First Instance. It also afforded an opportunity for his successor, Emmanuel Coulon, to take the oath.

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

([1]) OJ L 325, 12.12.2005, p. 1.

([2]) OJ L 333, 9.11.2004, p. 7.

([3]) Amendment of the Rules of Procedure of the Court of First Instance, adopted on 12 October 2005 (OJ L 298, 15.11.2005, p. 1).

([4]) OJ L 26, 31.1.2003, p. 41.

([5]) Order of 10 January 2005 in Case T-209/04 *Spain* v *Commission*; judgments of 21 September 2005 in Case T-87/05 *EDP* v *Commission* and of 23 November 2005 in Case T-178/05 *United Kingdom* v *Commission*, not yet published in the ECR.

([6]) Ibid.

I. *Procedural aspects*

a) *Intervention*

The fourth paragraph of Article 40 of the Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, Article 116(3) of the Rules of Procedure of the Court of First Instance provides that the intervener must accept the case as he finds it at the time of his intervention. Those two provisions, interpretation of which is of some complexity, have given rise to a wealth of case-law ([7]), which has been supplemented by two judgments delivered this year.

For instance, in *VKI* v *Commission*, the interveners raised arguments which had not been put forward by the Commission, the party they were supporting, and which, if they had been well-founded, would have entailed the annulment of the contested decision, that is to say, the opposite result to that which the Commission sought ([8]). The Court concluded that those arguments altered the framework of the dispute and were, therefore, inadmissible.

Then, in *Regione autonoma della Sardegna* v *Commission*, certain parties intervening in support of the applicant raised pleas not put forward by the applicant ([9]). The Commission disputed the admissibility of those pleas, arguing that, generally, intervening parties were not entitled to raise pleas different from those relied on by the party in whose support they intervene. However, in its judgment, the Court held that interveners had the right to set out their own pleas 'in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute.' In this case, certain of the interveners' pleas, while different from those relied on by the applicant, were connected to the subject-matter of the dispute and could, therefore, be relied on before the Court.

b) *Raising of an absolute bar to proceedings by the Court of its own motion*

In 2005, the Court applied the principles relating to the raising of an absolute bar to proceedings by the Court of its own motion in a fairly traditional manner.

For instance, in *Freistaat Thüringen* v *Commission*, an error of fact made by the Commission led the Court to raise of its own motion an absolute bar to proceeding arising from a fail-

([7]) See, for example, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1 and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraphs 203 and 212.

([8]) Judgment of 13 April 2005 in Case T-2/03 *Verein für Konsumenteninformation* v *Commission*, not yet published in the ECR.

([9]) Judgment of 15 June 2005 in Case T-171/02 *Regione autonoma della Sardegna* v *Commission*, not yet published in the ECR.

ure to state reasons (10). Similarly, in *Suproco* v *Commission* the Court raised of its own motion two pleas that insufficient reasons were stated for a Commission decision refusing to grant a derogation from certain rules of origin applicable to sugar from the Netherlands Antilles (11). Finally, in *CIS* v *Commission*, it also raised of its own motion a failure to state reasons for a decision on the withdrawal of assistance from the European Regional Development Fund (ERDF) because the decision did not set out the various facts and arguments necessary to allow the Court to review its lawfulness in the light of the pleas raised by the applicant (12).

Moreover, in *Corsica Ferries France* v *Commission*, the Court held that a breach of the rights of the defence does not fall within the scope of an infringement of essential procedural requirements and, therefore, should not be raised by the Court of its own motion, thus confirming the case-law already reported in the 2004 Annual Report (13). Similarly, in its judgment in *Common Market Fertilisers* v *Commission*, the Court refused to raise of its own motion a plea of illegality against a provision of the customs rules because it was not based on the lack of competence of the author of the contested measure (14).

c) *Removal of documents from the case file*

In *Gollnisch and Others* v *Parliament*, the applicants produced before the Court an opinion of the legal service of the Parliament drawn up on behalf of the Bureau of that institution. The Parliament requested the removal of that document from the case file. That request provided an opportunity for the Court, in granting the Parliament's request, to confirm its now settled case-law that it would be contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court by persons other than the services at whose request they were drawn up unless such production has been authorised by the institution concerned or ordered by that Court (15).

In contrast, in *Entorn* v *Commission*, the Court rejected a request for removal from the case-file of statements made by a third party to officials from the Unit on Coordination of Fraud Prevention (UCLAF) (16). According to the Court, the applicant provided a plausible expla-

(10) Judgment of 19 October 2005 in Case T-318/00 *Freistaat Thüringen* v *Commission*, not yet published in the ECR.

(11) Judgment of 22 September 2005 in Case T-101/03 *Suproco* v *Commission*, not yet published in the ECR.

(12) Judgment of 22 June 2005 in Case T-102/03 *CIS* v *Commission*, not yet published in the ECR.

(13) Judgment of 15 June 2005 in Case T-349/03 *Corsica Ferries France* v *Commission*, not yet published in the ECR, which cites the judgment of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* (under appeal, C-403/04 P and C-405/04 P), not yet published in the ECR, paragraph 425.

(14) Judgment of 27 September 2005 in Joined Cases T-134/03 and T-135/03 *Common Market Fertilisers* v *Commission* (under appeal, Case C-443/05 P), not yet published in the ECR.

(15) Order of 10 January 2005 in Case T-357/03 *Gollnisch and Others* v *Parliament*, not yet published in the ECR, which cites the judgments in Case C-445/00 *Austria* v *Council* [2002] ECR I-9151, paragraph 12, and in Case T-44/97 *Ghignone and Others* v *Council* ECR-SC I-A-223 and II-1023, paragraph 48.

(16) Judgment of 18 January 2005 in Case T-141/01 *Entorn* v *Commission* (under appeal, C-162/05 P), not yet published in the ECR.

nation of the fact that it had been able to obtain the document without committing any unlawful acts that might preclude it from being able to rely on the document in the proceedings before the Court.

II. *Proceedings concerning the legality of measures*

In this section an account will be given of the main decisions reached in actions for annulment on the basis of Article 230 EC ([17]). It must be observed that there is inevitably a degree of subjectivity in the selection of such decisions for discussion and that, therefore, several subjects tackled by the Court in 2005 will not be discussed individually in this report despite the clarification of the law resulting from some of those decisions. These include decisions on the subject of the ERDF ([18]), the European Agricultural Guidance and Guarantee Fund (EAGGF) ([19]), the European Social Fund (ESF) ([20]), the rules governing the use of certain appropriations by the Parliament ([21]) and decisions handed down in the areas of fisheries ([22]), plant-protection products ([23]), public procurement ([24]), anti-dumping measures ([25]), the environment ([26]) and the approximation of legislation relating to it ([27]).

A. Admissibility of actions brought under Article 230 EC

As in 2004, the Court of First Instance had occasion, in 2005, to examine, either of its own motion or on application by a party, the conditions for the admissibility of actions for annulment ([28]).

([17]) Mention could also be made of certain judgments (and orders) delivered in actions for damages. In the light of the condition that the conduct complained of must be unlawful for the liability of the Community for unlawful acts to arise, those judgments (and orders) sometimes also call into question the legality of measures adopted by the institutions.

([18]) Judgments of 18 October 2005 in Case T-60/03 *Regione Siciliana* v *Commission* and of 31 May 2005 in Case T-272/02 *Comune di Napoli* v *Commission*, not yet published in the ECR.

([19]) *Entorn* v *Commission*, footnote 16 above.

([20]) Judgment of 30 June 2005 in Case T-347/03 *Branco* v *Commission* and order of 13 October 2005 in Case T-249/02 *Fintecna* v *Commission*, not yet published in the ECR.

([21]) Order in *Gollnisch and Others* v *Parliament*, footnote 15 above.

([22]) Order in *Spain* v *Commission*, footnote 5 above, and judgment of 19 October 2005 in Case T-415/03 *Cofradía de pescadores de 'San Pedro' de Bermeo and Others* v *Council*, not yet published in the ECR.

([23]) Judgment of 28 June 2005 in Case T-158/03 *Industrias Químicas del Vallés* v *Commission* (under appeal, Case C-326/05 P), not yet published in the ECR.

([24]) See, for example, judgment of 6 July 2005 in Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission*, not yet published in the ECR.

([25]) Judgments of 17 March 2005 in Case T-192/98 *Eurocoton* v *Council,* in Case T-195/98 *Ettlin Gesellschaft für Spinnerei und Weberei and Others* v *Council* and in Case T-177/00 *Philips* v *Council*, not published in the ECR.

([26]) *United Kingdom* v *Commission*, footnote 5 above.

([27]) Judgment of 5 October 2005 in Joined Cases T-366/03 and T-235/04 *Land Oberösterreich* v *Commission* (under appeal, Joined Cases C-439/05 P and C-454/05 P), not yet published in the ECR.

([28]) For examples of cases where the Court examined the question of its own motion, see the judgments of 14 April 2005 in Case T-88/01 *Sniace* v *Commission* (under appeal, Case C-260/05 P); in *Land Oberösterreich* v *Commission*, footnote 27 above, and of 25 October 2005 in Case T-43/04 *Fardoom and Reinard* v *Commission*, and order of 7 September 2005 in Case T-358/03 *Krahl* v *Commission*, not yet published in the ECR.

1. Measures against which an action may be brought

In addition to the application of the case-law according to which only a measure which produces binding legal effects may be the subject of an action for annulment ([29]), this year the Court had occasion to deal with the less common issue of the connection between actions for annulment and contract cases. For instance, in *Helm Düngemittel.* v *Commission*, the Court confirmed that measures adopted by the institutions which form part of a contractual framework from which they are not separable are not one of the measures referred to by Article 249 EC which may be the subject of an action for annulment ([30]). Basing its view in this case on the contractual nature of the relationship between the applicant and the Commission, the Court dismissed as inadmissible an action for annulment brought against a measure which was not separable from that relationship and refused to reclassify the action as an application made under Article 238 EC (which gives the Community courts jurisdiction to give judgment pursuant to an arbitration clause contained in a contract concluded by the Community).

2. Time limit for bringing an action

Under the fifth paragraph of Article 230 EC, proceedings for annulment must be instituted within two months of the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. According to settled case-law, the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure. Moreover, failing publication or notification, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action. It is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period.

Accordingly, the Court held that where an applicant requests communication of a decision excluding eligible expenditure under a programme implemented under the ERDF more than four months after becoming aware of it, a reasonable time within the meaning of the case-law cited is exceeded ([31]).

([29]) See, for example, the order of 16 November 2005 in Case T-343/03 *Deutsche Post and Securicor Omega Express* v *Commission*, not published in the ECR, and judgment of 15 December 2005, in Case T-33/01 *Infront WM* v *Commission*, not yet published in the ECR. See also, as regards the fact that preparatory measures may not form the subject of an action for their annulment, the order of 22 July 2005 in Case T-376/04 *Polyelectrolyte Producers Group* v *Council and Commission* (under appeal, Case C-368/05 P), not yet published in the ECR.

([30]) Order of 9 June 2005 in Case T-265/03 *Helm Düngemittel* v *Commission*, not yet published in the ECR.

([31]) Order of 27 May 2005 in Case T-485/04 *COBB* v *Commission*, not published in the ECR.

Then, in *Olsen* v *Commission* (32), the Court had an opportunity to add an important rider to the application of those principles to litigation on State aid (33). In that case, the applicant contested a Commission decision authorising State aid paid to a Spanish competitor. Its action was lodged just over six months after the Kingdom of Spain, the only addressee of the contested decision, was notified of it. As the applicant was not the addressee of the contested decision, the Court held in its judgment that the criterion of notification of the decision is not applicable to it. As to whether, in this case, the criterion of publication or that of the day on which a measure came to the knowledge of an applicant was applicable, the Court cited the case-law according to which, with regard to measures which, in accordance with the established practice of the institution concerned, are published in the *Official Journal of the European Union*, the criterion of the day on which a measure came to the knowledge of an applicant was not applicable; in such circumstances it was the date of publication which marked the starting point of the period prescribed for instituting proceedings (34).

In the area of State aid, decisions by means of which the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure and decides that the measure is compatible with the common market are to be the subject of a summary notice published in the *Official Journal of the European Union* (35). Moreover, in accordance with the recent but established practice of the Commission, the summary notice includes a reference to the website of the Secretariat General of the Commission and the statement that the full text of the decision in question, from which all confidential information has been removed, can be found there in the authentic language version or versions. The fact that the Commission gives third parties full access to the text of a decision placed on its website, combined with publication of a summary notice in the *Official Journal of the European Union* enabling interested parties to identify the decision in question and notifying them of this possibility of access via the Internet, must be considered to be publication for the purposes of Article 230(5) EC. In this case, the applicant could legitimately expect that the contested decision would be published in the *Official Journal of the European Union*. As its application was lodged even before such publication, it was held admissible.

3. Legal interest in bringing proceedings

The applicant's interest in bringing proceedings must be assessed as at the time when the application was lodged (36). However, the Court held in *First Data* v *Commission* that, in the

(32) Judgment of 15 June 2005 in Case T-17/02 *Olsen* v *Commission* (under appeal, Case C-320/05 P), not yet published in the ECR.

(33) The same point was made in three orders: of 15 June 2005 in Case T-98/04 *SIMSA and Others* v *Commission*, not published in the ECR; of 19 September 2005 in Case T-321/04 *Air Bourbon* v *Commission*, and of 21 November 2005 in Case T-426/04 *Tramarin* v *Commission*, not yet published in the ECR.

(34) Judgment in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 39.

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

(36) Judgment in Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 30.

interest of the proper administration of justice, that consideration relating to the time when the admissibility of the action is assessed cannot prevent the Court from finding that there is no longer any need to adjudicate on the action in the event that an applicant who initially had a legal interest in bringing proceedings has lost all personal interest in having the contested decision annulled on account of an event occurring after that application was lodged ([37]). In that case, the applicants contested a decision by which the Commission opposed, on the basis of Article 81 EC, certain rules governing membership of a bank card scheme. Those rules were withdrawn after the action was brought so that, in the view of the Court, the applicants' interest in bringing proceedings, in so far as it had any, had ceased to exist.

The facts of that case, like those of the four other cases brought to a close in 2005, gave the Court an opportunity to apply the established principle that an interest in bringing proceedings cannot be assessed on the basis of a future, hypothetical event. In particular, if the interest which an applicant claims concerns a future legal situation he must demonstrate that the prejudice to that situation is already certain ([38]).

Thus, in three orders of 10 March 2005, the Court applied those principles in declaring inadmissible for lack of a legal interest in bringing proceedings several actions brought by Italian undertakings contesting a Commission decision declaring incompatible with the common market certain aid to firms in Venice and Chioggia ([39]). Raising an absolute bar to proceeding of its own motion, the Court found that the applicants had no legal interest in bringing proceedings on the basis essentially of the decision of the Italian Republic not to proceed to recover the aid from the applicants. To substantiate their interest in bringing proceedings the applicants confined themselves to citing future and uncertain circumstances, namely the possibility that the Commission would make a different assessment from that made by the Italian Republic and would require it to recover the alleged aid from the applicant undertakings.

Accordingly, first of all, since it is only in the future and uncertain event of a Commission decision calling into question the implementing decision of the Italian Republic that their legal position would be affected, the applicant undertakings have not demonstrated that there was a vested, present interest in seeking the annulment of the contested decision. Moreover, even in that event, the applicant undertakings would not thereby be deprived of any effective legal remedy, given the possibility they had of bringing actions in the national courts against any decisions of the competent national authority requiring them to return the alleged aid. Secondly, as to the arguments of the applicants regarding the future effects of the contested decision in so far as it declares the aid schemes at issue incompatible with the common market and thus precludes their implementation in the fu-

([37]) Order of 17 October 2005 in Case T-28/02 *First Data and Others* v *Commission*, not yet published in the ECR.

([38]) Judgment in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33.

([39]) Orders of 10 March 2005 in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-267/00, T-268/00, T-271/00, T-275/00, T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, not yet published in the ECR; Case T-269/00 *Sagar* v *Commission* and Case T-288/00 *Gardena Hotels and Comitato Venezia Vuole Vivere* v *Commission*, not published in the ECR. See, also, order of 20 September 2005 in Case T-258/99 *Makro Cash & Carry Nederland* v *Commission*, not published in the ECR.

ture, the Court observes that the Commission decision finding that the scheme is incompatible with the common market cannot be regarded as being of individual concern to the potential beneficiaries of an aid scheme, solely by virtue of their objective capacity (40). Accordingly, any claim that there is an interest in bringing proceedings solely in that capacity would in any event be inoperative for the purposes of assessing the admissibility of these actions.

Again applying the case-law on interest in bringing proceedings, the Court, in its judgment in *Sniace* v *Commission*, also on State aid, declared inadmissible an action brought by Sniace contesting a decision of the Commission declaring aid it had received incompatible with the common market (41). Sniace disputed the classification of the aid as State aid in the decision, claiming that it affected it adversely in particular because of the risk of legal action and certain effects on its relations with the credit institution which granted the aid. The Court dismissed the action on the basis that the applicant had no legal interest in bringing proceedings, citing the case-law mentioned above according to which if the interest upon which an applicant relies concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain (42). The applicant had not shown at all that, first, the alleged risk of legal proceedings was, in this case, vested and present, nor that, second, the classification as State aid could entail the obligation to notify the Commission in future of any measure adopted by that credit institution in favour of the applicant, nor, finally, that the damage, which, according to the applicant, results from the conduct of the administrative procedure, could be linked to the classification as State aid in the contested decision.

4. Standing to bring proceedings

The fourth paragraph of Article 230 EC provides: '[a]ny natural or legal person may … institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

a) *Direct concern*

In several cases concerning Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding (43), the Court held that Members of Parliament acting in their own name (and not on behalf of the party to which they belong) were not directly concerned by a regulation laying down the conditions for the financing

(40) See, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15, and Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 77.

(41) *Sniace* v *Commission*, footnote 28 above.

(42) *NBV and NVB* v *Commission*, footnote 38 above, paragraph 33.

(43) OJ L 297, 15.11.2003, p. 1.

of political parties, inter alia because the economic consequences of that regulation did not affect their legal position but only their factual situation ([44]). On the other hand, in two of those cases, the Court held that the regulation at issue, which creates a status for political parties at European level, directly affects certain political groupings. First, the creation of an advantageous legal status from which some political groupings may benefit while others are excluded from it, is likely to affect equality of opportunity between political parties. Second, decisions on the financing of political parties taken in accordance with the criteria established by the contested regulation fall within the limited discretion of the competent authority. Such decisions are thus purely automatic in nature deriving solely from the contested regulation without the application of other intermediary rules ([45]).

Moreover, in its judgment in *Regione Siciliana* v *Commission*, the Court clarified certain details of the application of the criterion of direct concern where decisions are adopted relating to aid granted by the ERDF ([46]). That judgment marks a certain development in relation to previous decisions made in slightly different contexts ([47]). In that case, the applicant disputed a decision relating to the cancellation of the aid granted to the Italian Republic and then paid to the applicant for the construction of a dam. The Commission argued that the decision was not of direct concern to the applicant as the Member States formed a screen between the Commission and the final beneficiary of the assistance. However the Court dismissed that plea of inadmissibility, citing case-law to the effect that for a person to be directly concerned by a measure that is not addressed to him, the measure must directly affect the individual's legal situation and its implementation must be purely automatic, resulting from Community rules alone to the exclusion of other intermediate rules ([48]).

With regard, first of all, to the alteration of the applicant's legal situation, the Court held that the contested decision had had the initial direct and immediate effect of changing the applicant's financial situation by depriving it of the balance of the assistance remaining to be paid by the Commission and requiring it to repay the sums paid by way of advances. As regards, next, the criterion that the contested decision should be automatically applicable, the Court observed that it is automatically and of itself that the contested decision produces its legal effects on the applicant, that is to say, as a result of Community law alone, and the national authorities enjoy no discretion in their duty to implement the decision. On this occasion the Court dismissed the argument that the national authorities may in theory decide to release the applicant from the financial consequences that the contested decision entails for it directly. A national decision providing funding of that magni-

([44]) Orders of 11 July 2005 in Case T-13/04 *Bonde and Others* v *Parliament and Council*, not published in the ECR; in Case T-40/04 *Bonino and Others* v *Parliament and Council*; and in Case T-17/04 *Front national and Others* v *Parliament and Council* (under appeal, Case C-338/05 P), not yet published in the ECR.

([45]) Orders in *Bonino and Others* v *Parliament and Council* and *Front national and Others* v *Parliament and Council*, footnote 44 above.

([46]) *Regione Siciliana* v *Commission*, footnote 18 above.

([47]) Orders of 6 June 2002 in Case T-105/01 *SLIM Sicilia* v *Commission* [2002] ECR II-2697, and of 8 July 2004 in Case T-341/02 *Regione Siciliana* v *Commission* (under appeal, Case C-417/04 P), not yet published in the ECR.

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

tude would remain extraneous to the application in Community law of the contested decision and its effect would be to put the applicant back in the situation it occupied before the contested decision was adopted, by bringing about in its turn a second alteration of the applicant's legal situation which was changed in the first place, and automatically, by the contested decision.

b) *Individual concern*

Applying the principles derived from settled case-law, the Court held that the measures contested in their respective applications were not of individual concern to: non-attached Members of the European Parliament, as regards a change in the conditions of the use of appropriations applying to political groups and non-attached Members ([49]); banana producers, as regards two regulations fixing certain conditions for the importation of those products into the Community ([50]); producers of Italian wine, as regards a regulation amending the system of traditional designations ([51]); Italian traders in the sugar sector, as regards a regulation fixing the intervention price for white sugar ([52]); and the proprietor of a forestry undertaking, as regards a decision approving a rural development programming document for the Republic of Austria ([53]).

The judgment in *Sniace* v *Commission*, which gave the Court an opportunity to clarify once again the conditions for the application of the fourth paragraph of Article 230 EC in the area of State aid, calls for further comment ([54]). In that case, Sniace disputed a Commission decision finding measures adopted for the benefit of Lenzing Lyocell, an Austrian company, to be compatible with the common market. The Court raised of its own motion the question of the applicant's standing to bring proceedings over that decision and, in particular, the question whether it was of individual concern to it in the light of the criteria defined for the first time by the Court in its judgment *COFAZ and Others* v *Commission* ([55]). According to those criteria, in the field of State aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure initiated pursuant to Article 88(2) EC in respect of an individual grant of aid are recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the contested decision. That was not the position in this case. First, the applicant played only a minor role in the course of the administrative procedure, as it lodged no complaint nor any observations which had a significant impact on the conduct

([49]) Order in *Gollnisch and Others* v *Parliament*, footnote 15 above.

([50]) Judgment of 3 February 2005 in Case T-139/01 *Comafrica and Dole Fresh Fruit Europe* v *Commission*, not yet published in the ECR.

([51]) Order of 28 June 2005 in Case T-170/04 *FederDoc and Others* v *Commission*, not yet published in the ECR.

([52]) Order of 28 June 2005 in Case T-386/04 *Eridania Sadam and Others* v *Commission*, not yet published in the ECR.

([53]) Order of 28 February 2005 in Case T-108/03 *von Pezold* v *Commission*, not yet published in the ECR.

([54]) *Sniace* v *Commission*, footnote 28 above.

([55]) Judgment in Case 169/84 *COFAZ and Others* v *Commission* [1986] ECR 391, paragraph 25.

of the procedure. Second, analysis of the physical characteristics, the price and the manufacturing processes of the products sold by the applicant and Lenzing Lyocell did not lead the Court to find that they were in direct competition, as the applicant did not, moreover, establish that the contested decision was capable of significantly affecting its position on the market.

In a different context, the Court held, in its judgment in *Infront WM* v *Commission* ([56]), that the applicant, as the holder of the broadcasting rights for an event considered by the United Kingdom to be of national interest within the meaning of Directive 89/552/EEC ([57]), was individually concerned by a Commission decision which made it possible to rely on the measure adopted by the United Kingdom as against broadcasting organisations established in another Member State, as that decision was such as to restrict its freedom to use rights it had previously acquired.

B. Competition rules applicable to undertakings

In 2005 the Court delivered eleven judgments adjudicating on the substantive rules prohibiting anti-competitive agreements, once again essentially in the matter of cartels ([58]). That high number can be contrasted with the single judgment relating to Article 82 EC ([59]) and the three judgments concerning substantive issues relating to merger control ([60]).

1. Scope of the competition rules

In ***Piau* v *Commission***, the Court once again made it clear that the competition rules can, in certain circumstances, apply in the area of sport ([61]). In this case, the Commission had rejected, on grounds of lack of Community interest, a complaint by the applicant challenging the Fédération internationale de football association (FIFA) Players' Agents Regula-

([56]) *Infront WM* v *Commission*, footnote 29 above.

([57]) 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 L 298, 17.10.1989, p. 23), as amended.

([58]) Judgments of 26 January 2005 in Case T-193/02 *Piau* v *Commission*, not yet published in the ECR (under appeal, Case C-171/05 P); of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR (under appeal, Case C-328/05 P); of 18 July 2005 in Case T-241/01 *Scandinavian Airlines System* v *Commission*; of 27 July 2005 in Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission*; of 15 September 2005 in Case T-325/01 *DaimlerChrysler* v *Commission*; of 25 October 2005 in Case T-38/02 *Groupe Danone* v *Commission* (under appeal, Case C-3/06 P); of 29 November 2005 in Case T-33/02 *Britannia Alloys & Chemicals* v *Commission*; Case T-52/02 *SNCZ* v *Commission*; Case T-62/02 *Union Pigments* v *Commission*; Case T-64/02 *Heubach* v *Commission*, and of 6 December 2005 in Case T-48/02 *Brouwerij Haacht* v *Commission*, none yet published in the ECR.

([59]) *Piau* v *Commission*, footnote 58 above.

([60]) *EDP* v *Commission*, footnote 5 above; judgments of 14 December 2005 in Case T-209/01 *Honeywell* v *Commission* and Case T-210/01 *General Electric* v *Commission*, none yet published in the ECR.

([61]) *Piau* v *Commission*, footnote 58 above.

tions. In its judgment, the Court held that football clubs and the national associations grouping them together are undertakings and associations of undertakings respectively, within the meaning of Community competition law: consequently, FIFA, which brings together national associations, itself constitutes an association of undertakings within the meaning of Article 81 EC. On the basis of that initial finding, the Court held that the Players' Agents Regulations constituted a decision by an association of undertakings. The purpose of the occupation of players' agent was to introduce, on a regular basis, and for a fee, a player to a club with a view to employment or to introduce two clubs to one another with a view to concluding a transfer contract. It was therefore an economic activity involving the provision of services, which did not fall within the scope of the specific nature of sport, as defined by the case-law.

2. Procedure for penalising anti-competitive practices

In ***Sumitomo Chemical and Others* v *Commission***, the Court held that the fact that the limitation period of five years laid down by the Community rules for punishing infringements of Articles 81 EC and 82 EC has expired does not prevent the Commission from finding an infringement without imposing a fine after the expiry of such a period (62). The Court made it clear that the fact that limitation does not apply in respect of a mere finding of an infringement is not contrary to the principle of legal certainty, the principles common to the Member States or the presumption of innocence. However, the Court also held that if the Commission is lawfully to find an infringement in respect of which the limitation period has expired, it must still establish that it has a 'legitimate interest' in doing so (63). In this instance, the Commission had not considered whether such an interest existed, which justified the annulment of the decision in so far as it concerned the applicants.

3. Points raised on the scope of Article 81 EC

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

By decision of 10 October 2001, the Commission found that DaimlerChrysler AG had, either itself or through its Belgian and Spanish subsidiaries, infringed the Community competition rules by concluding agreements with its distributors in Germany, Belgium and Spain concerning the retailing of passenger cars of the Mercedes-Benz make. In its judgment in the action brought by DaimlerChrysler, the Court confirmed that the latter had participated, through its Belgian subsidiary, in an 'anti-price-slashing' agreement with its

(62) Judgment of 6 October 2005 in Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Others* v *Commission*, not yet published in the ECR. See, at the material time, Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1). See, thereafter, Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

(63) Case 7/82 *GVL* v *Commission* [1983] ECR 483.

Belgian dealers, but did, however, criticise the Commission's analysis in relation to the German and Spanish markets [64].

On the German market, the applicant was, in particular, alleged to have instructed its agents, first, to sell new cars as far as possible only to customers in their own contract territory thus avoiding internal competition and, second, to require payment of a deposit of 15 % of the price of the vehicle for orders for new cars from customers from outside the territory. In its judgment the Court observed that, while the EC Treaty prohibits coordinated anti-competitive conduct by two or more undertakings, conversely unilateral conduct on the part of a manufacturer is not covered by the prohibition. The Court found in this instance that DaimlerChrysler had acted unilaterally. The Commission was thus wrong to take the view that the German agents to which DaimlerChrysler had given instructions bore a commercial risk which meant that they could be classified as independent operators; those agents should, in reality, have been treated in the same way as employees of DaimlerChrysler, integrated in that undertaking and forming an economic unit with it.

As regards the Spanish market, DaimlerChrysler was alleged to have prohibited its dealers from delivering passenger cars to leasing companies having no specified lessee, thus preventing them from building up stock and supplying a vehicle quickly. Nonetheless, the Court found that Spanish law requires that every leasing company must already have identified a lessee for the leasing contract at the time when the vehicle is acquired, irrespective of the disputed provisions of the dealership agreement. It followed that, by virtue of that legislation alone, companies outside the Mercedes-Benz group were in the same position as those within the group: consequently the restrictions on supplying leasing companies in Spain were not restrictions on competition within the meaning of Article 81(1) EC.

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

In ***Piau* v *Commission*** [65], referred to above, the Commission had held that the compulsory nature of the licence required by the FIFA regulations in question might be justified under Article 81(3) EC. In its judgment, the Court pointed out that the requirement to hold a licence in order to carry on the occupation of players' agent was a barrier to access to that economic activity and affected competition: accordingly, it could be accepted only in so far as the conditions set out in Article 81(3) EC were met. The Court found that the Commission had not made a manifest error of assessment in taking the view that the restrictions stemming from the compulsory nature of the licence might benefit from such an exemption. First, the need to raise professional and ethical standards for the occupation of players' agent in order to protect players; second, the fact that competition was not eliminated by the licence system; third, the virtual absence of any national rules; and fourth, the lack of any collective organisation for players' agents were all circumstances which justified the action taken by FIFA.

[64] *DaimlerChrysler* v *Commission*, footnote 58 above.

[65] *Piau* v *Commission*, footnote 58 above.

c) *Fines*

In the course of 2005 the Court delivered 10 judgments involving the lawfulness or appropriateness of fines for infringements of Article 81 EC [66]. For the most part those judgments applied principles which are now well established. This part of the report will therefore focus solely on the most salient developments which, once again, concern essentially the application of the guidelines for calculating fines ('the Guidelines') [67]. It is also possible to detect an appreciable increase in the number of cases concerning the conditions under which the Commission may, following the annulment or amendment of a fine, be required to reimburse interest on the fine paid or bank guarantee charges incurred in order to avoid the immediate payment of the fine [68].

— **Guidelines**

In 2005, as in previous years, the Court defined the conditions for applying a number of the rules for calculating fines set out in the Guidelines. In particular, the Court adjudicated on the criteria allowing the Commission, first, to assess the gravity of the infringement, second, to apply differential treatment to co-perpetrators of an infringement and, third, to assess whether there are any aggravating or attenuating circumstances.

Gravity

According to Section 1 A of the Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

The Court has several times had occasion to emphasise the importance of the first criterion (the nature of the infringement) in relation to the criteria of the actual impact of the infringement and the size of the relevant market. The Court therefore held in ***Groupe Danone* v *Commission*** that, pursuant to the Guidelines, agreements or concerted practices involving, in particular, price-fixing and customer-sharing may be classified as 'very serious' infringements on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area [69].

[66] *Tokai Carbon and Others* v *Commission*, footnote 58 above; *Scandinavian Airlines System* v *Commission*, footnote 58 above; *Brasserie nationale and Others* v *Commission*, footnote 58 above; *DaimlerChrysler* v *Commission*, footnote 58 above; *Groupe Danone* v *Commission*, footnote 58 above; *Britannia Alloys & Chemicals* v *Commission*, footnote 58 above; *SNCZ* v *Commission*, footnote 58 above; *Union Pigments* v *Commission*, footnote 58 above; *Heubach* v *Commission*, footnote 58 above, and *Brouwerij Haacht* v *Commission*, footnote 58 above.

[67] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3)

[68] Judgment of 21 April 2005 in Case T-28/03 *Holcim (Deutschland)* v *Commission* (under appeal, Case C-282/05 P), and the order of 4 May 2005 in Case T-86/03 *Holcim (France)* v *Commission*, neither published in the ECR; order of 20 June 2005 in Case T-138/04 *Cementir — Cementerie del Tirreno* v *Commission*, and judgment of 14 December 2005 in Case T-135/02 *Greencore Group* v *Commission*, not yet published in the ECR.

[69] *Groupe Danone* v *Commission*, footnote 58 above. See also, to that effect, *Scandinavian Airlines System* v *Commission*, footnote 58 above.

As regards the second criterion (the impact of the cartel) the Court also held in ***Groupe Danone* v *Commission*** that where an agreement having an anti-competitive object is implemented, even if only in part, it cannot be held that the agreement had no impact on the market ([70]). The Court further held that, irrespective of the geographic extent of the infringement and of the proportion which the sales concerned bear to sales made in the whole of the European Community, the absolute value of those sales is also a relevant indication of the gravity of the infringement, since it is an accurate reflection of the economic importance of the transactions which the infringement seeks to remove from normal competition ([71]). Finally, in ***Scandinavian Airlines System* v *Commission***, the Court held that, since, for the purpose of assessing the gravity of the infringement, the actual impact of the infringement on the market did not have to be taken into account unless it was measurable, in the case of an overall agreement designed to restrict potential competition, the actual effect of which was *ex hypothesi* difficult to measure, the Commission was not required to show with precision the actual impact of the cartel on the market and to quantify it, but could confine itself to estimates of the probability of such an effect ([72]).

Differential treatment

The assessment of the gravity of an infringement under the Guidelines is based on a flat-rate approach, in that the basic amount of the fine is in principle independent of the turnover of the undertaking concerned. Section 1 A of the Guidelines nonetheless authorises the Commission to apply differential treatment to undertakings which participated in the infringement by dividing them into a number of categories which correspond to distinct starting amounts. The question of which turnover figure is appropriate in order to apply differential treatment to undertakings has already given rise to case-law, which has been further clarified in 2005 by three cases emphasising the Commission's discretion in that regard.

First, in the '**Specialty graphite**' case, the Commission chose to divide the undertakings according to their worldwide turnover in each of the products concerned by the infringements penalised, in this instance price-fixing without market-sharing ([73]). The applicants disputed that choice and claimed, in particular, that the Commission should have taken account of their turnover in the European Economic Area (EEA), as in the 'lysine' case ([74]). In its judgment, the Court approved the Commission's approach, however, pointing out that although an approach based on worldwide turnover may be appropriate in the case of a global market-sharing cartel (see the 'graphite electrodes' case ([75])), that does not mean that such an approach must be excluded where there is no market-sharing. It was appropriate in the case in question to take into account total turnover on the markets in ques-

([70]) *Groupe Danone* v *Commission*, footnote 58 above.

([71]) Ibid.

([72]) *Scandinavian Airlines System* v *Commission*, footnote 58 above.

([73]) *Tokai Carbon and Others* v *Commission*, footnote 58 above.

([74]) See, in particular, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 (under appeal, Case C-397/03 P).

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

tion (and not on all the products of the undertaking). As regards the comparison with the 'lysine' case, the Court pointed out that the differential treatment was based in that case on the total turnover achieved by the undertakings from all their activities, while in this instance the Commission had used as a basis worldwide turnover from sales of the relevant product.

Second, in ***SNCZ* v *Commission***, the Court held that the Commission had not committed a manifest error of assessment in taking into account, for the purposes of differential treatment, relevant market share and turnover in the market affected, since the total turnover of the undertakings concerned gave only an incomplete picture of the real situation ([76]).

Third, the Commission's discretion in the choice of an appropriate turnover figure was recognised in particularly generous terms in ***Scandinavian Airlines System* v *Commission*** since, in that case, the Court inferred from the case-law that, for the purpose of determining the amount of the fine, the Commission 'is free to take into account the turnover figure of its choice, provided it does not appear unreasonable by reference to the circumstances of the case' ([77]). The Commission, by choosing to have taken into account both the total turnover of the undertakings fined and their turnover in the market concerned, could not be found to have made a manifest error of assessment.

Aggravating circumstances

In the course of 2005 the Court expressed its view on aggravating circumstances involving a threat of reprisals aimed at extending a cartel, repeated infringements and the fact that the undertaking fined had acted as ringleader.

According to the fourth indent of Section 2 of the Guidelines, retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement may constitute an aggravating circumstance. In ***Groupe Danone* v *Commission*,** the Court approved the Commission's view that where an undertaking which is a member of a cartel forces another member of that cartel to extend the cartel's scope by threatening that member with reprisals if it does not cooperate, that may be treated as an aggravating circumstance. Such conduct has the direct effect of aggravating the damage caused by the cartel. An undertaking which conducts itself in that way must for that reason bear a special responsibility ([78]). However, the Commission had not sufficiently established the causal link between the threats made by Danone, on the one hand, and the extension of the cooperation between Danone and Interbrew, on the other hand. The Court therefore adjusted the fine.

In the first indent of Section 2 of the Guidelines, the Commission also stated that it intended to treat repeated infringement as an aggravating circumstance justifying an increase in the basic amount of the fine. In ***Groupe Danone* v *Commission*,** the Commission had considered to be an aggravating circumstance the fact that Danone had already been

([76]) *SNCZ* v *Commission*, footnote 58 above.

([77]) *Scandinavian Airlines System* v *Commission*, footnote 58 above.

([78]) *Groupe Danone* v *Commission*, footnote 58 above.

found to have infringed Article 81 EC on two previous occasions for facts of the same type, although the applicant was known by a different name at the time and the two earlier infringements were in a different sector ([79]). In its judgment, the Court approved the Commission's approach, confirming that the analysis of the gravity of the infringement must take account of any repeated infringements. The Court stated in that regard that, given the objective pursued, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past.

Finally, pursuant to the third indent of Section 2 of the Guidelines, the Court reduced, in the 'specialty graphite' case, the percentage increase imposed by the Commission on SGL Carbon on account of its role as ringleader, since that role was overestimated in relation to the two other members of the cartel ([80]).

Attenuating circumstances

Section 3 of the Guidelines sets out a non-exhaustive list of attenuating circumstances which entail a reduction in the basic amount of the fine. It is noteworthy that, in ***Brasserie nationale and Others* v *Commission***, the Court held in essence that a situation (legal uncertainty as to the validity of certain contracts) which was not such as to justify a restrictive practice could not be taken into account as an attenuating circumstance warranting a reduction in the fine imposed because of that restrictive practice ([81]).

— 10 % ceiling

Regulation No 17 provided, as Article 23(2) of Regulation (EC) No 1/2003 now does, that for each undertaking and association of undertakings participating in an infringement of Article 81 EC or Article 82 EC, the fine is not to exceed 10 % of its total turnover in the preceding business year. Although the application of that rule does not in general give rise to many difficulties, the Court had an opportunity in 2005 to clarify two important points concerning the rule.

First, in the '**Specialty graphite'** case, the Court specified the conditions under which the upper limit of 10 % must be applied where the infringement has been expressly imputed to two companies, one of which is a subsidiary of the other, which separate before the decision imposing the fine is adopted ([82]). In such a situation, the Court determined that, since the 10 % ceiling refers to the financial year preceding the date of the decision, it aims to protect undertakings 'against excessive fines which could destroy them commercially'. Thus, the turnover refers not to the period of the infringements penalised, but to a period closer to the imposition of the fine (the financial year preceding the imposition of the fine). Accordingly, the 10 % ceiling must be applied

([79]) *Groupe Danone* v *Commission*, footnote 58 above.

([80]) *Tokai Carbon and Others* v *Commission*, footnote 58 above.

([81]) *Brasserie nationale and Others* v *Commission*, footnote 58 above.

([82]) *Tokai Carbon and Others* v *Commission*, footnote 58 above.

initially to each separate addressee of the decision and it is only if, subsequently, several addressees constitute the 'undertaking' (the economic entity responsible for the infringement), again at the date of the decision, that the upper limit may be applied to their cumulative turnover. In other words, if the economic unit formed by the companies has broken up before the decision, each addressee is entitled to have the 10 % ceiling applied individually to it.

Second, in ***Britannia Alloys & Chemicals* v *Commission***, the Court specified the conditions under which the upper limit applies where the undertaking which committed the infringement has transferred all its activities before the decision penalising the infringement ([83]). Under Article 15(2) of Regulation No 17, the upper limit must be calculated on the basis of turnover in the business year preceding the decision imposing the fine. However, in *Britannia Alloys & Chemicals* v *Commission*, the applicant had, by the time of the decision, become a non-trading company and was no longer active in the zinc sector. Since its turnover in the business year preceding the decision was therefore nil, the Court ruled that it could not serve as a basis for determining the upper limit provided for by Regulation No 17. The Court held that it is clear from the objectives of the system of which Article 15(2) of Regulation No 17 forms part and from the case-law that the application of the 10 % upper limit presupposes, first, that the Commission has available the turnover for the last business year preceding the date of adoption of the decision and, second, that those data represent a full year of normal economic activity over a period of 12 months. Accordingly, the Commission was obliged, in order to fix the maximum limit of the fine, to refer to the most recent turnover corresponding to a complete year of economic activity. The Commission was therefore entitled, in this instance, to set the upper limit by reference to the business year ending on 30 June 1996, even though the decision penalising the infringement had been taken in December 2001.

— The Leniency Notice

A large number of the cases dealt with in 2005 have again concerned the application of the 1996 Leniency Notice, although there have, as yet, been no cases concerning the 2002 notice ([84]).

If an undertaking is to benefit from a reduction in its fine for not contesting the facts, pursuant to the second indent of Section D 2 of the Leniency Notice, it must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections ([85]). The Court was prompted to develop these principles in ***Groupe Danone* v *Commission*** and held that 'a statement that the facts are not substantially contested, together … with a series of observations by which the applicant purports to clarify the significance of certain facts but which, in reality, contests those facts,

([83]) *Britannia Alloys & Chemicals* v *Commission*, footnote 58 above.

([84]) Commission notice on the non-imposition or reduction of fines in cartel cases (OJ C 207, 18.7.1996, p. 4, 'the Leniency Notice'), now replaced by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).

([85]) Case T-347/94 *Mayr Melnhof* v *Commission* [1998] ECR II-1751, paragraph 309.

cannot be considered to facilitate the Commission's task of identifying and penalising the relevant infringement of the competition rules' ([86]). In such circumstances, an undertaking is not entitled to a reduction under Section D 2, second indent, of the Leniency Notice, for not contesting the facts.

In addition, in the ***Specialty graphite*** case, the Court acknowledged that the Commission enjoys a broad discretion in determining the identity of the 'first' undertaking to have provided the Commission with decisive evidence within the meaning of Section B(b) of the Leniency Notice, the Court censuring the Commission only where that discretion is 'manifestly exceeded' ([87]).

Finally, in ***Brouwerij Haacht* v *Commission***, the Court held that the supply of information, albeit decisive, can justify a reduction in the fine imposed on the undertaking concerned only in so far as the information 'did indeed go beyond what the Commission could require that the applicant supply pursuant to Article 11 of Regulation No 17' ([88]). Since the information supplied by the applicant in this case did not satisfy that requirement, the Commission did not err when it refrained from reducing the applicant's fine on that account.

— Exercise of the Court's unlimited jurisdiction

The Court has unlimited jurisdiction in relation to fines, which allows it to reduce or increase the fines imposed by the Commission. In the course of 2005, the Court exercised its jurisdiction, inter alia, to ensure that appropriate action was taken where the Commission had erred in its assessment ([89]) or to correct an error in the order in which the stages for calculating fines laid down by the Guidelines were applied ([90]).

Developing this area further, the Court went into more detail about when it might exercise its unlimited jurisdiction to take account of facts subsequent to adoption of the contested decision. In ***Scandinavian Airlines System* v *Commission***, the applicant asked the Court to reduce its fine in order to take account of what it considered to be its exemplary conduct after the decision ([91]). In its judgment, the Court nonetheless held that the applicant could not infer from the case-law a principle by virtue of which a fine imposed on an undertaking could be reduced in consideration of conduct adopted by the undertaking after adoption of the decision imposing the fine. On this occasion the Court was concerned to make clear that such a reduction, 'even if it were possible, could in any event be operated by the Community judicature only with great care and in altogether exceptional circumstances, particularly because such a practice could be perceived as an incentive to commit

([86]) *Groupe Danone* v *Commission*, footnote 58 above.

([87]) *Tokai Carbon and Others* v *Commission*, footnote 58 above.

([88]) *Brouwerij Haacht* v *Commission*, footnote 58 above.

([89]) *Tokai Carbon and Others* v *Commission*, footnote 58 above; and *Groupe Danone* v *Commission*, footnote 58 above.

([90]) *Groupe Danone* v *Commission*, footnote 58 above.

([91]) *Scandinavian Airlines System* v *Commission*, footnote 58 above.

infringements while speculating on a possible reduction in the fine by reason of alteration of the undertaking's conduct after the decision'.

4. Points raised on Article 82 EC

In ***Piau* v *Commission*** [92], referred to above, the Court held that in the market affected by the FIFA rules in question, which is a market for the provision of services where the buyers are players and clubs and the sellers are agents, FIFA can be regarded as acting on behalf of football clubs, since it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs.

In the Court's view, because the FIFA regulations are binding for national associations that are members of FIFA and the clubs forming them, the clubs have a collective dominant position on the market for the provision of players' agents' services. Consequently, the Court held, contrary to the Commission, that FIFA, which is the emanation of those clubs and operates on this market through them, holds a dominant position on the market for players' agents' services: it is of little significance in this respect that FIFA does not act directly on the market as an economic operator and that its involvement stems from rule-making activity. However, the Court found that the Commission had rightly taken the view that the practices complained of were not an abuse of a dominant position. It followed that the lawfulness of the rejection of the complaint on the ground of lack of Community interest in continuing with the procedure was not affected by the error of law found.

5. Points raised on merger control

Of the four cases concerning the application of Regulation (EEC) No 4064/89, now replaced by Regulation (EC) No 139/2004, three are worthy of mention [93].

In the first place, ***EDP* v *Commission*** [94] made some important points concerning the burden of proof where it is denied that the commitments proposed by the parties are sufficient and the appraisal of concentrations in a sector which is not open to competition.

Thus, the Court stated that it is for the Commission to demonstrate that the commitments validly submitted by the parties to a concentration do not render that concentration, as modified by the commitments, compatible with the common market. The Court added, however, that the fact that the Commission regards commitments which have been val-

[92] *Piau* v *Commission*, footnote 58 above.

[93] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1, corrected version in OJ L 257, 21.9.1990, p. 13, subsequently repealed by Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1)). The only case not covered in this report concerns a decision applying the established case-law on the fact that an individual cannot contest the Commission's refusal to bring infringement proceedings (order of 25 May 2005 in Case T-443/03 *Retecal and Others* v *Commission*, not yet published in the ECR).

[94] *EDP* v *Commission*, footnote 5 above.

idly submitted as insufficient constitutes an improper reversal of the burden of proof only where the Commission bases that finding of their insufficiency, not upon an assessment of the commitments based on objective and verifiable criteria, but rather upon the assertion that the parties have been unable to provide sufficient evidence to allow it to carry out a substantive assessment. Furthermore, the Commission is entitled to reject non-binding commitments, since, in doing so, it does not transfer the burden of proof to the parties but denies the certain and measurable character which the commitments must display.

The Court also stated that in a sector which was not open to competition 'a monopoly represents the ultimate dominant position, which for that reason cannot be strengthened' on the market concerned and that therefore there was no competition that could be impeded by the concentration. In this case, Energias de Portugal (EDP), the incumbent Portuguese electricity company, and Eni SpA, an Italian energy company, were jointly to acquire Gás de Portugal (GDP), the incumbent Portuguese gas company. The transaction would have had effects on certain gas markets in particular. Those markets were to be open to competition by 1 July 2004 for non-domestic customers and by 1 July 2007 for all other customers. However, Member States could, in certain circumstances, derogate from particular obligations and postpone implementation of the directive, Portugal being entitled to just such a derogation until 2007. In the Court's view, by basing the prohibition of the concentration on the strengthening of dominant positions having as their consequence a significant impediment to competition on gas markets not open to competition by virtue of the derogation, the Commission had disregarded the effects, and consequently the scope, of that derogation.

Nevertheless, that error was confined to the gas markets alone. The Commission's findings concerning the situation on the electricity markets in Portugal, which were also affected by the transaction concerned, were therefore not undermined. The Court held on this point that the Commission had not made a manifest error of assessment in considering that the concentration would cause the disappearance of an important potential competitor (GDP) on all the electricity markets and that the commitments of the undertakings concerned did not resolve the problems which it had identified. The conclusion concerning the electricity markets was sufficient, on its own, to justify the decision finding the concentration in question to be incompatible with the common market, for which reason the Court did not annul the decision.

In the second place, in ***General Electric* v *Commission***, the Court made a number of points clarifying the scope of its power to review Commission merger decisions and further explaining the assessment for competition purposes of transactions with conglomerate effects, developing the judgments of the Court of First Instance and subsequently the Court of Justice in *Tetra Laval* v *Commission* ([95]). The Court laid great stress on the particular importance, first, of effective judicial review when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration and, second, of the quality of the evidence produced by the Commission in cases of conglomerate-type concentrations.

([95]) *General Electric* v *Commission*, footnote 60 above. See also, Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381 and Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987.

The origins of the case lie in a Commission decision of 3 July 2001, by which the Commission declared a merger between the United States companies Honeywell International and General Electric Company (GE) incompatible with the common market; as a result, the merger could not be put into effect in the European Union. In its judgment in *General Electric* v *Commission*, the Court upheld the Commission's finding that the merger would lead to the creation or strengthening of dominant positions, as a result of which effective competition would be significantly impeded on three markets, the market for jet engines for large regional aircraft, the market for corporate jet aircraft engines and the market for small marine gas turbines. The Court therefore approved the Commission's reasoning that the merger would strengthen the applicant's pre-merger dominance on the worldwide market for jet engines for large regional aircraft. In that respect the Commission's finding that the merger would prevent customers from enjoying the benefits of price competition was well founded. Furthermore, the Court upheld the Commission's rejection of the commitment proposed by the parties to the merger to resolve the competition problems which the merger created on that market. The Court noted on this point that structural commitments proposed by the parties can be accepted by the Commission only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future. Likewise, the Court rejected GE's arguments criticising the Commission's findings relating to the creation of dominant positions on the market for corporate jet aircraft engines and on the market for small marine gas turbines.

Those findings were sufficient for it to be held that the merger was incompatible with the common market. In its judgment the Court did not therefore annul the decision, although the Commission had made certain errors, in particular in the course of its analysis of the conglomerate effects of the merger.

The Court held that the Commission did not make a manifest error of assessment in concluding that prior to the merger GE was in a dominant position on the market for large commercial jet aircraft engines. For that purpose, the Commission could legitimately conclude that GE had used the commercial strength of subsidiaries in its group, in particular that of its aircraft leasing company, GECAS, to secure contracts which it probably would not have won without those companies' involvement. Conversely, the Court held that three separate limbs of the Commission's decision were unlawful.

First of all, the pillar of the contested decision relating to the strengthening of GE's pre-merger dominant position on the market for large commercial jet aircraft engines, resulting from vertical overlap, was not founded. In particular, the Court noted that the effects on the market anticipated by the Commission were caused by certain future behaviour on the part of the merged entity and that therefore the onus was on the Commission to produce convincing evidence as to the likelihood of that behaviour. In some cases, such evidence may consist of economic studies establishing the likely development of the market situation and demonstrating that there is an incentive for the merged entity to behave in a particular way, without prejudice, however, to the principle that the evaluation of evidence should be unfettered. In this case, the Commission had available all the evidence required to assess to what extent the behaviour in question was liable to constitute abuse

of a dominant position prohibited by Article 82 EC and be sanctioned as such. According to the Court, the Commission was therefore wrong not to have taken into account the deterrent effect of Article 82 in assessing the likelihood of the behaviour in question. The Commission's analysis was, on that account, vitiated by an error of law which necessarily entailed a manifest error of assessment.

The Court then went on to hold that the Commission had not established to a sufficient degree of probability that the merged entity would have extended to the markets on which Honeywell was present (avionics and non-avionics products) GE's practices on the market for large commercial jet aircraft engines, by which GE exploited its leasing subsidiary's financial and commercial strength. In any event, the Commission had not adequately established that those practices, assuming that they had been put into effect, would have been likely to create dominant positions on the various avionics and non-avionics markets concerned. Consequently, the Commission had made a manifest error of assessment on this point too.

Finally, the Court held that the Commission had not sufficiently established that the merged entity would have engaged in bundling of GE's engines and Honeywell's avionics and non-avionics products. In the absence of such sales, the mere fact that the merged entity would have had a wider range of products than its competitors was not sufficient to establish that it could have benefited from the creation or strengthening of dominant positions on the different markets concerned. Consequently, the Commission also made a manifest error of assessment on this point.

The third and final judgment in the sphere of merger control (***Honeywell International* v *Commission***) concerned the same transaction as that at issue in *General Electric* v *Commission* ([96]). Less wide ranging than the latter judgment, it nonetheless gave the Court an opportunity to apply the rule that, where the operative part of a decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. Consequently, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because it could not have had a decisive effect on the operative part adopted by the Commission. Applying that rule to Honeywell's action, the Court dismissed the action on the ground that there was no effective plea in law. The applicant had not contested all the pillars of reasoning, each of which constituted a sufficient legal and factual basis for the contested decision. It followed that its action could not have resulted in the annulment of the contested decision, even if all the pleas validly submitted by the applicant had been well founded.

C. State aid

1. Basic rules

a) *Constituent elements*

There has been no decision of the Court this year which has made any signification contribution to the clarification of the constituent elements of the definition of State aid. How-

([96]) *Honeywell* v *Commission*, footnote 60 above.

ever, in several cases, the Court has annulled Commission decisions for errors of fact or assessment, or for failure to state reasons.

For instance, in *Freistaat Thüringen* v *Commission*, the Court raised several failures to state reasons and several factual errors made by the Commission in its examination of certain measures for the benefit of a German company ([97]). Those errors led it to annul the contested decision in part, where necessary raising of its own motion a plea of failure to state reasons.

Similarly, in its judgment in *Confédération nationale du Crédit mutuel* v *Commission*, the Court annulled, for failure to state reasons, a Commission decision finding that measures adopted by the French Republic involving the collection and management of regulated savings under the 'Livret bleu' system constituted State aid that is incompatible with the common market ([98]). Having found that the operative part of the decision did not make it possible to ascertain the State measure or measures held by the Commission to constitute aid, the Court examined the reasons stated for the decision. Following that examination, it concluded that the analysis, by the decision, of the conditions which must be satisfied for State intervention to be treated as aid did not enable the measures found by the Commission to have conferred aid on Crédit Mutuel to be identified exactly. For example, the Court pointed out several ambiguities in the decision as regards the classification of the tax advantage granted to savers using the 'Livret bleu'. The analysis of the decision did not enable it to be determined clearly whether the Commission considered that the tax exemption constituted a transfer of State resources, while leaving the possibility of such an interpretation open. The Court thus held that it was not in a position to exercise its power to review the appraisal of the 'Livret bleu' system by the Commission.

b) *Decision taken following a request to do so by a Member State*

The judgment in *Regione autonoma della Sardegna* v *Commission* ([99]) is the first in which the Court reviewed the legality of a decision taken by the Commission after being requested to do so within two months.

In 1998, the Italian authorities notified the Commission of a planned aid scheme for restructuring small agricultural enterprises in difficulty envisaged by the Region of Sardinia, for a total amount of approximately EUR 30 million. The Commission decided in 2001 that the planned scheme was incompatible with the common market. The Region of Sardinia applied to the Court for the annulment of the Commission decision, taking issue inter alia with the finding that it was not certain that the scheme would benefit only enterprises in difficulty nor that it would restore their viability without unduly distorting competition.

([97]) *Freistaat Thüringen* v *Commission*, footnote 10 above.

([98]) Judgment of 18 January 2005 in Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission*, not yet published in the ECR.

([99]) *Regione autonoma della Sardegna* v *Commission*, footnote 9 above.

Article 7(1) and (7) of Regulation (EC) No 659/1999 ([100]) essentially provides, first, that the formal investigation procedure in the area of State aid is to be closed, as a rule, by means of a decision, and, second, that, should the Member State concerned so request, the Commission is, within two months, to take a decision on the basis of the information available to it. In the present case, the Court found that following the suggested period of 18 months during which the Commission is to endeavour to adopt a decision, the Italian Republic requested the Commission to make a decision within two months. In such a case, the Commission must make a decision in the light of the information available to it, and adopt a negative decision if it is not sufficient to establish that the project under consideration is compatible with the common market. In this case the Commission was entitled to take the view that it was not certain that the benefit of the planned aid would be reserved for enterprises in difficulty. It also sought to obtain information which would enable it to assess the effects of the plan on the enterprises intended to benefit and on competition, but the Italian authorities failed to provide such information. The information available to the Commission was thus not sufficient to establish that the project was compatible with the common market, and it was entitled to adopt a negative decision.

c) *Guidelines*

Although, under Article 87 EC, any aid granted by a State which distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States, certain aid may nonetheless be declared compatible with the common market under the conditions established by the Treaty and rules set by the Commission in certain cases in order to bring the exercise of its discretion within guidelines applicable to various types of aid. In particular, the Commission defined, in guidelines often relied upon before the Court, the conditions under which State aid for rescuing and restructuring firms in difficulty may be declared to be compatible with the common market ([101]). Those conditions include the limitation of aid to the minimum necessary to permit restructuring.

Those rules were at issue inter alia in *Regione autonoma della Sardegna* v *Commission* ([102]) but this report will concentrate on *Corsica Ferries France* v *Commission*, in which the Court held that the Commission had made an erroneous appraisal of the question whether the aid was limited to the minimum, a defect which rendered its decision unlawful ([103]). Although the Commission was under a duty to take into account the whole of the net proceeds of disposal realised in implementation of the restructuring plan, it left out of its calculation a sum of EUR 10 million which represented the net proceeds of disposal of the fixed assets of the Société nationale maritime Corse-Méditerrannée. The Court observed

([100]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

([101]) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

([102]) *Regione autonoma della Sardegna* v *Commission*, footnote 9 above.

([103]) *Corsica Ferries France* v *Commission*, footnote 13 above.

that although the Commission was, in principle, entitled in the exercise of its broad discretion to proceed on the basis of an approximate evaluation of the net proceeds of the disposal of assets under the restructuring plan, that was not the case here since it had the information necessary to assess the aid exactly.

d) *Abuses*

The EC Treaty prohibits not only aid incompatible with the common market but also misuse of aid. That term is clarified in Article 1(g) of Regulation (EC) No 659/1999 which defines it as 'aid used by the beneficiary in contravention of a decision [not to raise objections, a positive decision, a negative decision or a conditional decision of the Commission]'. In 2005 the Court applied that definition in two cases.

First, in *Saxonia Edelmetalle* v *Commission* ([104]) the Commission had initially authorised the payment of aid to several firms in the former German Democratic Republic. However, five years later the Commission found that the aid had been misused within the meaning of Article 88(2) EC, a finding which was contested by one of the two applicants. In its judgment the Court held that the Commission did not make a manifest error of assessment in adopting the decision without ascertaining what the sums at issue had actually been used for. Although they had been requested to provide a large amount of information about the matter the German authorities had furnished only incomplete replies which could be interpreted in two ways, both of which suggested a finding of misuse of aid. Although it is generally for the Commission to establish that the aid it previously authorised has been misused, it nonetheless falls to the Member State to provide all the evidence requested by the Commission following a request to provide information, in the absence of which the Commission is empowered to adopt a decision closing the formal examination procedure on the basis of the information available.

Then, in *Freistaat Thüringen* v *Commission*, the Court annulled part of a Commission decision finding that aid had been misused ([105]). According to the Court, in order to prove that aid granted under an authorised aid scheme was misused, the Commission must establish that the aid was used in contravention of national rules governing that scheme or additional conditions which were accepted by the Member State at the time the scheme was approved. On the other hand, the breach of a mere additional condition unilaterally imposed by the dispenser of the aid without being expressly provided for by such national rules, as approved by the Commission, cannot be considered sufficient to constitute misuse of aid within the meaning of the first subparagraph of Article 88(2) EC. In this case the Court therefore annulled the Commission decision finding aid granted in breach of a criterion unilaterally fixed by the *Land* of Thuringia to have been misused.

([104]) Judgment of 11 May 2005 in Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* v *Commission*, not yet published in the ECR.

([105]) *Freistaat Thüringen* v *Commission*, footnote 10 above.

e) *Recovery*

Where it finds that aid is incompatible with the common market, the Commission may order the Member State to recover it from the recipient. The cancellation of unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previously existing situation on the market ([106]). According to the case-law, that objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, in other words, the undertakings which have actually benefited from it ([107]). However, ascertaining who was the recipient is sometimes difficult in situations where company shares or assets of the undertaking which originally received the aid have been transferred. These complex questions have spawned a substantial body of litigation, illustrated by three cases brought to a close by the Court of First Instance in 2005. Those cases clarified the concept of actually benefiting from aid where aid was granted to a group of firms dissolved before the adoption of the contested decision (*Saxonia Edelmetalle* v *Commission*), or to a joint venture whose assets were partly transferred before the adoption of the contested decision (*Freistaat Thüringen* v *Commission* and *CDA Datenträger Albrechts* v *Commission*).

First, in *Saxonia Edelmetalle* v *Commission*, the Court clarified the obligations incumbent on the Commission in order to determine who received the aid to be recovered ([108]). In this case the aid had originally been granted to a group of firms which no longer existed at the time of the decision, so that the Commission decided to recover the aid from all the firms which were then part of the group without first examining the extent to which they were able to benefit from the aid. The Commission also found that the funds paid over were held by the group's holding company. In those circumstances, the Court held that the Commission could not treat the subsidiaries of that holding as the recipients of the misused aid at issue because they did not actually benefit from it. The Commission was not entitled to take the view that it was not required to examine the extent to which the various firms in the group benefited from the misused aid.

The Court was careful to make clear, however, that, in the light of the circumstances of the case, the Commission was not required to establish, in the contested decision, the extent to which each firm benefited from the amount at issue, but could confine itself to asking the German authorities to recover the aid from its recipient(s), that is to say, from the firm or firms which actually benefited from it. It therefore fell to the Federal Republic of Germany, in the exercise of its Community obligations, to proceed to recover the sum in question. Moreover, should the Member State encounter unforeseen difficulties in implement-

([106]) Judgments in Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 20; in Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 65; and in Case C-277/00 *Germany* v *Commission* [2003] ECR I-3925, paragraphs 73 and 74.

([107]) By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, to that effect, Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22; in Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraph 55; and *Germany* v *Commission*, footnote 106 above, paragraph 75).

([108]) *Saxonia Edelmetalle* v *Commission*, footnote 104 above.

ing an order for recovery, it may submit those problems for consideration by the Commission. In such a case the Commission and the Member State concerned must, in accordance with the duty of genuine cooperation stated in particular in Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid ([109]).

Secondly and thirdly, in *Freistaat Thüringen* v *Commission* and *CDA Datenträger Albrechts* v *Commission* ([110]) a large number of financial facilities were granted by banks to German public bodies with a view to the construction of a manufacturing plant for compact discs in Albrechts. The plant was the property of a joint venture, the share capital of which was subsequently transferred several times. In addition, following a period of restructuring necessitated by difficulties in the operation of the plant, some of the assets (fixed and current assets, technical know-how and marketing organisation) were purchased by a third company (CDA) while the land on which the company operated, the buildings, the technical infrastructure and the logistical installations remained the property of the joint venture ('LCA'). CDA and LCA then concluded an agreement on the exchange of services. However, as the Commission took the view that the various measures taken by the German authorities constituted State aid incompatible with the common market, it ordered recovery from inter alia LCA and CDA on the ground that those undertakings had continued the business of the original recipient using its production plant.

As regards the two measures in favour of one of the two original owners of the joint venture which owned the plant intended to finance its construction, the Court held that the Commission was, in principle, right to order recovery from LCA ([111]).

However, as regards other aid paid to the group owning the recipient joint venture which was not intended for its restructuring, there is no possibility that it actually benefited from it. Accordingly, LCA could not be regarded as a recipient. Similarly, as regards the aid intended for the joint venture but diverted to companies in the same group, the Commission, when it adopted the contested decision, had at its disposal a body of valid and consistent evidence that the joint venture did not actually benefit from a large proportion of the aid intended for the establishment, consolidation and restructuring of the CD plant. Moreover, that evidence made it possible to determine, at least approximately, the scale of the diversion.

As for the order for recovery from CDA, the Commission justified this essentially on the basis that there was an intention to evade the consequences of its decision. However, in the view of the Court, the existence of such an intention had not been established, still less because the assets were taken over at a market price. As regards the Commission's argument that LCA, which was in liquidation, was viewed as an 'empty shell' from which aid

([109]) See, inter alia, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 58; and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 50.

([110]) Judgments in *Freistaat Thüringen* v *Commission*, footnote 10 above, and of 19 October 2005 in Case T-324/00 *CDA Datenträger Albrechts* v *Commission*, not yet published in the ECR.

([111]) Relying on the judgment in *Belgium* v *Commission*, footnote 107 above, paragraphs 55 to 62.

could not be recovered, the Court countered that restoration of the previous situation and removal of the distortion of competition resulting from aid unlawfully paid may, in principle, be achieved by the registration as one of the liabilities of the undertaking in liquidation of an obligation relating to repayment of the aid concerned. According to the case-law, such registration would be sufficient to ensure the implementation of a decision ordering the recovery of State aid incompatible with the common market [112].

2. Procedural matters

a) *Right of interested parties to submit observations*

The procedure for reviewing State aid is, given its general structure, a procedure initiated against the Member State responsible for granting the aid [113] and not against the recipient or recipients of aid [114]. Article 88(2) EC does not require individual notice to be given to particular persons. The Commission is merely required to take steps to ensure that all persons who may be concerned are notified and given an opportunity to put forward their arguments [115]. In practice the persons concerned serve as sources of information for the Commission in the administrative procedure initiated under Article 88(2) EC [116].

The Court pointed out in *Saxonia Edelmetalle* v *Commission*, that the mere fact of being informed of the opening of a formal procedure is not sufficient to enable a party to submit its observations effectively [117]. In the light of Article 6(1) of Regulation No 659/1999, the Court held that the decision to open the formal investigation procedure, despite the necessarily temporary nature of the assessment it entails, should be sufficiently precise to enable the parties concerned to participate in an effective manner in the formal investigation procedure during which they will have the opportunity to put forward their arguments. However, in the present case, the applicants had not pleaded that the decision to open the procedure did not contain sufficient reasons to enable them to exercise effectively their right to submit observations and, in any event, by means of its notice in the *Official Journal of the European Communities*, the Commission had enabled the applicants to exercise effectively their right to submit observations.

(112) See, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraphs 60 and 62.

(113) Judgments in Case 234/84 *Belgium* v *Commission 'Meura'* [1986] ECR 2263, paragraph 29, and in Case T-109/01 *Fleuren Compost* v *Commission* [2004] II-127, paragraph 42.

(114) Judgments in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] I-7869, paragraph 83, and in *Fleuren Compost* v *Commission*, footnote 113 above, paragraph 44.

(115) Judgments in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17, and in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 59.

(116) Judgment in Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256.

(117) *Saxonia Edelmetalle* v *Commission*, footnote 104 above.

b) *Reliance before the Court on facts not mentioned during the administrative phase before the Commission*

In *Saxonia Edelmetalle* v *Commission*, one of the applicants relied before the Court on several facts which were not brought to the attention of the Commission in the administrative procedure ([118]). The Court upheld the objections of the Commission which argued that those facts were inadmissible. In that regard, the Court relied on the principle that in an action for annulment under Article 230 EC, the legality of a Community measure is to be assessed on the basis of elements of fact and law existing at the time the measure was adopted. In particular, the assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made ([119]). The Court concluded that an applicant who has participated in the investigation procedure provided for by Article 88(2) EC, cannot rely on factual arguments of which the Commission was unaware and of which it did not inform the Commission in the investigation procedure.

While pointing out that that bar does not necessarily apply by extension to all cases where an undertaking has not participated in the investigation procedure provided for by Article 88(2) EC the Court observes that, in this case, the applicant did not exercise its right to participate in the investigation procedure, although it is common ground that it was referred to specifically several times in the decision to open the investigation procedure. In those circumstances, factual arguments of which the Commission was unaware at the time it adopted the contested decision cannot be raised for the first time before the Court of First Instance as a means of contesting that decision.

That same question arose essentially in *Freistaat Thüringen* v *Commission* ([120]). In that case, the Court held that where the Member Sates and other parties concerned consider that certain facts alleged in the decision to open the formal examination procedure are incorrect they must inform the Commission thereof during the administrative procedure as they will otherwise be unable to dispute those facts in the course of the litigation. In the absence of information to the contrary from the parties concerned, the Commission is entitled to base its decision on the facts, even if incorrect, available to it at the time it adopts its final decision, where the facts concerned were the subject of a request by the Commission to the Member State to provide the necessary information. Where, however, the Commission fails to request the Member State to provide it with information on the facts it intends to rely on, it cannot, subsequently, justify any errors of fact by arguing that it was entitled, at the time it adopted its decision closing the formal examination procedure, to rely only on the information available to it at that time.

(118) *Saxonia Edelmetalle* v *Commission*, footnote 104 above.

(119) Judgments in *British Airways and Others* v *Commission*, footnote 115 above, paragraph 81, and in Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 47.

(120) *Freistaat Thüringen* v *Commission*, footnote 10 above.

D. Community trade mark

In 2005 a great many cases again concerned Council Regulation (EC) No 40/94 of 20 December 1994 on the Community trade mark ([121]). The 94 trade mark cases completed thus account for 15 % of the cases disposed of by the Court in 2005.

Under Regulation (EC) No 40/94, registration of a Community trade mark can be refused on the basis of absolute grounds for refusal and on account of relative grounds for refusal.

1. Absolute grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in only three of the total of 17 judgments in cases concerning absolute grounds for refusal of registration ([122]). In 2005 the case-law dealt essentially with the absolute grounds for refusal based on (i) the fact that the sign in question is not capable of being represented graphically (Articles 4 and 7(1)(a) of Regulation (EC) No 40/94), (ii) lack of distinctive character of the sign for which registration is sought or the fact that it is descriptive (Article 7(1)(b) and (c) of Regulation (EC) No 40/94), or (iii) the fact that the sign is contrary to public policy or to accepted principles of morality (Article 7(1)(f) of Regulation (EC) No 40/94).

a) *Signs not capable of being represented graphically*

Article 7(1)(a) of Regulation (EC) No 40/94 prohibits the registration of signs which do not conform to the requirements of Article 4 of that regulation. Article 4 provides that 'a Community trade mark may consist of any signs capable of being represented graphically … provided that such signs are capable of distinguishing the goods or services of one under-

([121]) OJ L 11, 14.1.1994, p. 1.

([122]) Judgments of 12 January 2005 in Case T-334/03 *Deutsche Post Euro Express* v *OHIM (Europremium)* (under appeal, Case C-121/05 P); of 14 April 2005 in Case T-260/03 *Celltech* v *OHIM (Celltech)* (under appeal, Case C-273/05 P); and of 25 October 2005 in Case T-379/93 *Peek & Cloppenburg* v *OHIM (Cloppenburg)*, none yet published in the ECR. The 14 judgments which did not result in annulment were the judgments of 12 January 2005 in Joined Cases T-367/02 to T-369/02 *Wieland-Werke* v *OHIM (SnTEM, SnPUR, SnMIX)*; of 19 January 2005 in Case T-387/03 *Proteome* v *OHIM (Bioknowledge)*; of 11 May 2005 in Joined Cases T-160/02 to T-162/02 *Naipes Heraclio Fournier* v *OHIM — France Cartes (Sword in a pack of cards, Jack of clubs and King of swords)* (under appeal, Case C-311/05 P); of 7 June 2005 in Case T-316/03 *Münchener Rückversicherungs-Gesellschaft* v *OHIM (MunichFinancialServices)*; of 8 June 2005 in Case T-315/03 *Wilfer* v *OHIM (Rockbass)* (under appeal, Case C-301/05 P); of 22 June 2005 in Case T-19/04 *Metso Paper Automation* v *OHIM (Paperlab)*; of 13 July 2005 in Case T-242/02 *Sunrider* v *OHIM (TOP)*; of 8 September 2005 in Joined Cases T-178/03 and T-179/03 *CeWe Color* v *OHIM (DigiFilm and DigiFilmMaker)*; of 13 September 2005 in Case T-140/02 *Sportwetten* v *OHIM — Intertops Sportwetten (Intertops)*; of 15 September 2005 in Case T-320/03 *Citicorp* v *OHIM (Live Richly)*; of 27 September 2005 in Case T-123/04 *Cargo Partner* v *OHIM (Cargo Partner)*; of 27 October 2005 in Case T-305/04 *Eden* v *OHIM (Smell of ripe strawberries)*, none yet published in the ECR; judgment of 30 November 2005 in Case T-12/04 *Almdudler-Limonade* v *OHIM (Shape of a lemonade bottle)*, not published in the ECR; judgments of 15 December 2005 in Case T-262/04 *BIC* v *OHIM (Shape of a flint lighter)* and in Case T-263/04 *BIC* v *OHIM (Shape of an electronic lighter)*, not yet published in the ECR.

taking from those of other undertakings'. In ***Eden* v *OHIM (Smell of ripe strawberries)***, the Court applied those provisions in order to adjudicate, for the first time, on an application for an olfactory mark. It was held in the judgment that the Board of Appeal had lawfully refused to register an olfactory mark, which was not perceived visually, was described by the words 'smell of ripe strawberries' and was accompanied by a colour image depicting a strawberry ([123]). In fact, a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective. However, that was not the case in this instance, even though the applicant had also submitted a figurative element, since the image of a strawberry forming part of the trade mark application represented only the fruit, which emits a smell supposedly identical to the olfactory sign at issue, and not the smell claimed.

b) *Lack of distinctiveness or fact that the sign is descriptive*

Under Article 7(1) of Regulation (EC) No 40/94, trade marks are not to be registered if they are devoid of distinctive character (subparagraph (b)) or if they consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, time of production of the goods or of rendering of the service, or other characteristics of the goods or service (subparagraph (c)). Article 7(1)(c) of Regulation (EC) No 40/94 prohibits the signs and indications referred to from being reserved to one undertaking alone because they have been registered as trade marks. That provision therefore pursues an aim in the public interest, which requires that such signs and indications may be freely used by all.

The Court held in three cases that the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) had erred in holding the signs at issue to be distinctive or descriptive.

First of all, in ***Celltech* v *OHIM (Celltech)***, the Court found that the Board of Appeal had not demonstrated that the word mark Celltech (in the sense of 'cell technology') was descriptive of the goods and services concerned, which were in the pharmaceutical field ([124]). It had not been explained in what way those terms gave any information about the intended purpose and nature of the goods and services referred to in the application for registration, in particular about the way in which those goods and services were applied to cell technology or how they resulted from it. Since the Board of Appeal had also failed to demonstrate that the word mark at issue was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation (EC) No 40/94, the Court annulled the Board of Appeal's decision.

([123]) *Eden* v *OHIM (Smell of ripe strawberries)*, footnote 122 above.

([124]) *Celltech* v *OHIM (Celltech)*, footnote 122 above.

Second, in ***Deutsche Post Euro Express* v *OHIM (Europremium)***, the Board of Appeal had been of the view that the mark Europremium was likely to be perceived by consumers as an indication of the notable quality and European origin of the goods and services covered by the trade mark application ([125]). The Court annulled the Board's decision, holding that the words 'euro' and 'premium' comprising the sign were not descriptive of the goods and services claimed by the applicant, namely goods and services relating to postal transport. Since, moreover, the sign Europremium, taken as a whole, did not enable the relevant public to establish a direct and concrete link to the goods and services concerned, the Board of Appeal's decision had to be annulled.

Finally, in ***Peek & Cloppenburg* v *OHIM (Cloppenburg)***, the Board of Appeal had held that registration of the word mark Cloppenburg for 'retail trade services' was precluded by an absolute ground for refusal, since the mark denoted, in particular, a German town ([126]). The Court, sitting in Chamber in extended composition, nonetheless held that Article 7(1)(c) of Regulation (EC) No 40/94 did not in principle preclude the registration of geographical names which were unknown to the relevant class of persons — or at least unknown as the designation of a geographical location — or of names in respect of which, because of the type of place they designated, it was unlikely that such persons would have believed that the category of goods concerned originated there or was conceived of there. In this case the grounds set out in the contested decision for the purpose of showing that average consumers in Germany knew the sign as a geographical location were not persuasive. In addition, the Board of Appeal had not demonstrated to the required legal standard that there existed, in the eyes of the public concerned, any link between the town or region of Cloppenburg and the category of services concerned, or that the word 'Cloppenburg' might reasonably have been supposed, in the eyes of that public, to designate the geographical origin of the category of services at issue. The Court therefore annulled the Board of Appeal's decision.

Conversely, the following signs were found to be descriptive or devoid of distinctiveness: SnTEM, SnPUR and SnMIX for metallic semi-finished products ([127]); the word mark Bioknowledge for products containing, or giving access to, information relating to organisms ([128]); a number of figurative signs directly evoking card games for playing cards ([129]); the word mark MunichFinancialServices for financial services ([130]); the word mark Rock-

([125]) *Deutsche Post Euro Express* v *OHIM (Europremium)*, footnote 122 above.

([126]) *Peek & Cloppenburg* v *OHIM (Cloppenburg)*, footnote 122 above.

([127]) *Wieland-Werke* v *OHIM (SnTEM, SnPUR, SnMIX)*, footnote 122 above.

([128]) *Proteome* v *OHIM (Bioknowledge)*, footnote 122 above.

([129]) *Naipes Heraclio Fournier* v *OHIM — France Cartes (Sword in a pack of cards, Jack of clubs and King of swords)*, footnote 122 above.

([130]) *Münchener Rückversicherungs-Gesellschaft* v *OHIM (MunichFinancialServices)*, footnote 122 above.

bass for musical instruments and accessories [131]; the word mark Paperlab for computer equipment and measuring installations for surveying and testing of paper [132]; the word marks DigiFilm and DigiFilmMaker for apparatus for recording, storing and processing digital data [133]; the word mark Live Richly for financial and monetary services [134]; the word mark Cargo Partner for services for the transport, packaging and storage of goods [135]; the shape of a transparent lemonade bottle with stippled upper and lower parts [136]; and two shapes of lighters for an electronic lighter and a flint lighter, respectively [137]. The word mark TOP was also found to be devoid of distinctive character, since it could not be regarded as appropriate for the purpose of identifying the commercial origin of the goods which it designated and, therefore, of performing the essential function of a trade mark [138].

c) *Trade mark contrary to public policy or to accepted principles of morality*

Article 7(1)(f) of Regulation No 40/94 provides that 'trade marks which are contrary to public policy or to accepted principles of morality' are not to be registered. In ***Sportwetten* v *OHIM — Intertops Sportwetten (Intertops)***, the applicant had sought a declaration of invalidity under that provision in respect of a figurative mark registered for betting services and OHIM had rejected its application [139]. The applicant based its arguments on the fact that, pursuant to national legislation authorising only undertakings licensed by the competent authorities to offer services connected with gambling, the proprietor of the mark was prohibited, in Germany, from offering the services in question and from advertising them. That contention gave the Court an opportunity to point out that it was the trade mark itself, namely the sign in relation to the goods or services as they appeared upon registration of the trade mark, which was to be assessed in order to determine whether it was contrary to public policy or accepted principles of morality; consequently the fact that the proprietor of the mark was prohibited, in Germany, from offering the services in question and from advertising them could not be regarded as relating to the intrinsic qualities of that trade mark and have the effect of rendering the trade mark itself contrary to public policy or accepted principles of morality.

[131] *Wilfer* v *OHIM (Rockbass)*, footnote 122 above.

[132] *Metso Paper Automation* v *OHIM (Paperlab)*, footnote 122 above.

[133] *CeWe Color* v *OHIM (DigiFilm and DigiFilmMaker)*, footnote 122 above.

[134] *Citicorp* v *OHIM (Live Richly)*, footnote 122 above.

[135] *Cargo Partner* v *OHIM (Cargo Partner)*, footnote 122 above.

[136] *Almdudler-Limonade* v *OHIM (Shape of a lemonade bottle)*, footnote 122 above.

[137] *BIC* v *OHIM (Shape of a flint lighter)*, footnote 122 above, and *BIC* v *OHIM (Shape of an electronic lighter)*, footnote 122 above.

[138] *Sunrider* v *OHIM (TOP)*, footnote 122 above.

[139] *Sportwetten* v *OHIM — Intertops Sportwetten (Intertops)*, footnote 122 above.

2. Relative grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in nine of the 42 judgments examining the Boards' assessment of relative grounds for refusal of registration ([140]). The main points made by those judgments concern, first, the comparison of word marks and complex figurative marks and, second, the protection conferred where genuine use has been made of a trade mark.

([140]) Judgments of 20 April 2005 in Case T-211/03 *Faber Chimica* v *OHIM — Nabersa (Faber)* and Case T-318/03 *Atomic Austria* v *OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)*; of 4 May 2005 in Case T-22/04 *Reemark* v *OHIM — Bluenet (Westlife)*; of 15 June 2005 in Case T-184/04 *Spa Monopole* v *OHIM — Spaform (Spaform)* and Case T-7/04 *Shaker* v *OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)* (under appeal, Case C-334/05 P); of 7 July 2005 in Case T-385/03 *Miles International* v *OHIM — Biker Miles (Biker Miles)*; of 14 July 2005 in Case T-126/03 *Reckitt Benckiser (España)* v *OHIM — Aladin (Aladin)*; of 5 October 2005 in Case T-423/04 *Bunker & BKR* v *OHIM — Marine Stock (BKR)*, and of 17 November 2005 in Case T-154/03 *Biofarma* v *OHIM — Bausch & Lomb Pharmaceuticals (ALREX),* none yet published in the ECR. The 33 judgments which did not result in annulment are the judgments of 1 February 2005 in Case T-57/03 *SPAG* v *OHIM — Dann and Backer (Hooligan)*; of 15 February 2005 in Case T-296/02 *Lidl Stiftung* v *OHIM — REWE-Zentral (Lindenhof)*; Case T-169/02 *Cervecería Modelo* v *OHIM — Modelo Continente Hipermercados (Negra Modelo*); of 1 March 2005 in Case T-185/03 *Fusco* v *OHIM — Fusco International (Enzo Fusco)*; Case T-169/03 *Sergio Rossi* v *OHIM — Sissi Rossi (Sissi Rossi)* (under appeal, Case, C-214/05 P), none yet published in the ECR; of 8 March 2005 in Case T-32/03 *Leder & Schuh* v *OHIM — Schuhpark Fascies (JELLO Schuhpark)*, not published in the ECR; of 9 March 2005 in Case T-33/03 *Osotspa* v *OHIM — Distribution & Marketing (Hai)*; of 16 March 2005 in Case T-112/03 *L'Oréal* v *OHIM — Revlon (Flexi Air)* (under appeal, Case C-235/05 P), not yet published in the ECR; of 13 April 2005 in Case T-353/02 *Duarte y Beltrán* v *OHIM — Mirato (Intea)*; Case T-286/03 *Gillette* v *OHIM — Wilkinson Sword (Right Guard Xtreme sport)*, not published in the ECR; of 20 April 2005 in Case T-273/02 *Krüger* v *OHIM — Calpis (CALPICO)*; of 21 April 2005 in Case T-269/02 *PepsiCo* v *OHIM — Intersnack Knabber-Gebäck (Ruffles)*; Case T-164/03 *Ampafrance* v *OHIM — Johnson & Johnson (monBeBé)*; of 4 May 2005 in Case T-359/02 *Chum* v *OHIM — Star TV (Star TV)*; of 11 May 2005 in Case T-31/03 *Grupo Sada* v *OHIM — Sadia (Grupo Sada)*; Case T-390/03 *CM Capital Markets* v *OHIM — Caja de Ahorros de Murcia (CM)*; of 25 May 2005 in Case T-352/02 *Creative Technology* v *OHIM– Vila Ortiz (PC WORKS)* (under appeal, Case C-314/05 P); Case T-67/04 *Spa Monopole* v *OHIM — Spa-Finders Travel Arrangements (Spa-finders)*; Case T-288/03 *TeleTech Holdings* v *OHIM — Teletech International (Teletech Global Ventures)* (under appeal, Case C-312/05 P); of 7 June 2005 in Case T-303/03 *Lidl Stiftung* v *OHIM — REWE-Zentral (Salvita)*; of 22 June 2005 in Case T-34/04 *Plus* v *OHIM — Bälz et Hiller (Turkish Power)* (under appeal, Case C-324/05 P); of 28 June 2005 in Case T-301/03 *Canali Ireland* v *OHIM — Canal Jean (Canal Jean CO New York)*; of 13 July 2005 in Case T-40/03 *Murúa Entren* v *OHIM — Bodegas Murúa (Julián Murúa Entrena)*; of 14 July 2005 in Case T-312/03 *Wassen International* v *OHIM — Stroschein Gesundkost (Selenium-ACE)*; of 22 September 2005 in Case T-130/03 *Alcon* v *OHIM — Biofarma (Travatan)* (under appeal, Case C-412/05 P); of 27 October 2005 in Case T-336/03 *Éditions Albert René* v *OHIM — Orange (Mobilix)*; of 23 November 2005 in Case T-396/04 *Sofass* v *OHIM — Sodipan (Nicky)*; of 24 November 2005 in Case T-346/04 *Sadas* v *OHIM — LTJ Diffusion (Arthur et Felicie)*; Case T-3/04 *Simonds Farsons Cisk* v *OHIM — Spa Monopole (Kinji by Spa)*; Case T-135/04 *GfK* v *OHIM — BUS (Online Bus)*; of 8 December 2005, in Case T-29/04 *Castellblanch* v *OHIM — Champagnes Roederer (Cristal Castellblanch)*, none yet published in the ECR; of 14 December 2005 in Case T-169/04 *Arysta Lifescience* v *OHIM — BASF (Carpovirusine)*; and of 15 December 2005 in Case T-384/04 *RB Square Holdings Spain* v *OHIM — Unelko (cleanx)*, not published in the ECR.

a) *Complex figurative marks and word marks*

In four of the cases in which the Court annulled decisions of the Boards of Appeal, it was because of one or more errors in the Board of Appeal's assessment of the likelihood of confusion between word marks and complex figurative marks, consisting of two or more categories of mark, combining, for example, letters and a graphic element.

For example, in ***Faber Chimica* v *OHIM — Nabersa (Faber)***, the Court held that OHIM had erred in finding visual similarity between the word mark naber and a complex figurative mark which, although it included the word element 'faber', also included a significant figurative element consisting of an invented construction requiring a conceptual effort of construction ([141]). In its judgment the Court also decided that there was a phonetic difference between the two marks and consequently, following an overall assessment taking account, in particular, of the fact that the relevant public was a specialised public, the Court found that the marks at issue were not similar.

Likewise, in ***Shaker* v *OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)***, the Court rejected the Board of Appeal's assessment holding, contrary to the Board, that in a complex figurative mark composed, among other things, of a round dish decorated with lemons and the word Limoncello, the figurative element was dominant and had nothing in common with the earlier word mark Limonchelo ([142]).

In another case, ***Miles Handelsgesellschaft International* v *OHIM — Biker Miles (Biker Miles)***, the Board of Appeal had erred in finding that certain figurative elements (particularly a road with a circle round it) and the verbal element ('biker') were significant in respect of the overall impression produced by a figurative mark, whilst the dominant element in that figurative mark was, in fact, another verbal element ('miles'), which gave rise to confusion with the earlier word mark Miles ([143]).

Lastly, in ***Bunker & BKR* v *OHIM — Marine Stock (BKR)***, the Board of Appeal had correctly identified the dominant element of a composite figurative mark (B.K.R.) but had, however, erred in its assessment of the mark's visual and aural similarity with an earlier word mark (BK Rods) ([144]).

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

Under Article 43(2) of Regulation (EC) No 40/94, if the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition must furnish proof that, during the period of five years preceding the date of publication of the Community

([141]) *Faber Chimica* v *OHIM — Nabersa (Faber)*, footnote 140 above.

([142]) *Shaker* v *OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)*, footnote 140 above.

([143]) *Miles International* v *OHIM — Biker Miles (Biker Miles)*, footnote 140 above.

([144]) *Bunker & BKR* v *OHIM — Marine Stock (BKR)*, footnote 140 above.

trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. Article 43(2) also provides '[i]f the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services'. Article 43(3) of Regulation (EC) No 40/94 applies those principles to earlier national marks.

Three judgments delivered in 2005 looked in greater detail at the meaning of genuine use and the scope of the protection conferred by such use.

First, concerning genuine use, the Court confirmed in its judgments in ***GfK* v *OHIM* and *Castellblanch* v *OHIM*** that proof of such use 'also includes proof of use of the earlier mark in a form that differs in respect of elements which do not alter the distinctive character of that trade mark in the form registered' ([145]).

Second, in ***Reckitt Benckiser (España)* v *OHIM — Aladin (Aladin)***, the Court defined the scope of products protected where there has been genuine use of the mark in relation to part only of the goods or services ([146]). The Court interpreted the reference in Article 43(2) of Regulation (EC) No 40/94 to use in part as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Therefore, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

By providing, in this instance, undisputed proof of genuine use of the mark in respect of a 'product for polishing metals consisting of cotton impregnated with a polishing agent (magic cotton)', which is a 'polish for metals' within the meaning of the sub-category of goods to which the earlier mark relates, the applicant had properly established that the mark had been put to genuine use for that sub-category as a whole. As a consequence, in deeming, for the purposes of the examination of the opposition, the earlier mark to be registered solely for a 'product for polishing metals consisting of cotton impregnated with a polishing agent (magic cotton)', the Board of Appeal had applied Article 43(2) and 3 of Regulation (EC) No 40/94 incorrectly.

([145]) G*fK* v *OHIM — BUS (Online Bus)*, footnote 140 above, and *Castellblanch* v *OHIM — Champagne Roederer (Cristal Castellblanch)*, footnote 140 above.

([146]) *Reckitt Benckiser (España)* v *OHIM — Aladin (Aladin)*, footnote 140 above.

3. Formal and procedural issues

a) *Procedure before the Board of Appeal*

Language of proceedings in *ex parte* proceedings

Article 115(4) of Regulation (EC) No 40/94, which lays down the rules governing the language of *ex parte* proceedings before OHIM, states that the language of proceedings is to be the language used for filing the application for a Community trade mark. The same provision confers on OHIM the right to send written communications to the applicant in the second language indicated by the latter if the application for a Community trade mark was filed in a language other than the languages of OHIM. According to the case-law, the proceedings comprise all such acts as must be carried out in processing an application and therefore the term 'procedural documents' covers, for the purposes of Article 115(4) of Regulation (EC) No 40/94, any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing, be they notifications, requests for correction, clarification or other documents. All such documents must therefore be drawn up by OHIM in the language used for filing the application ([147]).

In ***Sunrider* v *OHIM (TOP)***, the Court held that OHIM had infringed Article 115(4) of Regulation (EC) No 40/94 by sending a number of documents to the applicant in English even though the application had been filed in Greek and English had been indicated only as the second language ([148]). The Court refused, however, to annul the Board of Appeal's decision, since it was clear from the documents produced by the applicant that it had been able to understand fully the communications concerned and that consequently its rights of defence had not been prejudiced.

Rules of evidence

— Facts and evidence submitted in *ex parte* proceedings before the Board of Appeal

Under the third sentence of Article 59 of Regulation (EC) No 40/94, in appeals against decisions of the examiners, a written statement setting out the grounds of appeal must be filed within four months after the date of notification of the decision.

In ***Wilfer* v *OHIM (Rockbass)***, the Court held that Article 59 could not be construed as preventing new facts or evidence submitted during the hearing of an appeal on an absolute ground for refusal from being taken into account after the expiry of the prescribed period within which the grounds of appeal must be presented. In the Court's view, Article 74(2) of Regulation (EC) No 40/94, which provides that OHIM may disregard facts or evidence which are not

([147]) Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283.

([148]) *Sunrider* v *OHIM (TOP)*, footnote 122 above.

submitted in due time by the parties concerned, allows the Board of Appeal discretion in taking into account additional evidence produced after that period has expired ([149]). However, although the Board of Appeal had wrongly refrained from examining a statement produced by the applicant nine days before the Board of Appeal adopted its decision, the Court did not annul the decision, since the statement concerned did not contain any new arguments or new evidence that was likely to affect the substance of the contested decision.

— Request for proof of genuine use of the earlier mark

Pursuant to Article 43(2) and (3) of Regulation (EC) No 40/94, for the purposes of examining an opposition introduced under Article 42 of that regulation, the earlier mark is presumed to have been put to genuine use as long as the applicant does not request proof of such use. The presentation of such a request therefore has the effect of shifting the burden of proof to the opponent to demonstrate genuine use (or the existence of proper reasons for non-use) if his opposition is not to be dismissed. For that to occur, the request must be made expressly and in sufficient time to OHIM.

In ***L'Oréal* v *OHIM — Revlon (Flexi Air)***, the Board of Appeal had held that L'Oréal's request for proof of genuine use of an earlier mark relied on by Revlon, the opponent, had not been submitted within the time limit set and did not need to be taken into account for the decision on the opposition ([150]). The Court upheld that finding, noting that genuine use of the earlier mark was a matter which, once raised by the applicant for the trade mark, had to be settled before a decision was given on the opposition proper. Furthermore, the fact that the Board of Appeal had not mentioned the request for proof of genuine use, although it had been repeated by the applicant before it, could not justify annulment of the contested decision, since the factual situation had remained identical to that on which the Opposition Division had been required to rule: consequently the Board of Appeal was lawfully entitled to hold, like the Opposition Division, that the request made subsidiarily before it had not been submitted in time.

— Freedom as to the form of evidence

The Court made some important points on the freedom as to the form of evidence before the Boards of Appeal. In ***Atomic Austria* v *OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)***, OHIM had rejected an opposition on the basis that the certificates showing that the opponent's marks were registered were not accompanied by proof that the marks concerned had been renewed ([151]). The Court held that, on the one hand, an opponent is free to choose the evidence he considers useful to submit to OHIM in support of his opposition and that, on the other hand, OHIM is

([149]) *Wilfer* v *OHIM (Rockbass)*, footnote 122 above.

([150]) *L'Oréal* v *OHIM — Revlon (Flexi Air)*, footnote 140 above.

([151]) *Atomic Austria* v *OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)*, footnote 140 above.

obliged to examine all the evidence submitted to it in order to determine whether it does prove that the earlier mark was registered or filed, and cannot reject out of hand a particular type of evidence on the basis of the form it takes. If OHIM could impose conditions as to the form of the evidence to be produced, the result would be that in some cases the parties would find it impossible to produce such evidence, for example if a national patent office did not issue official documents to certify the renewal of a mark. In this case OHIM had rejected the opposition supported by the certificates produced by the applicant, relying on a presumption about the length of the protection period for marks under Austrian law. That presumption was legally correct but if OHIM, as it ought to have done, had verified it from the point of view of Austrian law, it would have found that the presumption had to be reversed. The Court thus annulled the Board of Appeal's decision.

— Application of the principle that decisions must be adopted within a reasonable time before the Boards of Appeal

In ***Sunrider* v *OHIM (TOP)***, the Court held that the principle that decisions must be adopted within a reasonable time applied to proceedings before the various adjudicating bodies of OHIM, including the Boards of Appeal, but that, as in the other areas in which the principle applies, infringement of the principle, assuming it is established, does not justify annulment of the contested decision in every case ([152]).

b) Proceedings before the Court

Admissibility of the forms of order sought by OHIM

There were, once again, a large number of judgments in 2005 concerning the admissibility of the forms of order sought by OHIM, by which OHIM either left the matter to the Court's discretion or sought annulment of a decision of one of its Boards of Appeal.

In, for example, ***Reemark* v *OHIM — Bluenet (Westlife)***, OHIM had stated that it wished to support the form of order sought, and the pleas in law advanced, by the applicant but had nonetheless formally requested that the action be dismissed solely because it considered itself obliged to do so in view of the case-law of the Court ([153]). In that case, and likewise in ***Spa Monopole* v *OHIM — Spaform (Spaform)*** ([154]), the Court recalled the principle that, in proceedings concerning an action brought against a decision of an OHIM Board of Appeal adjudicating in opposition proceedings, OHIM does not have power to alter, by the position which it adopts before the Court of First Instance, the terms of the dispute, as delimited in the respective claims and contentions of the applicant for registration and of the opposing party ([155]). The Court nonetheless found that it did not follow from the case-law

([152]) *Sunrider* v *OHIM (TOP)*, footnote 122 above.

([153]) *Reemark* v *OHIM — Bluenet (Westlife)*, footnote 140 above.

([154]) *Spa Monopole* v *OHIM — Spaform (Spaform)*, footnote 140 above.

([155]) Judgment of 12 October 2004 in Case C-106/03 P *Vedial* v *OHIM*, not yet published in the ECR, paragraphs 26 to 38.

that OHIM was obliged to claim that an action brought against a decision of one of its Boards of Appeal should be dismissed, since, although OHIM does not have the requisite capacity to bring an action against a decision of a Board of Appeal, conversely it cannot be required to defend systematically every contested decision of a Board of Appeal or to claim automatically that every action challenging such a decision should be dismissed. The Court therefore held that OHIM, although not able to alter the terms of the dispute, could claim that the form of order sought by whichever one of the parties it might choose should be allowed and could put forward arguments in support of the pleas in law advanced by that party. However, it also observed in *Reemark* v *OHIM* that it cannot independently seek an order for annulment or put forward pleas for annulment which have not been raised by the other parties.

In ***Peek & Cloppenburg* v *OHIM (Cloppenburg)***, which concerned *ex parte* proceedings, OHIM supported, in essence, the applicant's claim for annulment of the contested decision but considered that that approach would be tantamount to accepting the applicant's request and would relieve the Court of the need to give a ruling ([156]). OHIM had, in consequence, refrained from formulating a particular form of order and had, at the hearing, left the matter to the Court's discretion. The Court, having recalled the principles set out above and applied them to *ex parte* proceedings, noted that OHIM had clearly expressed its intention to support the claims and pleas in law put forward by the applicant. It therefore reformulated the form of order sought by OHIM and deemed OHIM to have pleaded in essence that the applicant's claim should be allowed. Moreover, contrary to OHIM's contention, the action had not become devoid of purpose on account of the correspondence of the parties' arguments on the substance of the case, since it had not been possible to amend or withdraw the decision of the Board of Appeal because of the latter's independence.

Admissibility of new matters of fact and law before the Court

In ***Solo Italia* v *OHIM — Nuova Sala (Parmitalia)***, the Court held that its review of the legality of a decision by a Board of Appeal had to be carried out with regard to the issues of law raised before the Board of Appeal ([157]). It therefore declined to examine a plea in law alleging infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which had not been raised before OHIM.

The Court took the same restrictive approach in ***SPAG* v *OHIM — Dann and Backer (Hooligan)***: it recalled the principle that a review of the legality of decisions of the Boards of Appeal in the context of Regulation (EC) No 40/94 must, pursuant to Article 74 of the regulation, be carried out in the light of the factual and legal context of the dispute as it was brought before the Board of Appeal ([158]). More specifically, as regards

([156]) *Peek & Cloppenburg* v *OHIM (Cloppenburg)*, footnote 122 above.

([157]) Judgment of 31 May 2005 in Case T-373/03 *Solo Italia* v *OHIM — Nuova Sala (Parmitalia)*, not yet published in the ECR.

([158]) *SPAG* v *OHIM — Dann and Backer (Hooligan)*, footnote 140 above. See also, to that effect, *Citicorp* v *OHIM (Live Richly)*, footnote 122 above.

the factual context of the proceedings, the Court concluded from Article 74 of Regulation (EC) No 40/94 that no contention of illegality on the part of OHIM may be made regarding matters of fact which were not submitted to it and that, accordingly, matters of fact which are relied on before the Court without having been submitted previously before any of the bodies of OHIM must be dismissed. As regards the legal framework of the dispute, the Court stated that 'the matters of law relied on before the Court of First Instance which have not been raised previously before the bodies of OHIM, in so far as they relate to a matter of law which it was not necessary to resolve in order to ensure a correct application of Regulation (EC) No 40/94 having regard to the facts, evidence and arguments provided by the parties, cannot affect the legality of a decision of the Board of Appeal relating to the application of a relative ground for refusal, since they do not form part of the legal framework of the dispute as it was brought before the Board of Appeal. They are, consequently, inadmissible. By contrast, when a rule of law must be upheld or a matter of law must be ruled upon in order to ensure a correct application of Regulation (EC) No 40/94 having regard to the facts, evidence and arguments provided by the parties, a matter of law relating to that issue may be relied upon for the first time before the Court'.

4. Operational continuity of the adjudicating bodies of OHIM

It follows from the principle of continuity in terms of functions as between the adjudicating bodies of OHIM that, within the scope of application of Article 74(1), *in fine*, of Regulation No 40/94 (which restricts, in proceedings relating to relative grounds for refusal of registration, the examination to the facts, evidence and arguments provided by the parties and the relief sought), the Board of Appeal is required to base its decision on all the matters of fact and of law which the party concerned introduced either in the proceedings before the body which heard the application at first instance or in the appeal, subject only to Article 74(2) of Regulation (EC) No 40/94 (the fact that OHIM disregards facts or evidence which are not submitted in due time by the parties concerned) ([159]).

In ***Focus Magazin Verlag* v *OHIM***, the Opposition Division had rejected the applicant's opposition on the ground that, since it had failed to provide a complete translation of the certificate of registration of its German trade mark, it had not adduced proof of the existence of its earlier mark ([160]). The Board of Appeal had in turn refused to take into

([159]) Case T-308/01 *Henkel* v *OHIM — LHS (UK) (Kleencare)* [2003] ECR II-3253, paragraph 32. It should be noted on this point that Commission Regulation (EC) No 1041/2005 of 29 June 2005 amending Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ L 172, 5.7.2005, p. 4), provides that '[w]here the appeal is directed against a decision of an opposition division, the board shall limit its examination of the appeal to facts and evidence presented within the time limits set in or specified by the opposition division in accordance with the regulation and these rules, unless the board considers that additional or supplementary facts and evidence should be taken into account pursuant to Article 74(2) of the regulation'.

([160]) Judgment of 9 November 2005 in Case T-275/03 *Focus Magazin Verlag* v *OHIM — ECI Telecom (Hi-FOCuS)*, not yet published in the ECR.

account the translation of the German certificate of registration, which had been produced for the first time before it. The Court censured that approach relying on the principle of continuity in terms of functions as between the adjudicating bodies of OHIM and holding that the document in question was not submitted out of time for the purposes of Article 74(2) of Regulation (EC) No 40/94, but was annexed to the pleading lodged by the applicant before the Board of Appeal, that is, within the four-month time limit laid down in Article 59 of Regulation (EC) No 40/94 ([161]).

By contrast, in ***TeleTech Holdings* v *OHIM — Teletech International (Teletech Global Ventures)***, the Court held that, although it followed from the principle of continuity of functions as between the Boards of Appeal and the OHIM bodies ruling at first instance that the former are bound to consider, in the light of all the relevant matters of fact and of law, whether or not a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling, conversely in proceedings concerning the relative grounds for refusal of registration or for invalidity, operational continuity does not entail the obligation or even the opportunity for the Board of Appeal to extend its consideration of a relative ground for invalidity to facts, evidence or arguments which the parties have not invoked either before the Cancellation Division or the Board of Appeal ([162]).

E. Access to documents

In 2005, the nine decisions made by the Court of First Instance ruling on decisions on requests for access to documents on the basis of Regulation (EC) No 1049/2001 ([163]) served to confirm, in one case, that the Court exercised only a restricted review over decisions refusing access on the basis of a public interest exception (Article 4(1)(a) of Regulation (EC) No 1049/2001) ([164]) and, in seven other cases, that the refusal by a Member State as regards a request for disclosure of a document originating from it (or drawn up on its behalf) is binding on the Commission and therefore prevents it from disclosing it ([165]).

([161]) See, to the same effect, *GfK* v *OHIM — BUS (Online Bus)*, footnote 140 above.

([162]) *TeleTech Holdings* v *OHIM — Teletech International (Teletech Global Ventures)*, footnote 140 above.

([163]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

([164]) Judgment of 26 April 2005 in Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* (under appeal, Case C-266/05 P), not yet published in the ECR.

([165]) Judgment of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* (under appeal C-64/05 P), not yet published in the ECR. See judgment of 17 March 2005 in Case T-187/03 *Scippacercola* v *Commission*, not yet published in the ECR; orders of 8 June 2005 in Case T-139/03 *Nuova Agricast* v *Commission*, in Case T-287/03 *SIMSA* v *Commission*, in Case T-295/03 *Poli Sud* v *Commission*, in Case T-297/03 *Tomasetto Achille* v *Commission*, in Case T-298/03 *Bieffe* v *Commission*, not published in the ECR, and in Case T-299/03 *Nuova Faudi* v *Commission*, not yet published in the ECR.

In the ninth decision, in *VKI* v *Commission*, the Court clarified the conditions governing the treatment by the institutions of a request for access to a large number of documents ([166]). In that case, the Verein für Konsumenteninformation (VKI), an association of Austrian consumers, had made a request to the Commission for access to its administrative file in a competition procedure resulting in a decision censuring eight Austrian banks for their participation in a cartel (known as the 'Lombard Club'). The Commission refused that request in its entirety and the VKI brought an action for annulment of that refusal before the Court.

The Court held that since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted.

In this case, the Court found that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents. Consequently, the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible.

However, the Court added that a derogation from that obligation to examine the documents may be permissible in exceptional cases where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required. In such a situation, the institution is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. The institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access.

In this case, it was not apparent from the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned. As a result, the Court annulled the decision.

([166]) *Verein für Konsumenteninformation* v *Commission*, footnote 8 above.

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

Over the last few years, a substantial number of actions have been brought against specific restrictive measures directed against certain persons and entities with a view to combating terrorism, which led the Court to rule, in 2005, in five cases on this subject. Three of those cases were held inadmissible either on the ground of the applicant's lack of standing to bring proceedings ([167]) or, in the last of them, on the ground that the Court manifestly had no jurisdiction and the action was out of time ([168]). However, the Court ruled on the substance of two other cases which allowed it to establish very important principles as regards, in particular, the relationship between the provisions of the Community legal order and those of the United Nations Charter ([169]).

Before and after the terrorist attacks of 11 September 2001, the Security Council of the United Nations adopted several resolutions concerning the Taliban, Osama bin Laden, the Al-Qaeda network and the persons and bodies associated with them. By those resolutions, all the Member States of the United Nations are required to freeze funds and other financial resources under the direct or indirect control of those persons and bodies. A sanctions committee was tasked with identifying the subjects concerned and the financial resources to be frozen and considering requests for derogations. Those resolutions were implemented in the Community by several common positions and Council regulations ordering the freezing of the funds of the persons and bodies concerned. Several of them sought the annulment of those regulations before the Court.

In its judgments, the Court held, first, that reliance on Articles 60 EC, 301 EC and 308 EC in combination as a legal basis made it possible, in the field of economic and financial sanctions, to attain the objective pursued by the Union and its Member States under the CFSP. Having held that the Council was competent to adopt the contested regulation, the Court considered the applicants' plea alleging breach of their fundamental rights enshrined in Community law and the ECHR. Since the contested regulations applied decisions taken by the Security Council of the United Nations, consideration of that plea led the Court to consider, as a preliminary issue, the relationship between the international legal order under the United Nations and the domestic or Community legal order. The Court found, on that point, that under international law, the obligations of the Member States of the United Nations under the Charter of that organisation clearly prevail over every other obligation including their obligations under the ECHR and under the EC Treaty and that primacy extends to decisions of the Security Council taken pursuant to Title VII of the Charter. Moreover, although it is not itself a Member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the

([167]) Orders of 15 February 2005 in Case T-206/02 *KNK* v *Council* and in Case T-229/02 *PKK and KNK* v *Council* (under appeal, Case C-229/05 P), not yet published in the ECR.

([168]) Order of 18 November 2005 in Case T-299/04 *Selmani* v *Council and Commission*, not yet published in the ECR.

([169]) Judgments of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* (under appeal, Case C-415/05 P), and in Case T-315/01 *Kadi* v *Council and Commission* (under appeal, Case C-402/05 P), not yet published in the ECR.

same way as its Member States, by virtue of the Treaty establishing it. Accordingly, first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.

The Court went on to analyse the implications of this principle for its judicial review of regulations which merely implement the decisions of the Security Council of the United Nations. The Court observed in that regard that any review of the internal lawfulness of the contested regulation would therefore imply that the Court is to consider, indirectly, the lawfulness of those decisions. In view of their primacy, those decisions fall outside the ambit of the Court's judicial review so that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law or of the fundamental rights enshrined in the Community legal order. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations. Nonetheless, the Court considers itself empowered to check the lawfulness of the contested regulation and, indirectly, the lawfulness of the decisions of the Security Council which that regulation implements, with regard to superior rules of international law falling within the ambit of *jus cogens*, understood as a body of higher rules of public international law from which neither the Member States nor the bodies of the United Nations may derogate and which include inter alia mandatory provisions concerning the universal protection of fundamental human rights.

The Court then reviewed the regulation in the light of those principles and found that the freezing of funds provided for by the contested regulation does not infringe the applicants' fundamental rights, as protected by *jus cogens*. In particular, the regulation does not infringe the applicants' right to property provided that it is protected by *jus cogens*. As regards the right to a fair hearing, the Court observes that no rule of *jus cogens* requires a prior hearing for the persons concerned by the Sanctions Committee, and, moreover, the resolutions at issue set up a mechanism for the re-examination of individual cases.

On the question of the right to an effective judicial remedy, the Court observed that, in dealing with the action brought by the applicants it carries out a complete review of the lawfulness of the contested regulation with regard to observance by the Community institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. It also reviews the lawfulness of the contested regulation having regard to the Security Council's decisions. Further, it reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council in the light of *jus cogens*. On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions are themselves compatible with fundamental rights as protected by the Community legal order, nor to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or to check indirectly the appropriateness and proportionality of those measures. To that extent, and in the absence of an independent international court responsible for ruling in actions brought against decisions taken by the Sanctions Committee, there is no judicial remedy available to the applicant.

(170) See, for example, the judgments of 3 February 2005 in Case T-137/03 *Mancini* v *Commission* (under appeal, Case C-172/05 P); and in Case T-172/03 *Heurtaux* v *Commission* and the judgment of 17 March 2005 in Case T-362/03 *Milano* v *Commission*, not yet published in the ECR.

However, the Court acknowledged that any such lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*, as the right of access to the courts is not absolute. The applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council. Consequently, the Court dismissed the actions as unfounded.

G. Community staff cases

In 2005, the Court decided a large number of staff cases given that, leaving aside the 117 cases transferred to the Civil Service Tribunal, approximately 20 % of the cases decided this year (or 119 cases) fall within that area. However, the Court annulled measures in only a small number of cases as there were only fourteen judgments to that effect. Given the very large number of decisions made in this subject area and the limited scale of this report, the commentary will be limited to three observations.

First, as last year, the variety of decisions challenged before the Court should be highlighted, judgments and orders having been delivered on matters of appointment, promotion and competitions ([170]) on the financial entitlements of officials and other staff ([171]), on a framework agreement concluded between the Commission and trade union and professional organisations ([172]), on contracts for temporary staff ([173]), on disciplinary procedures ([174]), and on career development reports ([175]). Second, a significant proportion of annulments (six out of 14 judgments) are the result of a failure to state reasons or adequate reasons in the contested decision ([176]). Finally, because of the practical importance of the

([171]) In particular, many judgments were delivered this year on the conditions for entitlement to an expatriation allowance under the Staff Regulations, which gave the Court an opportunity to clarify the term 'State' within the meaning of Article 4(1)(a) of Annex VII to the old Staff Regulations for Officials of the European Communities (see, for example, the judgment of 30 June 2005 in Case T-190/03 *Olesen* v *Commission*, and of 25 October 2005 in Case T-83/03 *Salazar Brier* v *Commission* (under appeal, Case C-9/06 P)), not yet published in the ECR.

([172]) Judgment of 12 April 2005 in Case T-191/02 *Lebedef* v *Commission* (under appeal, Case C-268/05 P), not yet published in the ECR.

([173]) Judgment of 13 September 2005 in Case T-272/03 *Fernández Gómez* v *Commission* (under appeal, Case C-417/05 P), not yet published in the ECR.

([174]) Judgment of 5 October 2005 in Case T-203/03 *Rasmussen* v *Commission*, not yet published in the ECR.

([175]) Judgment of 12 July 2005 in Case T-157/04 *De Bry* v *Commission* (under appeal, Case C-344/05 P), not yet published in the ECR.

([176]) Judgments in *Heurtaux* v *Commission*, footnote 170 above; of 1 March 2005 in Case T-143/03 *Smit* v *Europol*; of 2 June 2005 in Case T-177/03 *Strohm* v *Commission*; of 5 July 2005 in Case T-9/04 *Marcuccio* v *Commission*; of 15 September 2005 in Case T-132/03 *Casini* v *Commission*; and of 8 December 2005 in Case T-237/00 *Reynolds* v *Commission*, not yet published in the ECR.

question decided, it must be pointed out that, in its judgment in *Fardoom and Reinard* v *Commission*, the Court held the system of target averages and indicative quotas set up by the Commission in 2002 for the reporting procedure for officials to be lawful ([177]). The Court held that the system of target averages, far from limiting the freedom of judgment of the assessors, served, on the contrary, to increase it by encouraging the awarding of marks which represent the merits of officials.

H. Customs law

In 2005, as in previous years, the Court ruled in several actions concerning the refusal by the Commission of applications for remission of import duties on the basis of the relief clause in the Community customs legislation which provides that import duties or export duties may be repaid or remitted in specific situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned ([178]). Although the Court decided these cases by applying the established principles in this field, two cases are nonetheless of interest.

First, in *Geologistics* v *Commission*, which concerned an application for remission made by an undertaking deemed to be financially liable as the person authorised to use the external Community transit procedure ('the principal'), for the removal of goods from customs supervision, the Court annulled a Commission decision, taking the view that it had made two manifest errors of assessment ([179]). First, contrary to the Commission's view, the fact that the national authorities, who were aware of the existence of a fraud affecting the applicant and were investigating it, did not inform the applicant because of the demands of that investigation, had placed the applicant in a 'special situation', as regards the customs debt relating to fraudulent operations taking place after the discovery of the fraud and connected to it. Secondly, the Commission was wrong to take the view that the applicant was guilty of 'obvious negligence' in not supervising the various third parties involved in the transit and in not taking out appropriate insurance. The first was not substantiated and, as regards the second, the Court held that it cannot be accepted that as a general rule the failure to take out insurance amounts, on its own, to obviously negligent conduct on the part of the trader.

Second, in *Ricosmos* v *Commission*, the Court made two interesting points clarifying the conditions under which an application for remission may be refused ([180]).

([177]) *Fardoom and Reinard* v *Commission*, footnote 28 above.

([178]) Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1), and Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1). See, for example, the judgment in *Common Market Fertilisers* v *Commission*, footnote 14 above.

([179]) Judgment of 27 September 2005 in Case T-26/03 *Geologistics* v *Commission*, not yet published in the ECR.

([180]) Judgment of 13 September 2005 in Case T-53/02 *Ricosmos* v *Commission* (under appeal, Case C-420/05 P), not yet published in the ECR.

First, as regards procedure, the Court relied inter alia on case-law concerning access to the case file in the field of competition law to establish that, where the Commission intends to take a decision unfavourable towards the applicant, it must, at the time it communicates its objections, give the applicant an opportunity to examine all the documents likely to be relevant in support of the request for remission or repayment and, in order to do so, it must at the very least provide the applicant with a complete list of the non-confidential documents on file containing sufficiently precise information for the applicant to assess, in full knowledge of the facts, whether the documents described are likely to be useful to it.

Secondly, as regards the assessment of the substance of applications for remission, the Court made clear that although, in order to refuse such an application, there must be a connection between the negligence of which the operator is accused and the special situation established, it is not necessary for the special situation to be the direct and immediate consequence of such negligence. In that connection it is sufficient for the negligence to have contributed to or facilitated the removal of goods from customs supervision.

III. *Actions for damages*

In 2005, leaving aside staff cases, the Court ruled in 17 judgments and orders on the substantive conditions for the non-contractual liability of the Community ([181]). It was only in *AFCon Management Consultants and Others* v *Commission* that a right to damages was upheld, in that case an amount just less than EUR 50 000 to be paid to an undertaking unlawfully excluded from a tendering procedure ([182]). Moreover, in *Camar* v *Council and Commission*, the Court, applying the classic principles of assessment of damage, fixed the quantum of damages awarded previously in an interlocutory judgment ([183]). All the other actions, although they were dismissed, provided a number of clarifications regarding the admissibility of actions for damages, the damage which can be indemnified and the conduct liable to give rise to damages.

([181]) Judgments of 3 February 2005 in Case T-19/01 *Chiquita Brands and Others* v *Commission*, in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, footnote 50 above; of 16 March 2005 in Case T-283/02 *EnBW Kernkraft* v *Commission;* of 17 March 2005 in Case T-285/03 *Agraz and Others* v *Commission* (under appeal, Case C-243/05 P); in Case T-160/03 *AFCon Management Consultants and Others* v *Commission*, not yet published in the ECR; judgment in *Holcim (Deutschland)* v *Commission*, footnote 68 above; judgment of 13 July 2005 in Case T-260/97 *Camar* v *Council and Commission*; order of 14 September 2005 in Case T-140/04 *Adviesbureau Ehcon* v *Commission*, not yet published in the ECR; judgment in *Cofradía de pescadores de 'San Pedro' de Bermeo and Others* v *Council*, footnote 22 above; order of 26 October 2005 in Case T-124/04 *Ouariachi* v *Commission* (under appeal, Case C-4/06 P); judgments of 30 November 2005 in Case T-250/02 *Autosalone Ispra* v *Commission*; of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission*; in Case T-151/00 *Laboratoire du Bain* v *Council and Commission*; in Case T-301/00 *Groupe Fremaux and Palais Royal* v *Council and Commission*; in Case T-320/00 *CD Cartondruck* v *Council and Commission*; in Case T-383/00 *Beamglow* v *Parliament and Others*, and in *Fedon & Figli and Others* v *Council and Commission*, footnote 181 above, none yet published in the ECR.

([182]) *AFCon Management Consultants and Others* v *Commission*, footnote 181 above.

([183]) *Camar* v *Council and Commission*, footnote 181 above.

A. Conditions for admissibility of an action for damages

In 2005 the Court made several rulings clarifying the formal conditions for the admissibility of actions for damages, the limitation periods in this area and the principle of autonomous remedies.

First, according to settled case-law, an applicant is not obliged to put in figures the amount of the loss which it submits it has suffered. Nonetheless, as the Court made clear in *Polyelectrolyte Producers Group* v *Council and Commission*, to meet the formal conditions for admissibility laid down by the Rules of Procedure (Article 44(1)(c)), the applicant must clearly indicate the evidence which enables its nature and extent to be assessed. In this case the evasive argument of the applicant regarding the loss it allegedly suffered is confined to mere assertion wholly unsupported by relevant evidence, which results in the inadmissibility of the action for damages ([184]).

Second, as regards limitation periods, the Court was able to reiterate the settled case-law according to which the time bar applies only to the period preceding by more than five years the date of the act stopping time from running and does not affect rights which arose during subsequent periods ([185]). In its order in *Adviesbureau Ehcon* v *Commission*, the Court held that that case-law applied only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That was not the position in this case, in which the alleged loss, if proved, even though its full extent may not have been appreciated until after the rejection of the applicant's tender for the contract in question, was nevertheless caused instantly by that rejection ([186]).

Then, thirdly, in *Holcim (France)* v *Commission,* the Court reiterated the principle of the autonomy of remedies, ruling that, where an applicant could have brought an action for annulment or for failure to act against an act or abstention allegedly causing it loss, but failed to do so, the failure to exercise such remedies does not in itself make the action for damages time-barred ([187]). Again on the question of autonomous remedies that case also allowed the Court to clarify the scope of the case-law according to which an action for damages is inadmissible where it actually seeks the withdrawal of an individual decision which has become definitive. That case-law concerns 'the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision.' ([188]) The Court made clear that this case-law was relevant only where

([184]) Order in *Polyelectrolyte Producers Group* v *Council and Commission*, footnote 29 above. See also the judgment in *Autosalone Ispra* v *Commission*, footnote 181 above.

([185]) See, to that effect, the judgment of 16 April 1997 in Case T-20/94 *Hartmann* v *Council and Commission*, [1997] ECR II-595, paragraph 132. For an application of that case-law in 2005, see the judgment in *Holcim (Deutschland)* v *Commission*, footnote 68 above.

([186]) Order in *Ehcon* v *Commission*, footnote 181 above.

([187]) Order in *Holcim (France)* v *Commission*, footnote 68 above.

([188]) See, inter alia, judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 33.

the alleged damage results solely from an individual administrative measure which has become definitive and which the person concerned could have contested in an action for annulment. In this case the loss alleged by the applicant did not result from an individual administrative measure which the applicant could have contested but from the wrongful failure of the Commission to take a measure necessary to comply with a judgment. The action was therefore held admissible.

B. Damage which can be the subject of compensation

In its judgment in *Internationaler Hilfsfonds* v *Commission*, the Court established the principle that lawyers' fees incurred in proceedings before the Ombudsman are not recoverable by way of damages in an action for compensation, inter alia because a party has the option of applying to the Ombudsman without using a lawyer ([189]). Similarly, in its order in *Ehcon* v *Commission*, the Court held that the applicant has not managed to establish the existence of a direct causal relationship between the alleged costs incurred before the Ombudsman and the alleged illegalities and that a citizen's free choice to refer a matter to the Ombudsman cannot appear to be the direct and necessary consequence of cases of improper administration which may be attributable to Community institutions or bodies ([190]).

C. Liability for unlawful conduct

In addition to the liability which may be incurred even in the absence of unlawful conduct which will be discussed below, it is more usual for the Community to incur non-contractual liability for an unlawful act. In those circumstances, in order for the Community to incur non-contractual liability a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded ([191]).

In 2005, the Court delivered no less than nine judgments in actions for damages in connection with a common organisation of the market ([192]). However, discussion will be confined here to the six judgments delivered in December 2005, in which the Court, sitting as a Grand Chamber, considered the question of the relationship between the decisions of

([189]) Order of 11 July 2005 in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* (under appeal, Case C-331/05 P), not yet published in the ECR.

([190]) Order in *Ehcon* v *Commission*, footnote 181 above.

([191]) Judgments in Case 26/81 *Oleifici Mediterranei* v *CEE* [1982] ECR 3057, paragraph 16, and in Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30.

([192]) Judgments in *Chiquita Brands and Others* v *Commission*, footnote 181 above; *Comafrica and Dole Fresh Fruit Europe* v *Commission*, footnote 181 above; *Agraz and Others* v *Commission*, footnote 181 above; *FIAMM and FIAMM Technologies* v *Council and Commission*, footnote 181 above; *Laboratoire du Bain* v *Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal* v *Council and Commission*, footnote 181 above; *CD Cartondruck* v *Council and Commission*, footnote 181 above; *Beamglow* v *Parliament and Others*, footnote 181 above, and *Fedon & Figli and Others* v *Council and Commission*, footnote 181 above.

the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) and the Community legal order ([193]).

In those cases, the applicants submitted that the conduct of the Community was unlawful under the WTO agreements, which led the Court to decide whether such agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation in the light of a decision of the DSB. In those six judgments, the Court held that that was not the position. The WTO agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions except where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements ([194]). Neither of those exceptions is applicable where there is a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules. As regards the first exception, in undertaking to comply with the WTO rules, the Commission did not intend to assume a specific obligation in the context of the WTO capable of allowing a review, as the dispute settlement system in any event accords considerable importance to negotiation. Accordingly, review by the Community courts could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute. As regards the second exception, the Court held that the common organisation of the market for bananas cannot be regarded as referring expressly to specific provisions of the WTO agreements.

The case-law requires that, for the conduct of an institution to be declared illegal under the rules on liability for unlawful conduct, a sufficiently serious breach of a legal rule designed to confer rights on individuals must be established. The system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question. The determining factor for regarding a breach of Community law as sufficiently serious lies in the manifest and serious failure by the Community institution concerned to observe the limits on its discretion. Where that institution has only considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ([195]). In *Holcim (Deutschland)* v *Commission*, the applicant sought reimbursement of the cost of bank guarantees set up to avoid the payment of a fine eventually annulled by the Court ([196]). The Court found that although the Commission had reduced dis-

([193]) *FIAMM and FIAMM Technologies* v *Council and Commission*, footnote 181 above; *Laboratoire du Bain* v *Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal* v *Council and Commission*, footnote 181 above; *CD Cartondruck* v *Council and Commission*, footnote 181 above; *Beamglow* v *Parliament and Others*, footnote 181 above; and *Fedon & Figli and Others* v *Council and Commission*, footnote 181 above. On this point, see also *Chiquita Brands and Others* v *Commission*, footnote 181 above.

([194]) See, for example, the judgment in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395.

([195]) Judgments in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 40 and 42 to 44, and in Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraphs 52 to 55.

([196]) *Holcim (Deutschland)* v *Commission*, footnote 68 above.

cretion in the field where the unlawful measure complained of was taken (assessment of a breach of Article 81(1) EC), it was nonetheless confronted with a complex situation, such that the unlawful measure it took was not, in the light of that complexity, sufficiently serious to give rise to a right to compensation.

D. Liability in the absence of unlawful conduct

Under Article 288 EC, in the case of non-contractual liability, the Community has, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties. In a series of judgments delivered in December 2005, the Court, sitting as a Grand Chamber, expressly recognised that the Community could incur liability even in the absence of unlawful conduct ([197]).

In 1993, the Council adopted a regulation introducing for the Member States common rules for the import of bananas (the COM for bananas) ([198]). This regulation contained preferential provisions for bananas from certain African, Caribbean and Pacific States. Following complaints lodged by certain States, the DSB of the WTO held that the Community regime governing the import of bananas was incompatible with the WTO agreements. In 1998 the Council therefore adopted a regulation amending that regime. Since the United States took the view that the new regime was still not compatible with the WTO agreements, it requested, and obtained, authorisation from the DSB to impose increased customs duty on imports of Community products appearing on a list drawn up by the United States authorities. Six companies established in the European Union brought proceedings before the Court of First Instance of the European Communities claiming compensation from the Commission and the Council of the European Union for the damage alleged to have been suffered by them because the United States' retaliatory measures applied to their exports to the United States.

In its judgment the Court first held that the Community could not incur liability in this case for unlawful conduct. However, it held that where it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community's non-contractual liability. National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the per-

([197]) *FIAMM and FIAMM Technologies* v *Council and Commission*, footnote 181 above; *Laboratoire du Bain* v *Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal* v *Council and Commission*, footnote 181 above; *CD Cartondruck* v *Council and Commission*, footnote 181 above; *Beamglow* v *Parliament and Others*, footnote 181 above; and *Fedon & Figli and Others* v *Council and Commission*, footnote 181 above.

([198]) Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ L 47, 25.2.1993, p. 1).

petrator of the damage. When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, as to the causal link between that damage and the conduct of the Community institution and as to the unusual and special nature of the damage in question are all met. This is thus the first time that the Court held that the Community incurred non-contractual liability in the absence of unlawful conduct on the part of its bodies other than in a purely hypothetical case.

In this case, the condition requiring the applicants to have sustained damage is satisfied. That is also true of the condition relating to the causal link between that damage and the conduct of the institutions. The withdrawal of concessions in relation to the Community which took the form of the increased customs duties on imports is to be regarded as a consequence resulting objectively, in accordance with the normal and foreseeable operation of the WTO dispute settlement system accepted by the Community, from the retention in force by the defendant institutions of a banana import regime incompatible with the WTO agreements. Thus, the conduct of the defendant institutions necessarily led to adoption of the retaliatory measure, and 'must be regarded as the immediate cause of the damage suffered by the applicants following imposition of the United States increased customs duty.' On the other hand, the applicants have not succeeded in proving that they sustained unusual damage, that is to say, damage which exceeds the limits of the economic risks inherent in operating in the sector concerned. The possibility of tariff concessions being suspended is among the vicissitudes inherent in the current system of international trade and, accordingly, has to be borne by every operator who decides to sell his products on the market of one of the WTO members. The Court therefore dismissed the six actions.

IV. Applications for interim relief

2005 confirmed the downward trend in the number of applications for interim relief already observed in 2004, with only 21 applications lodged, compared with 26 in 2004 and 39 in 2003. In 2005, the President of the Court of First Instance, in his capacity as judge responsible for granting interim relief, decided 13 cases.

Of those, only the assessment of urgency in *Deloitte Business Advisory* v *Commission* will be considered in this report ([199]). In that case, Deloitte Business Advisory sought suspension of the operation of both a Commission decision rejecting the bid made by a consortium to which it belonged and the decision awarding the contract at issue to a third party. In addition to the damage to its reputation, the applicant claimed that, if the contested decisions were annulled and interim measures were not adopted, it would no longer be possible for it to be awarded the contract covered by the tendering procedure and then to perform the contract and, as a result, to derive certain benefits in terms of prestige, experience and revenue.

([199]) Order of the President of the Court of First Instance of 20 September 2005 in Case T-195/05 R *Deloitte Business Advisory* v *Commission,* not yet published in the ECR.

When he considered whether it was proven, with a sufficient degree of probability, that the applicant was likely to suffer serious and irreparable damage if the interim measures applied for were not adopted, the judge hearing the application for interim measures took the view that the consortium to which the applicant belonged had lost its opportunity to be awarded the contract and, consequently, to derive the various financial and non-financial benefits that could possibly result from the performance of the contract. In view, first, of the expected date of performance of the contract, it was therefore unlikely that the possibility of the Commission organising a new tendering procedure would in itself make it possible to preserve the opportunity that the applicant had to be awarded and to perform the contract. Second, as regards the possibility that the applicant could be compensated subsequently for any damage suffered, the file did not contain anything to guarantee, with a sufficient degree of certainty, that, if the contested decisions were annulled, the Commission would compensate the applicant without an action for damages being brought. Moreover, the damage sustained by the applicant through the loss of the opportunity to be awarded the contract must be considered very difficult to quantify and, therefore, as constituting irreparable damage. However, the applicant had not thereby established satisfactorily that it would have been able to derive sufficiently sizeable benefits from the award and performance of that contract under the tendering procedure. Since the balance of interests was in any case in favour of not ordering interim measures, the judge hearing the application for interim relief dismissed the application.

B — Composition of the Court of First Instance

(Order of precedence as at 7 October 2005)

First row, from left to right:

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

Second row, from left to right:

O. Czúcz, Judge; F. Dehousse, Judge; N. J. Forwood, Judge; P. Mengozzi, Judge; J. D. Cooke, Judge; A. W. H. Meij, Judge; M. E. Martins de Nazaré Ribeiro, Judge; E. Cremona, Judge.

Third row, from left to right:

E. Coulon, Registrar; S. S. Papasavvas, Judge; K. Jürimäe, Judge; D. Šváby, Judge; I. Wiszniewska-Białecka, Judge; I. Pelikánová, Judge; V. Vadapalas, Judge; I. Labucka, Judge; V. Trstenjak, Judge.

1. Members of the Court of First Instance

(in order of their entry into office)

Bo Vesterdorf

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

Rafael García-Valdecasas y Fernández

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

Virpi Tiili

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

Pernilla Lindh

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

Josef Azizi

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

John Cooke

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

Marc Jaeger

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

Jörg Pirrung

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

Paolo Mengozzi

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

Arjen W. H. Meij

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

Mihalis Vilaras

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

Nicholas James Forwood

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

Hubert Legal

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

Maria Eugénia Martins de Nazaré Ribeiro

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

Franklin Dehousse

Born 1959; Law degree (University of Liege, 1981); research fellow (Fonds national de la recherche scientifique, 1985–89); legal advisor 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 de Montesquieu, Bordeaux; Collège Michel Servet of the Universities of Paris; Faculties of Notre-Dame de la Paix, Namur); Special Representative of the Minister for Foreign Affairs (1995–99); Director of European Studies of the Royal Institute of International Relations (1998–2003); assesseur at the Council of State (2001–03); consultant to the European Commission (1990–2003); member of the Internet Observatory (2001–03); Judge at the Court of First Instance since 7 October 2003.

Ena Cremona

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

Ottó Czúcz

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

Irena Wiszniewska-Białecka

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

Irena Pelikánová

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

Daniel Šváby

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

Vilenas Vadapalas

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

Küllike Jürimäe

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

Ingrida Labucka

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

Savvas S. Papasavvas

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

Verica Trstenjak

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

Hans Jung

Born 1944; Assistant, and subsequently Assistant Lecturer at the Faculty of Law (Berlin); Rechtsanwalt (Frankfurt am Main); Lawyer-linguist at the Court of Justice; Legal Secretary at the Court of Justice in the Chambers of the President, Mr Kutscher, and subsequently in the Chambers of the German judge; Deputy Registrar at the Court of Justice; Registrar of the Court of First Instance from 10 October 1989 to 6 October 2005.

Emmanuel Coulon

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

2. Changes in the composition of the Court of First Instance in 2005

On 6 October 2005, the Registrar Mr Hans Jung left the Court of First Instance; he was replaced by Mr Emmanuel Coulon.

3. Order of precedence

from 1 January to 6 October 2005

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

H. Jung, Registrar

from 7 October to 31 December 2005

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

E. Coulon, Registrar

4. Former Members of the Court of First Instance

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

Presidents

José Luís Da Cruz Vilaça (1989–95)
Antonio Saggio (1995–98)

Registrar

Hans Jung (1989–2005)

Chapter III

The European Union Civil Service Tribunal

A — Activity of the Civil Service Tribunal in 2005

By the President, Mr Paul J. Mahoney

In 2005 a new court was added to the court structure of the European Union. By decision of 2 November 2004 [1], the Council established the European Union Civil Service Tribunal, exercising its power, under the Treaty of Nice, to create judicial panels attached to the Court of First Instance in order to exercise, in certain specific areas, the judicial competence laid down in the second paragraph of Article 220 and Article 225a of the Treaty.

The Civil Service Tribunal, which has jurisdiction in any dispute between the Community and its servants under Article 236 EC, came into being principally as a result of the saturation of the role of the Court of First Instance — whose jurisdiction has grown over the years — and the impact that has had on the effectiveness of judicial review in the Community legal order. With the creation of the Civil Service Tribunal, the Court of First Instance will be relieved of a considerable volume of litigation which currently represents about a quarter of the cases lodged each year.

The procedure for the appointment of the judges of the Civil Service Tribunal differs from that followed in the Court of Justice and the Court of First Instance in that the judges of the Civil Service Tribunal are appointed by the Council by unanimous decision, after consultation of a committee of seven independent persons, which gives its 'opinion on the candidates' suitability to perform the duties of judge' and appends to the opinion a list of candidates containing the names of at least twice as many candidates as there are judges to be appointed (fourth paragraph of Article 225a EC and Article 3(3) and (4) of Annex I to the Statute of the Court of Justice) [2]. The Council is also required to 'ensure a balanced composition of the Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented' (Article 3(1) of Annex I to the Statute of the Court of Justice).

The judges are appointed for a period of six years and may be reappointed. Any vacancy is to be filled by the appointment of a new judge for a period of six years (Article 2(2) and (3) of Annex I to the Statute of the Court of Justice).

By decision of 22 July 2005 (2005/577/EC, Euratom), the Council appointed the seven judges who took their oath at the formal sitting of the Court of Justice on 5 October 2005.

By decision of 6 October 2005, the Civil Service Tribunal appointed Mr Paul Mahoney first President of the Tribunal for a period of three years. On the same date the procedure for the recruitment of the Registrar was commenced. By decision of 9 November

(1) Council Decision 2004/752/EC, Euratom, of 2 November 2004 (OJ L 333, 9.11.2004, p. 7).

(2) By Decision 2005/45/EC, Euratom, of 18 January 2005 (OJ L 21, 25.1.2005, p. 13), the Council established the operating rules of the committee.

2005, the Tribunal appointed Mrs Waltraud Hakenberg Registrar of the Civil Service Tribunal and she took her oath at the formal sitting held on 30 November 2005.

Jurisdiction was transferred on 12 December 2005, following publication in the *Official Journal of the European Union* of the Decision of the President of the Court of Justice recording that the European Union Civil Service Tribunal had been constituted in accordance with law ([3]). As provided for by Article 3(3) of Decision 2004/752/EC, Euratom, the President of the Court of First Instance then ordered the transfer of the cases in which the written procedure had not yet been completed, that is to say, 117 cases.

According to Article 3(4) of Council Decision 2004/752/EC, Euratom, until the entry into force of its rules of procedure, the European Union Civil Service Tribunal is to apply *mutatis mutandis* the Rules of Procedure of the Court of First Instance.

The period between the swearing of the oath by the judges of the Civil Service Tribunal and the actual transfer of cases was used to examine those rules in detail with a view to adapting them to the specific needs of the Civil Service Tribunal and the provisions of Annex I of the Statute of the Court of Justice.

The Tribunal also gave considerable thought to its working methods and, in particular, to the constitution and composition of its Chambers, and assignment of the Judges to Chambers. Thus, in accordance with Article 4(2) to (4) of Annex I of the Statute of the Court of Justice, and Article 10 of the Rules of Procedure of the Court of First Instance, the Tribunal appointed Mr Horstpeter Kreppel and Mr Sean Van Raepenbusch Presidents of Chamber. The Tribunal decided to sit in three Chambers, the first and second composed of three judges and the third of five. The third Chamber may also sit with three judges; its President is the President of the Tribunal ([4]).

The Tribunal is drafting its Rules of Procedure which have to take account of the specific features of litigation in staff cases. Certain basic principles have already been set out in Article 7 of Annex I to the Statute of the Court of Justice. For instance, according to Article 7(3), the written stage of the procedure is to comprise only one exchange of pleadings, unless the Tribunal decides that a second exchange of written pleadings is necessary. Where there is such second exchange, it is provided that the Tribunal may, with the agreement of the parties, decide to proceed to judgment without an oral procedure. According to Article 7(4), at all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement. That means that a procedural framework must be set up to meet the wish thus expressed by the Council.

The rules on costs in the Civil Service Tribunal are different from those in force in the Court of Justice and the Court of First Instance in that, under Article 7(5) of Annex I to the Statute of the Court of Justice, subject to the specific provisions of the Rules of

([3]) OJ L 325, 12.12.2005, p. 1.

([4]) See OJ Notice in OJ C 322, 17.12.2005, p. 16.

Procedure which have yet to be decided, the unsuccessful party is to be ordered to pay the costs should the court so decide.

The Tribunal should be in a position to submit draft Rules of Procedure to the Court of Justice early in 2006.

Although its official address is that of the Court of Justice, the Civil Service Tribunal is housed in the Allegro Building, 35A avenue J. F. Kennedy, in Luxembourg. The Tribunal has its own court room.

B — Composition of the Civil Service Tribunal

(Order of precedence as at 30 November 2005)

From left to right:

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

1. Members of the Civil Service Tribunal

(in order of their entry into office)

Paul J. Mahoney

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

Horstpeter Kreppel

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

Irena Boruta

Born 1950; law graduate of the University of Wrocław (1972), doctorate in law (Łodz, 1982); lawyer at the Bar of the Republic of Poland (since 1977); visiting researcher (University of Paris X, 1987 to 1988; University of Nantes, 1993–94); expert of 'Solidarność' (1995–2000); professor of labour law and European social law at the University of Łodz (1997–98 and 2001–05), associate professor at Warsaw School of Economics (2002), professor of labour law and social security law at Cardinal Stefan Wyszynski, Warsaw (2000–05); Deputy Minister of Labour and Social Affairs (1998–2001); member of the negotiation team for the accession of the Republic of Poland to the European Union (1998–2001); representative of the Polish Government to the International Labour Organisation (1998–2001); author of a number of works on labour law and European social law; Judge at the Civil Service Tribunal since 6 October 2005.

Heikki Kanninen

Born 1952, graduate of the Helsinki School of Economics and of the faculty of law of the University of Helsinki; legal secretary at the Supreme Administrative Court of Finland; general secretary to the committee for reform of legal protection in public administration; principal administrator at the Supreme Administrative Court; General Secretary to the Committee for Reform of Administrative Litigation, counsellor in the legislative department of the Ministry of Justice; Assistant Registrar to the EFTA Court; legal secretary at the Court of Justice of the European Communities; Judge at the Supreme Administrative Court (1998–2005); member of the Asylum Board; Vice-President of the Committee on the Development of the Finnish Courts; Judge at the Civil Service Tribunal since 6 October 2005.

Haris Tagaras

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

Sean Van Raepenbusch

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

Stéphane Gervasoni

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

Waltraud Hakenberg

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

2. Order of precedence

from 6 October to 29 November 2005

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

from 30 November 2005

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

Chapter IV

Meetings and visits

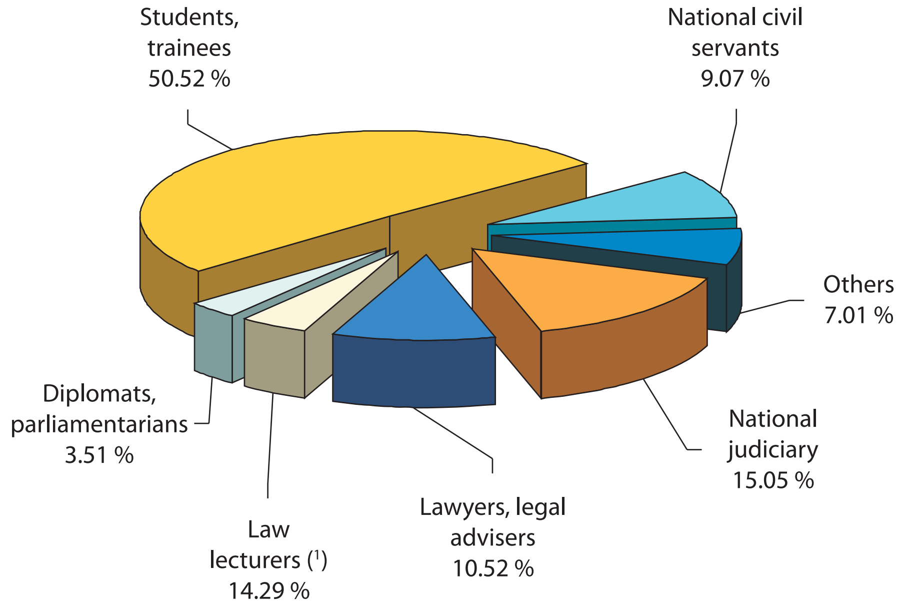
A — Official visits and functions at the Court of Justice and the Court of First Instance in 2005

17 January	Mr Peter Chase, Director of the Office of European Union and Regional Affairs at the US Department of State, Bureau of European and Eurasian Affairs
17 January	Mr Jānis Maizītis, Prosecutor General of the Republic of Latvia, and Ms Rudīte Āboliņa, Assistant Prosecutor General of the Republic of Latvia
19 January	European Affairs Committee of the Danish Parliament
27 January	New Year's Reception of the 'Bridge Forum Dialogue'
28 January	Ms Louisa Macovei, Romanian Minister for Justice, accompanied by HE Tudorel Postolache, Ambassador of Romania to the Grand Duchy of Luxembourg
31 January	Meeting of Agents of the Member States and the European institutions
24–25 February	Dialogue between the European Union and China on the subject of human rights
14 March	Mr Christos Artemides, President of the Supreme Court of Cyprus
14 March	Delegation from the Legal Affairs Committee of the European Parliament
5 April	Mr Mareks Segliņš, Chairman of the Legal Affairs Committee of the Latvian Parliament
6 April	HE Mehmet Burhan Ant, Ambassador of the Republic of Turkey to the Grand Duchy of Luxembourg
11 April	HE Bülent Arinç, President of the Grand National Assembly of the Republic of Turkey, and HE Mehmet Burhan Ant, Ambassador of the Republic of Turkey
11–15 April	Delegation from the Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law in Africa (OHBLA)
17–20 April	Delegation from the Constitutional Court of the Czech Republic
25 April	Delegation of the Board of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union
27 May	Mr Erik Fribergh, Deputy Registrar of the European Court of Human Rights

6 June	Ms Judith Kumin and Ms Erika Feller, Regional Representative of the United Nations High Commissioner for Refugees (UNHCR)
7 June	Delegation from the Constitutional Court of the Republic of Bulgaria
9 June	HE Bernhard Marfurt, Ambassador, Head of the Swiss Mission to the European Communities in Brussels
13 June	Governmental delegation from Ukraine
14–15 June	Mr John Jackson, Professor at Georgetown University (Washington)
22 September	Ms Anne E. Jensen, Member of the European Parliament
10–11 October	Delegation from the Constitutional Court of the Republic of Poland
11 October	Delegation from the Constitutional Court of the Republic of Bulgaria
14 November	Delegation from the Council of Bars and Law Societies of Europe (CCBE)
15 November	Mr Anton Tabone, Speaker of the House of Representatives of the Republic of Malta
8 December	Delegation from the Consiglio Nazionale Forense

B — Study visits to the Court of Justice and the Court of First Instance in 2005

Distribution by type of group

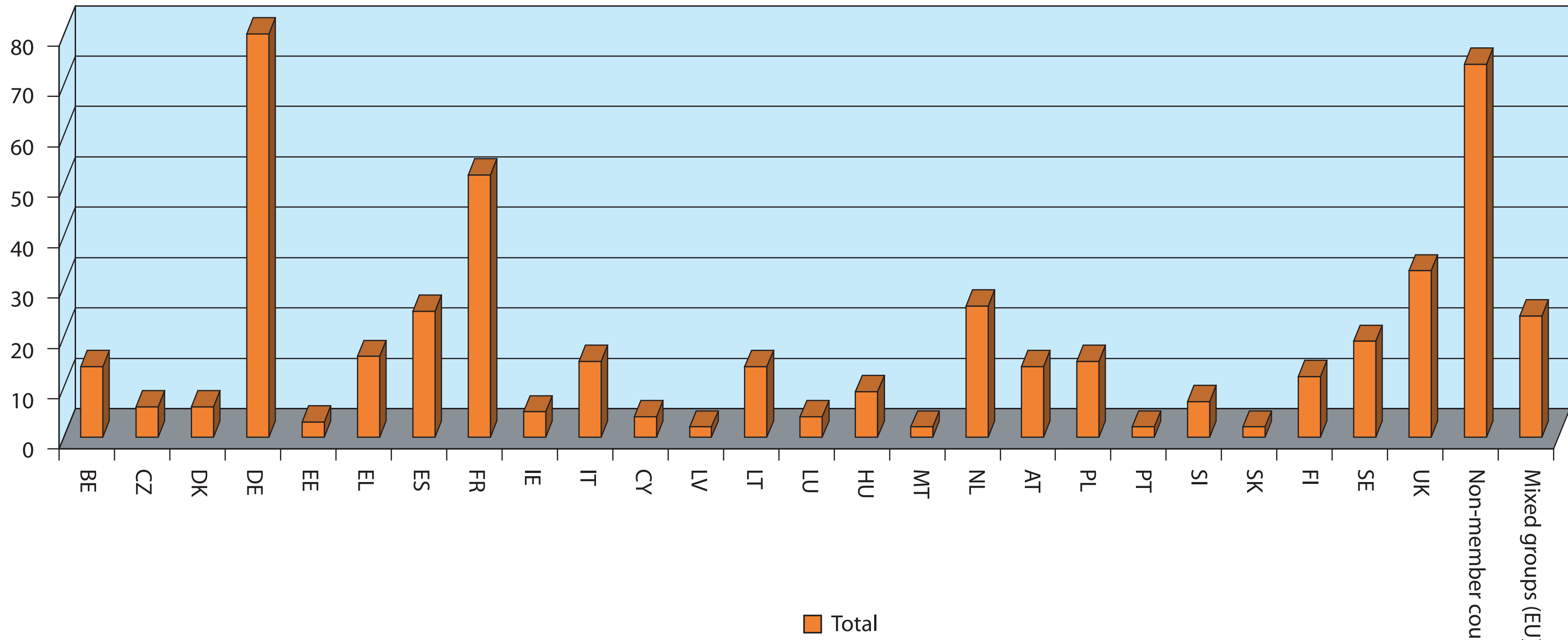


	National judiciary	Lawyers, legal advisers	Law lecturers (1)	Diplomats, parliamentarians	Students, trainees	National civil servants	Others	Total
Number of groups	73	51	21	17	245	44	34	485

(1) Other than those accompanying student groups

Study visits to the Court of Justice and the Court of First Instance in 2005

Distribution by Member State (1)

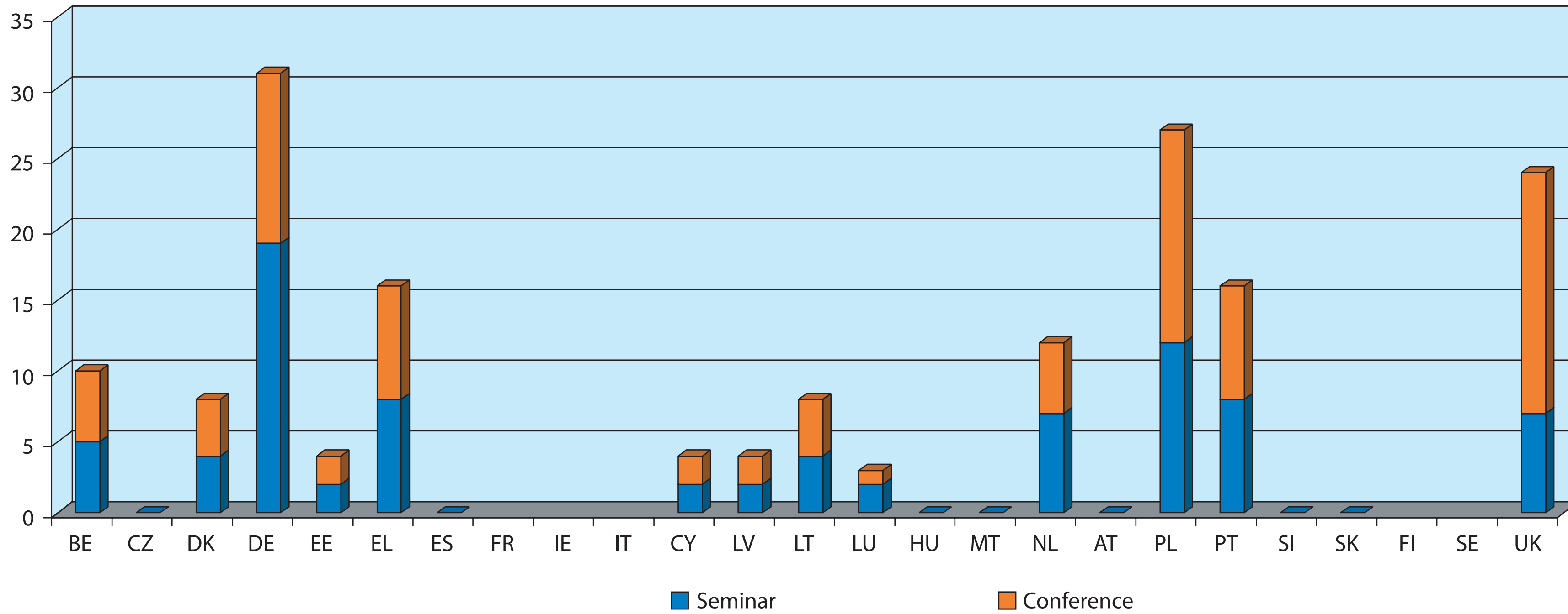


	Number of visitors								Number of groups
	National judiciary	**Lawyers, legal advisers**	**Law lecturers [1]**	**Diplomats, parliamentarians**	**Students, trainees**	**National civil servants**	**Others**	**Total**	**Total**
BE	92	3			307		18	**420**	**14**
CZ					42	16		**58**	**6**
DK	6				123	14		**143**	**6**
DE	241	156	8	166	1 435	232	159	**2 397**	**80**
EE	10	1						**11**	**3**
EL	167	52	6		166	25	50	**466**	**16**
ES	159	45			281	61	80	**626**	**25**
FR	227	59		140	1 002	10	114	**1 552**	**52**
IE		8			36	10	5	**59**	**5**
IT	20	1	2	189	238			**450**	**15**
CY		10			4			**14**	**4**
LV					4	3		**7**	**2**
LT		6	5	35	3	12		**61**	**14**
LU					16		126	**142**	**4**
HU			11		159		11	**181**	**9**
MT		5			35			**40**	**2**
NL	36	50			589	68	15	**758**	**26**
AT	30		5		212	10	38	**295**	**14**
PL	196	119	4		138	5		**462**	**15**
PT			4		2			**6**	**2**
SI	62	62			49			**173**	**7**
SK		6						**6**	**2**
FI		31		13	54		84	**182**	**12**
SE	85	28			54	178	23	**368**	**19**
UK	110	82		6	513	12		**723**	**33**
Non-member countries	154	96	3	10	1 210	24	48	**1 545**	**74**
Mixed groups (EU)		169		22	595	36	82	**904**	**24**
Total	**1 595**	**989**	**48**	**581**	**7 267**	**716**	**853**	**12 049**	**485**

[1] Other than those accompanying student groups.

Study visits to the Court of Justice and the Court of First Instance in 2005

National judiciary



	BE	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
Seminar	5		4	19	2	8					2	2	4	2			7		12	8					7	82
Conference	5		4	12	2	8					2	2	4	1			5		15	8					17	85

C — Formal sittings in 2005

21 January	Formal sitting for the giving of a solemn undertaking by the President and Members of the Commission of the European Communities
7 March	Formal sitting in memory of Robert Lecourt, Ole Due and of Pieter VerLoren van Themaat, former Members of the Court of Justice
5 October	Formal sitting on the occasion of the commencement of operation of the European Union Civil Service Tribunal
6 October	Formal sitting on the occasion of the departure of Mr H. Jung, Registrar of the Court of First Instance, and the entry into office of Mr E. Coulon as Registrar of the Court of First Instance
30 November	Formal sitting on the occasion of the entry into office of Ms W. Hakenberg as Registrar of the Civil Service Tribunal

D — Visits and participation in official functions in 2005

Court of Justice

10 January	Representation of the Court at the formal sitting for the 'opening of the legal year of the Cour d'appel de Paris'
13–15 January	Representation of the Court at the 85th anniversary of the Supreme Court of the Republic of Estonia, in Tartu
14 January	Representation of the Court at the formal session of both chambers of the Austrian Parliament on the occasion of the 10th anniversary of the accession of the Republic of Austria to the European Union, in Vienna
21 January	Representation of the Court at the formal sitting of the European Court of Human Rights, in Strasbourg
27 January	Attendance of the President at the funeral of Mr Ole Due, former President of the Court, in Copenhagen
9 February	Participation of the President at the celebration marking the 10th anniversary of the Greek Economic and Social Committee in Athens
10 February	Participation of the President at the 'Manouil Chrysoloras' conference on the subject 'Developments in the judicial system of the European Union after the Treaty of Nice', in Athens
14 February	Participation of the President at the conference organised by the Centre d'études européennes of the law faculty of the Université Jean Moulin on the subject 'The role of the Court of Justice of the European Communities in the economic integration of the new enlarged Europe', in Lyon
14–15 February	Representation of the Court at the 'Conference of Presidents of European Constitutional Courts' organised by the Constitutional Court of Hungary, in Budapest
25–26 February	Representation of the Court at the 10th anniversary of the accession of the Republic of Austria to the European Union, in Vienna
28 February	Participation of the President at a conference organised by the Freie Universität Berlin
1 March	Representation of the Court at the formal sitting of the Federal Labour Court on the occasion of the departure of its President and of the entry into office of his successor, in Erfurt
3 March	Representation of the Court at the seminar organised in the context of the Luxembourg Presidency on the subject 'Mutual trust in the European criminal law area', in Luxembourg

16 March	Receipt by the President of the honorary distinction 'das österreichische Ehrenkreuz für Wissenschaft und Kunst 1. Klasse' (Austrian Cross of Honour for Science and Art, First Class) from HE W. Hagg, Ambassador of the Republic of Austria, in Luxembourg
17 March	Representation of the Court at the opening of the Fifth Congress of the European Association of Women Lawyers, in Strasbourg
21–31 March	Official visit of the President of, and a delegation from, the Court to the People's Republic of China
7–8 April	Representation of the Court at the colloquium organised on the occasion of the 127th anniversary of the Bar, in Istanbul
26 April	Participation of the President at a hearing on fundamental rights in the European Union organised by the European Parliament, in Brussels
5–9 May	Official visit of the President of, and a delegation from, the Court to the Supreme Court of Cyprus
15 May	Representation of the Court at the official State ceremony on the occasion of the 50th anniversary of the signature of the Austrian State Treaty, in Vienna
15–18 May	Official visit of the President of the Court and of Judge Kūris to Lithuania (Vilnius)
15–19 May	Representation of the Court at the XIIIth Congress of the Conference of the European Constitutional Courts, in Nicosia
23 May	Receipt by the President of the title 'Doctor *honoris causa*' of the Deutsche Hochschule für Verwaltungswissenschaften
25 May	Participation of the President at the colloquium 'Feierliche Zeugnisübergabe 2005 in Verbindung mit dem Kongress Internationaler Juristennachwuchs & Praxis anlässlich des 2500. Absolventen der Internationalen Rechtsstudien' at the University of Trier
30 May	Representation of the Court at the formal sitting of the Federal Finance Court on the occasion of the departure of its President and of the entry into office of his successor, in Munich
1 June	Representation of the Court at the ceremony organised on the occasion of the National Day of the Italian Republic, in Rome
2–3 June	Representation of the Court at the third annual conference of the 'Réseau européen des conseils de la justice', in Barcelona
5–6 June	Representation of the Court at the Board meeting and General Assembly of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, in Leipzig

20 June	Participation of the President at the colloquium 'Veranstaltungsreihen des Centrums für Europäisches Privatrecht' and talk of the President on the subject 'Rechtswirkungen von EG-Richtlinien in privatrechtlichen Beziehungen' (Legal effects of EC directives in private-law relationships), in Münster
20–21 June	Representation of the Court at the seminar on judicial procedures in litigation concerning foreign nationals and refugees, in Brussels
27 June	Participation of the President at the ceremony marking the departure of the President of the Greek Council of State, in Athens
28 June	Representation of the Court at the ceremonies organised on the occasion of the National Day of the Republic of Slovenia, in Brussels
1 July	Representation of the Court at the 50th anniversary of the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), in Noordwijk (Netherlands)
1–2 July	Representation of the Court at the Fourth Conference of the Association of European Competition Law Judges, in London
2–4 July	Official visit of the President to the Constitutional Court of Poland, in Warsaw
12 July	Representation of the Court at the occasion marking the 25th anniversary of the Constitutional Court of Spain, in Madrid
12–13 July	Representation of the Court at a hearing organised by the European Parliament Committee on Budgetary Control concerning the status and institutional framework of OLAF, in Brussels
7–9 September	Participation of the President at the 'Third European Lawyers' Day' organised by the Académie de droit européen, in Geneva
19–20 September	Participation of a delegation from the Court at the '30th meeting of the Committee of Legal Advisers on Public International Law', in Strasbourg
21 September	Representation of the Court at the colloquium on 'Harmonisation of law on the African and European continents', in Bordeaux
28 September–1 October	Participation of the President at the 'Rechtswissenschaftlicher Kongress in Tokio' organised by the Deutscher Akademischer Austauschdienst and the Alexander von Humboldt-Stiftung, in Tokyo
29–30 September	Representation of the Court at the Fourth Symposium of European Trade Mark Judges in Alicante
30 September	Representation of the Court at the formal commemoration of the establishment of the Austrian Constitutional Court, in Vienna
3 October	Representation of the Court at the official ceremony for Germany's Reunification Day, in Potsdam

3 October	Participation of a delegation from the Court at the 'Opening of the Legal Year', in London
17 October	Participation of the President at the colloquium 'Europäische Integration und Europäische Wirtschaft' organised by the Europa Institut — Saarland University, in Saarbrücken
23 October	Representation of the Court at the official award ceremony for the Peace Prize of the German Book Trade, in Frankfurt-am-Main
31 October	Participation of the President at the colloquium 'The future of Europe beyond the present uncertainty', in Thessaloniki
2–4 November	Participation of the President at the '6th International ECLN Colloquium', in Berlin
9 November	Lecture by the President on the subject 'Fundamental Rights and Fundamental Freedoms: the challenge of striking a delicate balance' as part of the 'Sir Thomas More Lecture' series, in London
10 November	Talk by the President on the subject 'Effet utile versus legal certainty: the case-law of the European Court of Justice on the direct effect of directives' when giving the UKAEL annual address, in London
17 November	Participation of the President at the dinner given for the Presidents of the institutions on the occasion of the 10th anniversary of the institution of the European Ombudsman, in Brussels
21 November	Receipt by the President of the decoration of 'Grand Officer of the Order of Merit' of the Italian Republic, in Luxembourg
22 November	Representation of the Court at the workshop of members of the Network of the Presidents of the Supreme Judicial Courts of the European Union and representatives of the European institutions, in Brussels
28–29 November	Participation of a delegation from the Court at a seminar on the subject 'EU–Argentina: The challenge of reforming democratic States' organised by the European Commission Delegation in Argentina, in Buenos Aires
29 November	Representation of the Court at the meeting of the Board of the Association of the Councils of State and Supreme Administrative Jurisdictions, in Brussels
6 December	Representation of the Court at a reception organised by the President of the Republic of Finland on the occasion of Independence Day, in Helsinki
22 December	Representation of the Court at the events organised on the occasion of Constitutionality Day by the Constitutional Court of Slovenia, in Ljubljana

Court of First Instance

24 February	Participation of the President of the Court of First Instance at a conference on the subject 'Law and economics of competition' organised by the Court of Cassation, in Paris
3 March	Participation of the President of the Court of First Instance at an 'Antitrust forum' organised by University College London, in London
7 March	Meeting of the President of the Court of First Instance with Mr Barroso, President of the Commission, in Brussels
17 March	Participation of the President of the Court of First Instance at a congress (speech at the opening session) organised by the European Women Lawyers Association, in Strasbourg
8 April	Participation of the President of the Court of First Instance at a forum entitled 'Internationales Forum EG Kartellrecht', organised by the Studienvereinigung Kartellrecht eV, in Brussels
15 April	Meeting in Brussels with Ms Neelie Kroes, Commissioner for competition matters, and Mr Michel Petite, Director General of the Commission's Legal Service
25 April	Participation of the President of the Court of First Instance at a ceremony for signature of the Treaty of Accession of Bulgaria and Romania to the European Union
28 April	Participation of the President of the Court of First Instance at a forum entitled 'XIIth St Gallen International Competition Law Forum (ICL)', organised by the Universität St Gallen, in Switzerland
3 May	Participation of the President of the Court of First Instance at the 'European Competition Day' organised by the Ministry of Economic Affairs and Foreign Trade and the Competition Council, in Luxembourg
9 May	Participation of the President of the Court of First Instance at a conference entitled 'The Transatlantic Antitrust Dialogue', organised by the British Institute of International and Competition Law, in London
26 May	Participation of the President of the Court of First Instance at a conference entitled 'Third Annual Forum of the European State Aid Law Institute — Refining the concept of State Aid' organised by The European State Aid Law Institute, in Brussels
1 June	Participation of the President of the Court of First Instance at a seminar organised by the Dansk Konkurrenceretsforening (Danish competition law society), in Copenhagen
10 June	Participation of the President of the Court of First Instance at a seminar entitled 'Advokatmødet 2005' organised by the Advokatsamfundet (Danish Bar), in Kolding (Denmark)

19 September	Participation of the President of the Court of First Instance at a seminar entitled 'The Court of First Instance after enlargement: A Court of general competence', organised by the Ministry of Foreign Affairs in Finland
20 October	Speech of the President of the Court of First Instance given at Trinity College Dublin as part of a visit organised by the Irish Centre for European Law, in Dublin
24 October	Visit of the President of the Court of First Instance to the European Ombudsman, in Strasbourg
31 October	Speech of the President of the Court of First Instance given at the University of Copenhagen
3 November	Participation of the President of the Court of First Instance at a colloquium entitled 'Sixth International ECLN Colloquium/IACL Round Table: The Future of the European Judicial System — The Constitutional Role of European Courts', organised by Humboldt-Universität in Berlin
4 November	Participation of the President of the Court of First Instance at a lecture entitled 'Competition and economic law', in Lisbon
17 November	Participation at the ceremony marking the 10th anniversary of the European Ombudsman, in Brussels
2 December	Participation of the President of the Court of First Instance at a conference on 'The Modernisation Reform of EC Antitrust Enforcement and its Effects in the National Legal Order', organised by the 'Europarättslig Tidskrift' (Swedish European law journal) and 'The Swedish FIDE Association'; contribution on the subject 'The EC System of Competition Law Enforcement and the Role of the Community Courts', in Stockholm

Chapter V

Tables and statistics

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

General activity of the Court of Justice

1. Cases completed, new cases, cases pending (2000–05)

Cases completed

2. Nature of proceedings (2000–05)
3. Judgments, orders, opinions (2005)
4. Bench hearing actions (2005)
5. Subject matter of the action (2005)
6. Proceedings for interim measures: outcome (2005)
7. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2005)
8. Duration of proceedings (2000–05)

New cases

9. Nature of proceedings (2000–05)
10. Direct actions — Type of action (2005)
11. Subject matter of the action (2005)
12. Actions for failure of a Member State to fulfil its obligations (2000–05)
13. Expedited and accelerated procedures (2000–05)

Cases pending as at 31 December

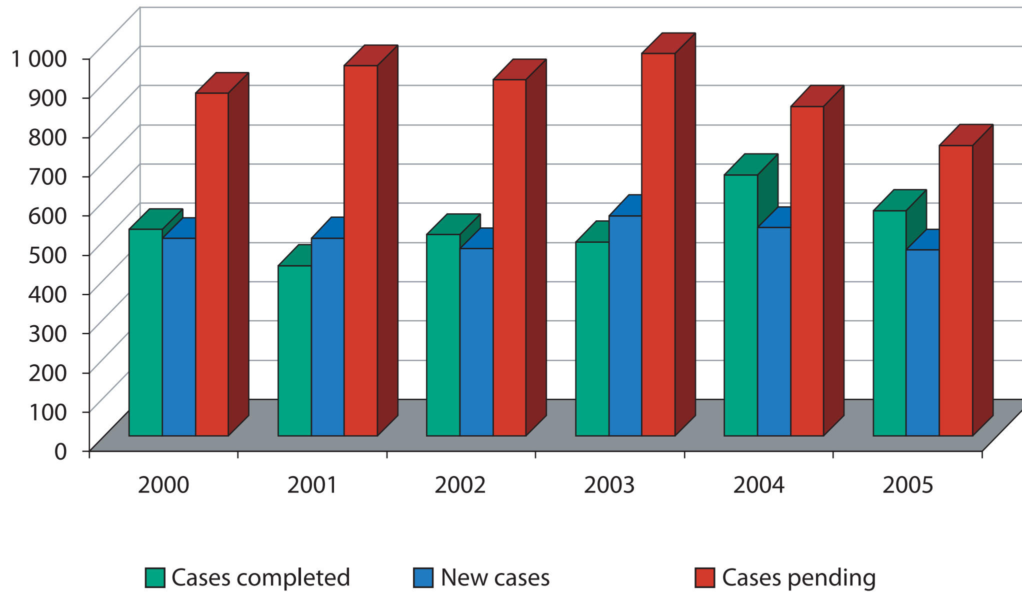
14. Nature of proceedings (2000–05)
15. Bench hearing actions (2005)

General trend in the work of the Court (1952–2005)

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

General activity of the Court of Justice

1. Cases completed, new cases, cases pending (2000–05) ([1])

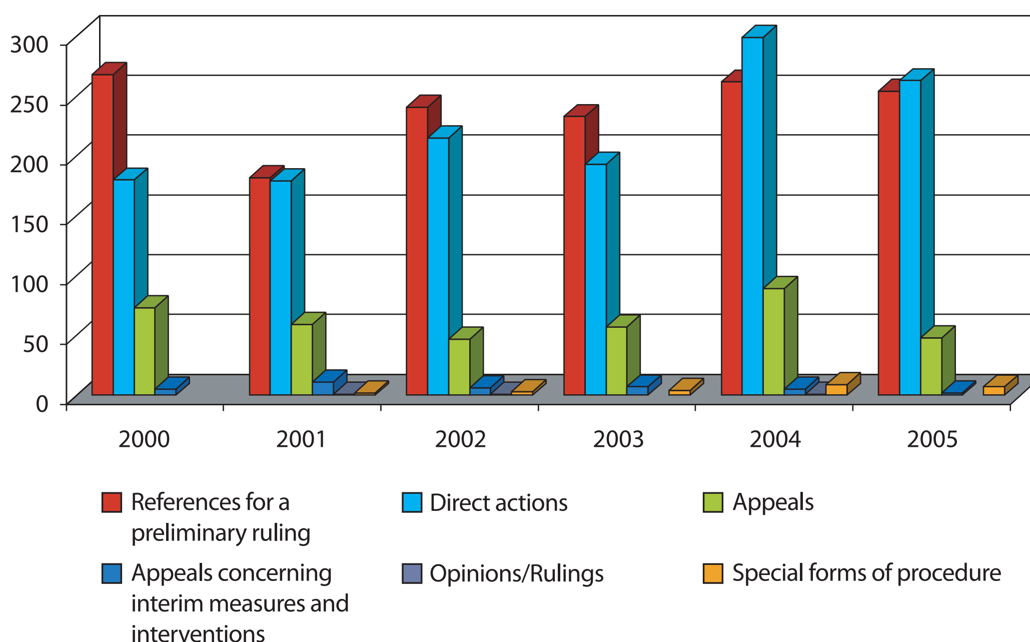


	2000	2001	2002	2003	2004	2005
Cases completed	526	434	513	494	665	574
New cases	503	504	477	561	531	474
Cases pending	873	943	907	974	840	740

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

Cases completed

2. Nature of proceedings (2000–05) ([1])([2])

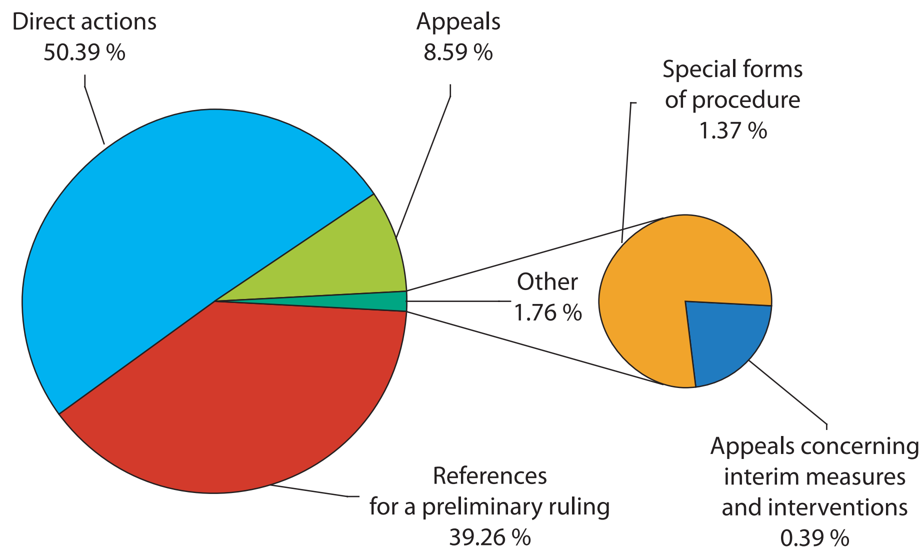


	2000	2001	2002	2003	2004	2005
References for a preliminary ruling	268	182	241	233	262	254
Direct actions	180	179	215	193	299	263
Appeals	73	59	47	57	89	48
Appeals concerning interim measures and interventions	5	11	6	7	5	2
Opinions/Rulings		1	1		1	
Special forms of procedure		2	3	4	9	7
Total	**526**	**434**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

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

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

3. Judgments, orders, opinions (2005)([1])



	Judgments	Non-interlocutory orders ([2])	Interlocutory orders ([3])	Other orders ([4])	Opinions of the Court	Total
References for a preliminary ruling	164	19		18		201
Direct actions	177		1	80		258
Appeals	21	19	3	1		44
Appeals concerning interim measures and interventions			2			2
Opinions/Rulings						
Special forms of procedure		1		6		7
Total	**362**	**39**	**6**	**105**	**0**	**512**

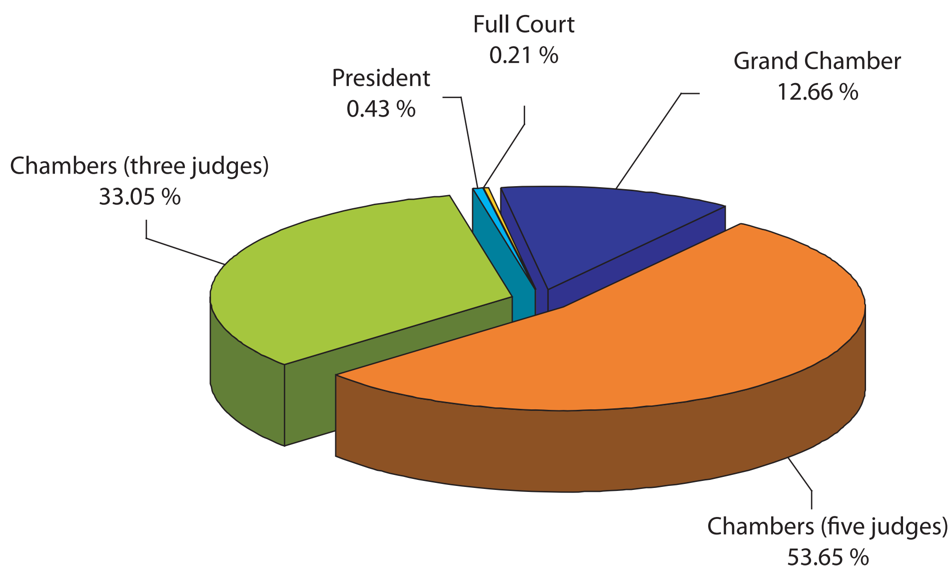
([1]) The figures given (net figures) represent the number of cases after joinder on the grounds of similarity (a set of joined cases = one case).

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

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

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

4. Bench hearing actions (2005) (1)



	Judgments/ Opinions	Orders (2)	Total
Full Court	1		1
Grand Chamber	59		59
Chambers (five judges)	245	5	250
Chambers (three judges)	103	51	154
Chambers (three judges)		2	2
Total	**408**	**58**	**466**

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

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

5. Subject matter of the action (2005) ([1])

	Judgments/ Opinions	Orders ([2])	Total
Accession of new States	1		1
Agriculture	41	22	63
Approximation of laws	38	3	41
Area of freedom, security and justice	5		5
Association of the overseas countries and territories	2		2
Brussels Convention	8		8
Commercial policy	4		4
Common Customs Tariff	5	2	7
Community own resources	2		2
Company law	24		24
Competition	14	3	17
Customs union	8	1	9
Energy	3		3
Environment and consumers	42	2	44
European citizenship	2		2
External relations	7	1	8
Fisheries policy	11		11
Free movement of capital	5		5
Free movement of goods	9	2	11
Freedom of establishment	4	1	5
Freedom of movement for persons	15	2	17
Freedom to provide services	9	2	11
Industrial policy	11		11
Intellectual property	3	2	5
Law governing the institutions	10	6	16
Principles of Community law	1	1	2
Privileges and immunities	1		1
Regional policy	5		5
Social policy	26	3	29
Social security for migrant workers	10		10
State aid	22	1	23
Taxation	34		34
Transport	16		16
EC Treaty	398	54	452
EU Treaty	3		3
CS Treaty	3		3
EA Treaty	1		1
Privileges and immunities			
Procedure		1	1
Staff Regulations	3	3	6
Others	**3**	**4**	**7**
OVERALL TOTAL	**408**	**58**	**466**

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

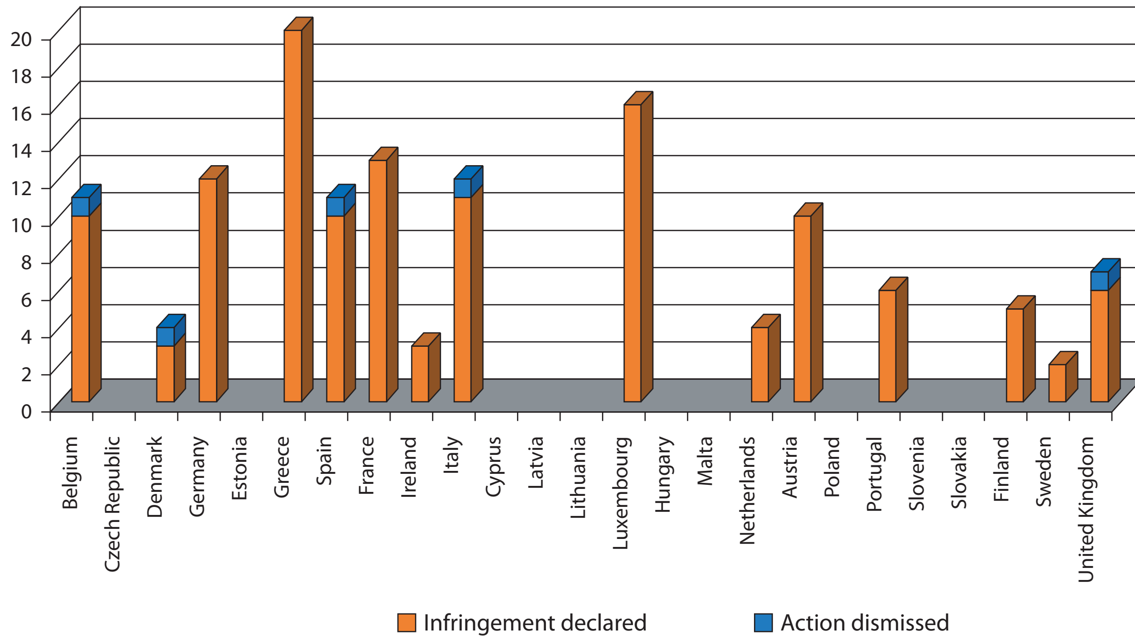
([2]) Orders terminating proceedings by judicial determination (other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the Court of First Instance).

6. Proceedings for interim measures: outcome (2005) ([1])

	Number of applications for interim measures	Number of appeals concerning interim measures and interventions	Outcome	
			Dismissed/Contested decision upheld	Granted/Contested decision set aside
Agriculture	2		2	
Environment and consumers	1		2	
Law governing the institutions		1	1	
State aid	1	1	1	
Total EC Treaty	4	2	6	
EA Treaty				
Others				
OVERALL TOTAL	**4**	**2**	**6**	

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

7. Judgments concerning failure of a Member State to fulfil its obligations: outcome (2005) ([1])

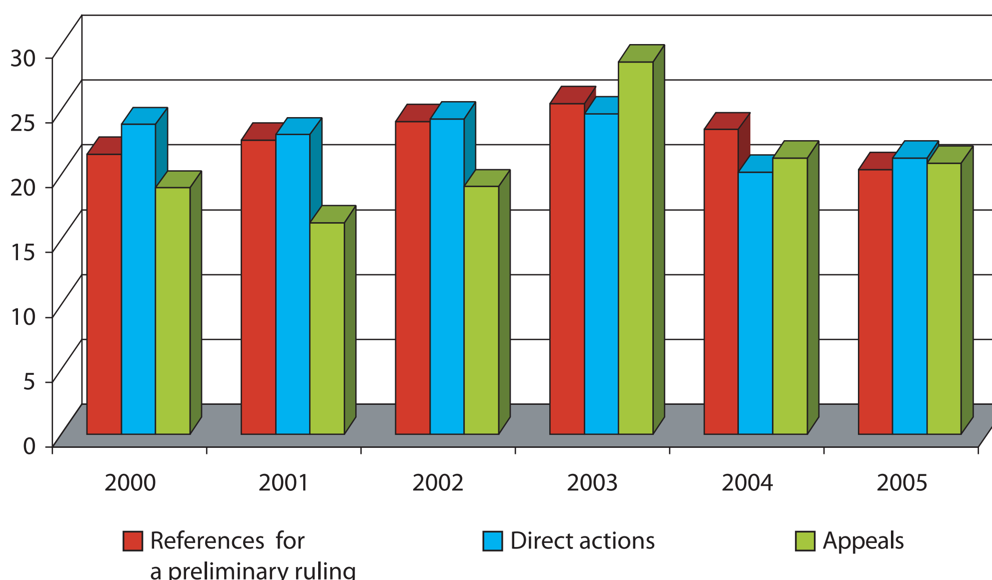


	Infringement declared	Action dismissed	Total
Belgium	10	1	11
Czech Republic			
Denmark	3	1	4
Germany	12		12
Estonia			
Greece	20		20
Spain	10	1	11
France	13		13
Ireland	3		3
Italy	11	1	12
Cyprus			
Latvia			
Lithuania			
Luxembourg	16		16
Hungary			
Malta			
Netherlands	4		4
Austria	10		10
Poland			
Portugal	6		6
Slovenia			
Slovakia			
Finland	5		5
Sweden	2		2
United Kingdom	6	1	7
Total	**131**	**5**	**136**

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

8. Duration of proceedings (2000–05) ([1])

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



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

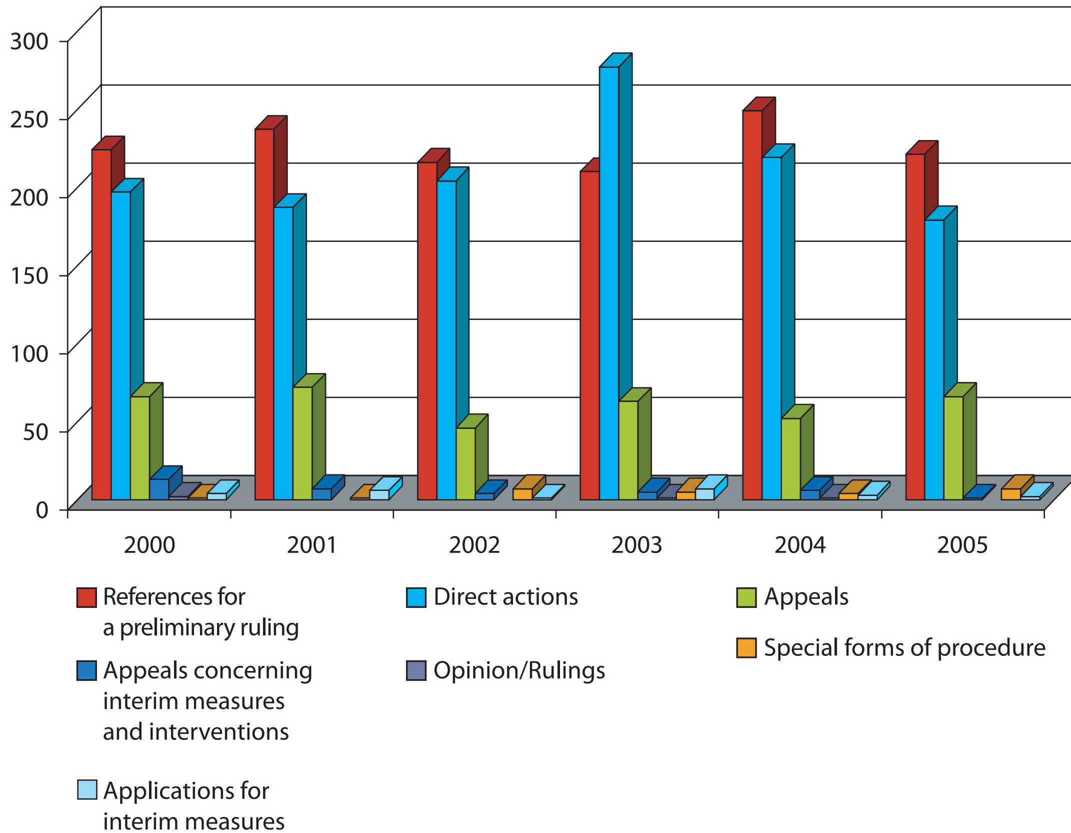
([1]) The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions and rulings on agreements; special forms of procedure (namely taxation of costs, legal aid, application to set a judgment aside,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

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

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

New cases

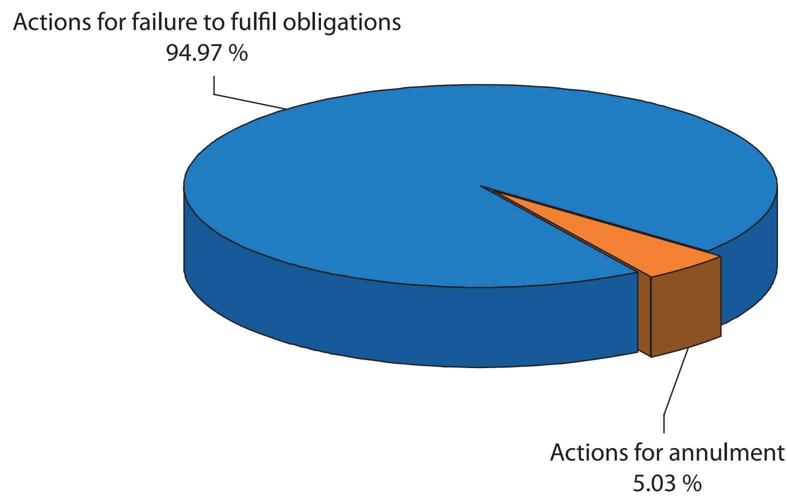
9. Nature of proceedings (2000–05) ([1])



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

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

10. Direct actions — Type of action (2005) ([1])



Actions for annulment	9
Actions for failure to act	
Actions for damages	
Actions for failure to fulfil obligations	170
Total	**179**

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

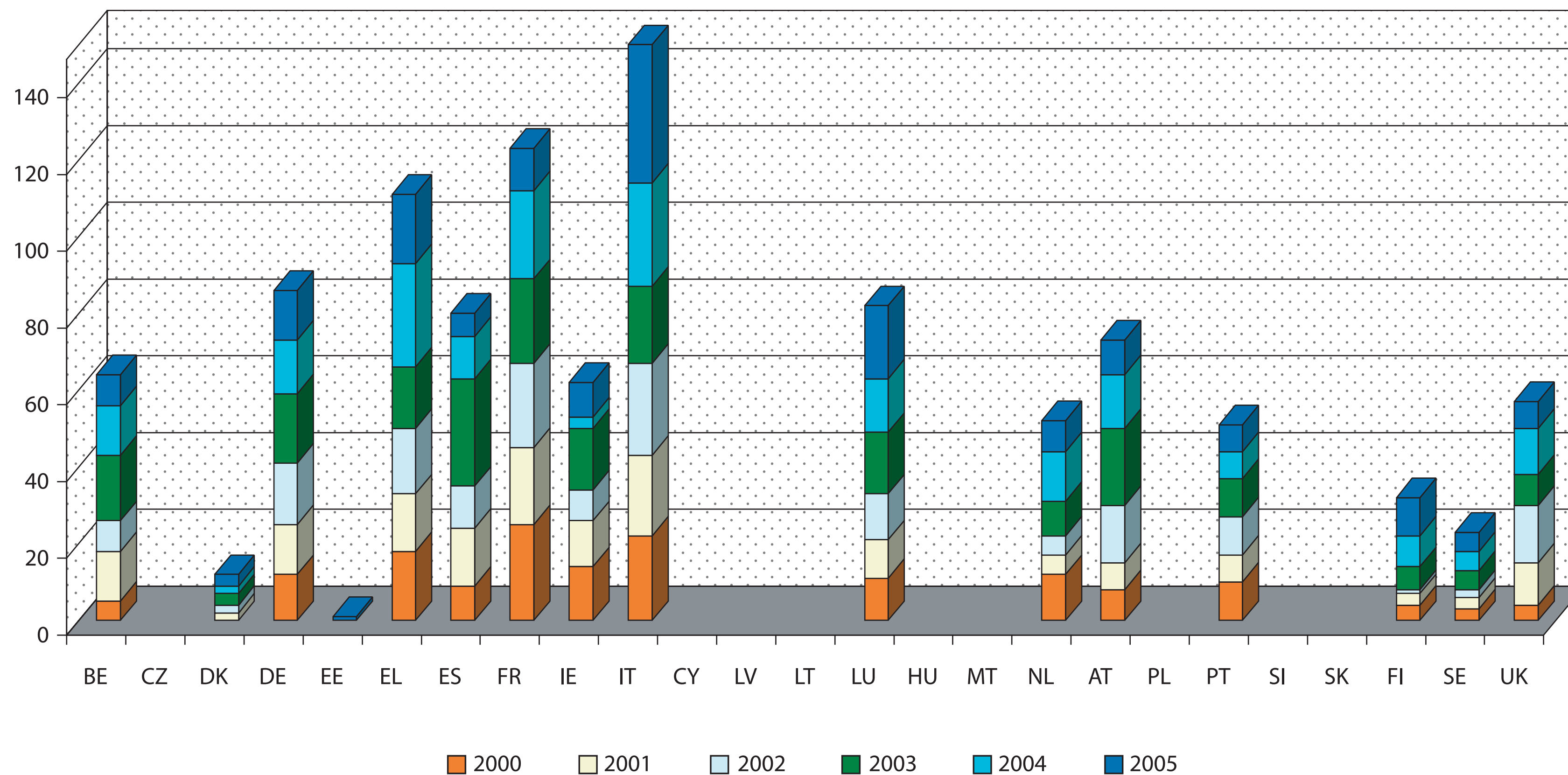
11. Subject matter of the action (2005) (1)(2)

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total	Special forms of procedure
Agriculture	4	27	4		35	
Approximation of laws	9	17	1		27	
Area of freedom, security and justice	2	4			6	
Brussels Convention		2			2	
Commercial policy		2			2	
Common Customs Tariff		5			5	
Common foreign and security policy	1		2		3	
Community own resources	7				7	
Company law	9	3			12	
Competition	1	7	2		10	
Customs union		5	4		9	
Economic and monetary policy	1	1			2	
Energy	9				9	
Environment and consumers	38	8	4	1	51	
European citizenship	1	1			2	
External relations	2	7	1		10	
Fisheries policy	6				6	
Free movement of capital	2	7	1		10	
Free movement of goods	8	5			13	
Freedom of establishment	7	14			21	
Freedom of movement for persons	8	16	1		25	
Freedom to provide services	5	6	1		12	
Industrial policy	6	2			8	
Intellectual property	6	3	15		24	
Justice and home affairs		1	1		2	
Law governing the institutions	2		8		10	
Principles of Community law		2			2	
Privileges and immunities		1			1	
Regional policy		2			2	
Social policy	17	15	4		36	
Social security for migrant workers	2	10			12	
State aid	3	1	5		9	
Taxation	9	40			49	
Transport	13	1			14	
EC Treaty	178	215	54	1	448	
EU Treaty	1	5			6	
CS Treaty		1			1	
EA Treaty						
Privileges and immunities						5
Procedure			1		1	2
Staff Regulations			11		11	
Others			12		12	7
OVERALL TOTAL	**179**	**221**	**66**	**1**	**467**	**7**

(1) Taking no account of applications for interim measures.

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

12. Actions for failure of a Member State to fulfil its obligations (2000–05) ([1])



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

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

The actions covered are actions under Articles 93, 169, 170, 171 and 225 of the EC Treaty (now Articles 88 EC, 226 EC, 227 EC, 228 EC and 298 EC), Articles 141 EA, 142 EA and 143 EA and Article 88 CS (2).

(2) Including one action brought under Article 170 of the EC Treaty (now Article 227 EC).

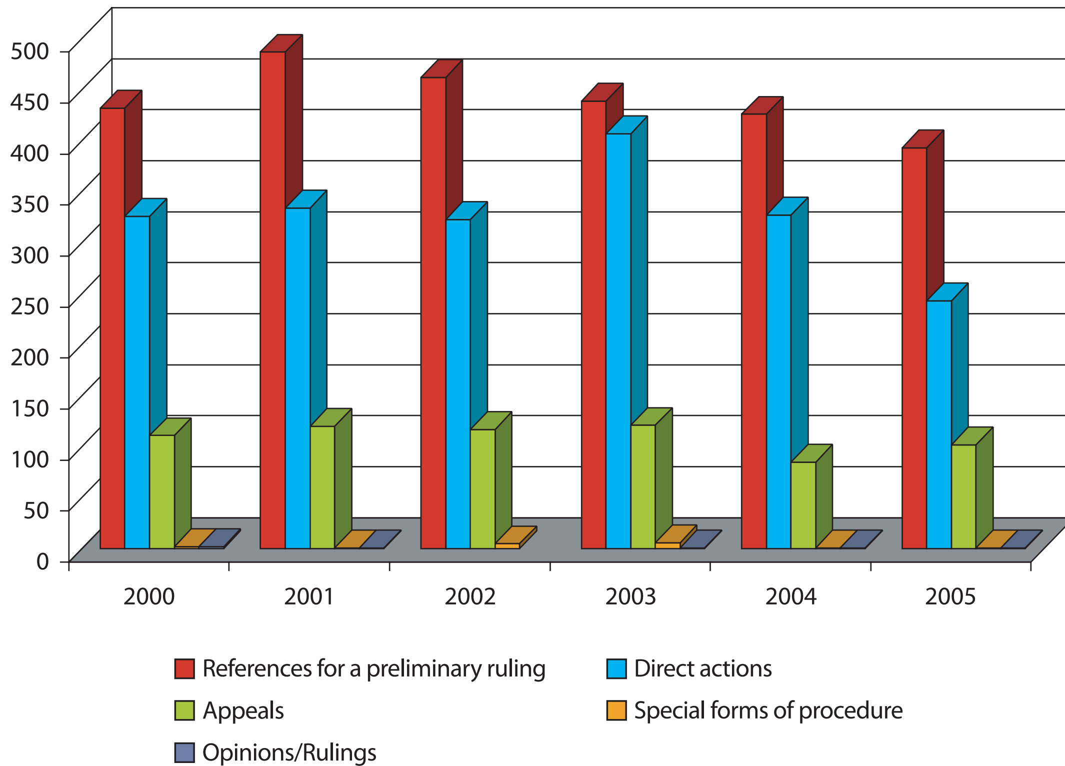
13. Expedited and accelerated procedures (2000–05) ([1])

	2000		2001		2002		2003		2004		2005		Total
	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	Granted	Not granted	
Direct actions						1		3	1	2			7
References for a preliminary ruling		1	1	5		1		3		10		5	26
Appeals				2			1	1					4
Opinions of the Court										1			1
Total		**1**	**1**	**7**		**2**	**1**	**7**	**1**	**13**		**5**	**38**

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

Cases pending as at 31 December

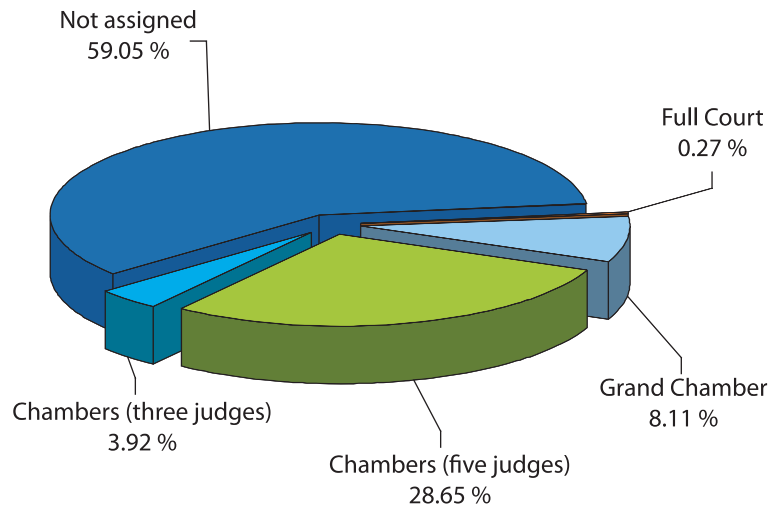
14. Nature of proceedings (2000–05) ([1])



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

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

15. Bench hearing actions (2005) ([1])



	Direct actions	References for a preliminary ruling	Appeals	Other proceedings	Total
Not assigned	170	199	68		437
Full Court	1			1	2
Grand Chamber	14	43	3		60
Chambers (five judges)	42	142	28		212
Chambers (three judges)	16	9	3	1	29
President					
Total	**243**	**393**	**102**	**2**	**740**

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

General trend in the work of the Court (1952–2005)

16. New cases and judgments

Year	New cases [1]						Judgments [2]
	Direct actions [3]	References for a preliminary ruling	Appeals concerning interim measures and interventions	Appeals	Total	Applications for interim measures	
1953	4				4		
1954	10				10		2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43		10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37		24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79		64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	62	69			131	5	78
1976	52	75			127	6	88
1977	74	84			158	6	100
1978	147	123			270	7	97
1979	1 218	106			1 324	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	217	129			346	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165

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Year	New cases (1)					Applications for interim measures	Judgments (2)
	Direct actions (3)	References for a preliminary ruling	Appeals concerning interim measures and interventions	Appeals	Total		
1985	294	139			433	23	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	193	179			372	17	238
1989	244	139			383	19	188
1990[4]	221	141	15	1	378	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	5	210
1993	265	204	17		486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	6	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
2004	220	249	52	6	527	3	375
2005	179	221	66	1	467	2	362
Total	**7 707**	**5 514**	**681**	**58**	**13 960**	**341**	**6 827**

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

(2) Net figures.

(3) Including opinions of the Court.

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

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

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

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	BE	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Benelux (2)	Total
1983	9		4	36				15	2	7							19								6		98
1984	13		2	38				34	1	10							22								9		129
1985	13			40				45	2	11				6			14								8		139
1986	13		4	18		2	1	19	4	5				1			16								8		91
1987	15		5	32		17	1	36	2	5				3			19								9		144
1988	30		4	34			1	38		28				2			26								16		179
1989	13		2	47		2	2	28	1	10				1			18			1					14		139
1990	17		5	34		2	6	21	4	25				4			9			2					12		141
1991	19		2	54		3	5	29	2	36				2			17			3					14		186
1992	16		3	62		1	5	15		22				1			18			1					18		162
1993	22		7	57		5	7	22	1	24				1			43			3					12		204
1994	19		4	44			13	36	2	46				1			13			1					24		203
1995	14		8	51		10	10	43	3	58				2			19	2		5				6	20		251
1996	30		4	66		4	6	24		70				2			10	6		6			3	4	21		256
1997	19		7	46		2	9	10	1	50				3			24	35		2			6	7	18		239
1998	12		7	49		5	55	16	3	39				2			21	16		7			2	6	24		264
1999	13		3	49		3	4	17	2	43				4			23	56		7			4	5	22		255
2000	15		3	47		3	5	12	2	50							12	31		8			5	4	26	1	224
2001	10		5	53		4	4	15	1	40				2			14	57		4			3	4	21		237
2002	18		8	59		7	3	8		37				4			12	31		3			7	5	14		216
2003	18		3	43		4	8	9	2	45				4			28	15		1			4	4	22		210
2004	24		4	50		18	8	21	1	48				1	2		28	12		1			4	5	22		249
2005	21	1	4	51		11	10	17	2	18				2	3		36	15	1	2			4	11	12		221
Total	**516**	**1**	**108**	**1 465**		**103**	**163**	**693**	**47**	**862**				**59**	**5**		**646**	**276**	**1**	**57**			**42**	**61**	**408**	**1**	**5 514**

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

(2) Case C-265/00 Campina Melkunie.

18. New references for a preliminary ruling (by Member State and by court or tribunal)

			Total
Belgium	Cour de cassation	68	
	Cour d'arbitrage	4	
	Conseil d'État	35	
	Other courts or tribunals	409	516
Czech Republic	Nejvyššího soudu		
	Nejvyšší správní soud		
	Ústavní soud		
	Other courts or tribunals	1	1
Denmark	Højesteret	19	
	Other courts or tribunals	89	108
Germany	Bundesgerichtshof	98	
	Bundesverwaltungsgericht	67	
	Bundesfinanzhof	226	
	Bundesarbeitsgericht	16	
	Bundessozialgericht	72	
	Staatsgerichtshof des Landes Hessen	1	
	Other courts or tribunals	985	1465
Estonia	Riigikohus		
	Other courts or tribunals		
Greece	Άρειος Πάγος	9	
	Συμβούλιο της Επικρατείας	25	
	Other courts or tribunals	69	103
Spain	Tribunal Supremo	15	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	140	163
France	Cour de cassation	72	
	Conseil d'État	33	
	Other courts or tribunals	588	693
Ireland	Supreme Court	15	
	High Court	15	
	Other courts or tribunals	17	47
Italy	Corte suprema di Cassazione	83	
	Consiglio di Stato	51	
	Other courts or tribunals	728	862

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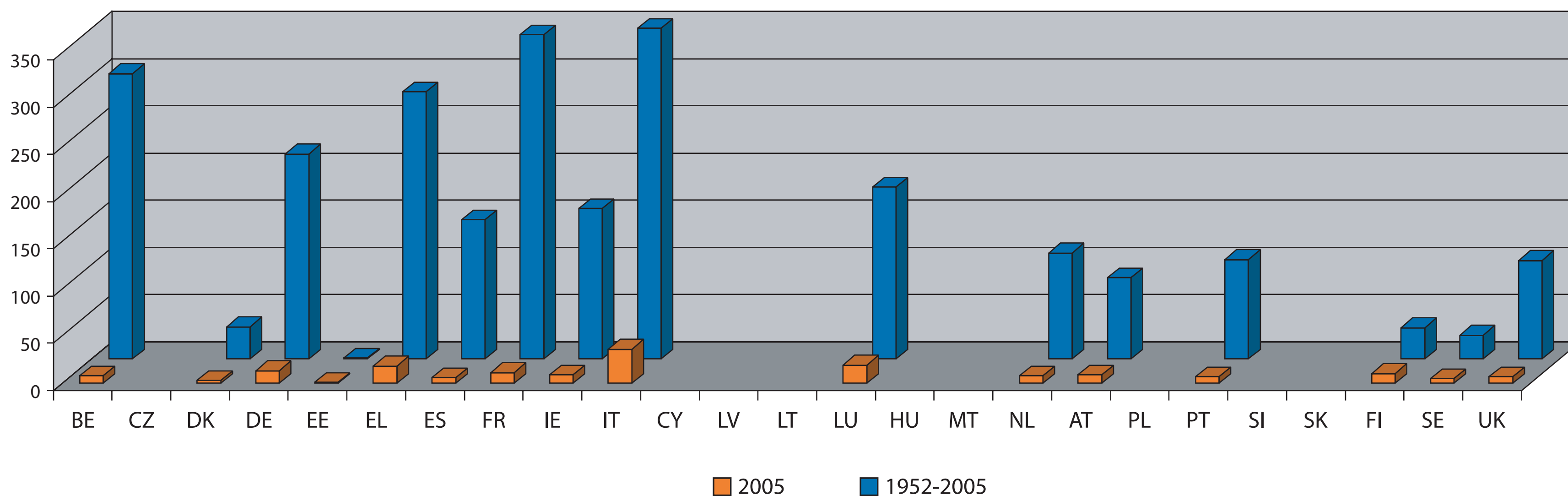
			Total
Cyprus	Ανώτατο Δικαστήριο		
	Other courts or tribunals		
Latvia	Augstākā tiesa		
	Satversmes tiesa		
	Other courts or tribunals		
Lithuania	Konstitucinis Teismas		
	Lietuvos Aukščiausiasis Teismas		
	Vyriausiasis administracinis Teismas		
	Other courts or tribunals		
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	6	
	Other courts or tribunals	30	59
Hungary	Legfelsöbb Bíroság		
	Other courts or tribunals	5	5
Malta	Constitutional Court		
	Qorti ta' l-Appel		
	Other courts or tribunals		
Netherlands	Raad van State	47	
	Hoge Raad der Nederlanden	139	
	Centrale Raad van Beroep	44	
	College van Beroep voor het Bedrijfsleven	130	
	Tariefcommissie	34	
	Other courts or tribunals	252	646
Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	58	
	Oberster Patent- und Markensenat	1	
	Bundesvergabeamt	23	
	Verwaltungsgerichtshof	45	
	Vergabekontrollsenat	3	
	Other courts or tribunals	142	276
Poland	Sąd Najwyższy		
	Naczelny Sąd Administracyjny		
	Trybunał Konstytucyjny		
	Other courts or tribunals	1	1

>>>

			Total
Portugal	Supremo Tribunal de Justiça	1	
	Supremo Tribunal Administrativo	32	
	Other courts or tribunals	24	57
Slovenia	Vrhovno sodišče		
	Ustavno sodišče		
	Other courts or tribunals		
Slovakia	Ústavný Súd		
	Najvyšší súd		
	Other courts or tribunals		
Finland	Korkein hallinto-oikeus	14	
	Korkein oikeus	7	
	Other courts or tribunals	21	42
Sweden	Högsta Domstolen	7	
	Marknadsdomstolen	3	
	Regeringsrätten	18	
	Other courts or tribunals	33	61
United Kingdom	House of Lords	33	
	Court of Appeal	34	
	Other courts or tribunals	341	408
Benelux	Cour de justice/Gerechtshof [1]	1	1
Total			**5 514**

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

19. New actions for failure of a Member State to fulfil its obligations [1]



	BE	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Total
2005	8		3	13	1	18	6	11	9	36				19			8	9		7			10	5	7	**170**
1952–2005	302		34	217	1	283	147	343	159	534				182			112	86		105			33	25	104	**2 667**

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

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

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

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

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

General activity of the Court of First Instance

1. New cases, completed cases, cases pending (2000–05)

New cases

2. Nature of proceedings (2000–05)
3. Type of action (2000–05)
4. Subject matter of the action (2000–05)

Completed cases

5. Nature of proceedings (2000–05)
6. Subject matter of the action (2005)
7. Subject matter of the action (2000–05) (judgments and orders)
8. Bench hearing action (2000–05)
9. Duration of proceedings in months (2000–05) (judgments and orders)

Cases pending as at 31 December

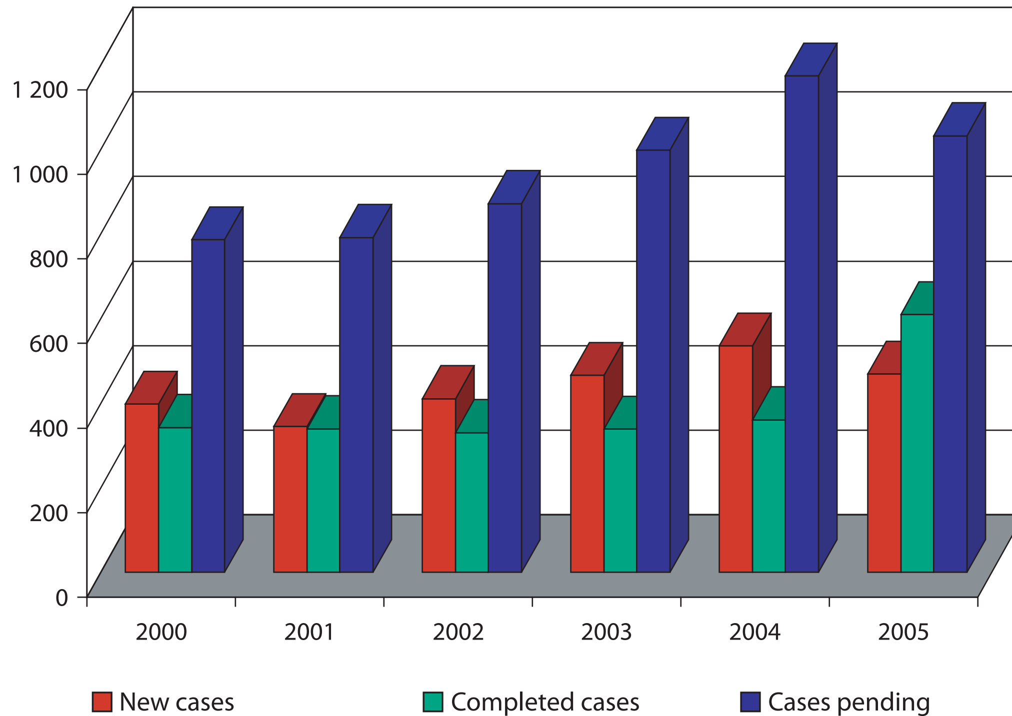
10. Nature of proceedings (2000–05)
11. Subject matter of the action (2000–05)

Miscellaneous

12. Proceedings for interim measures (2000–05)
13. Expedited procedures (2001–05)
14. Appeals against decisions of the Court of First Instance (1989–2005)
15. Results of appeals (2005) (judgments and orders)
16. General trend (1989–2005) (new cases, completed cases, cases pending)

General activity of the Court of First Instance

1. New cases, completed cases, cases pending (2000–05) ([1])

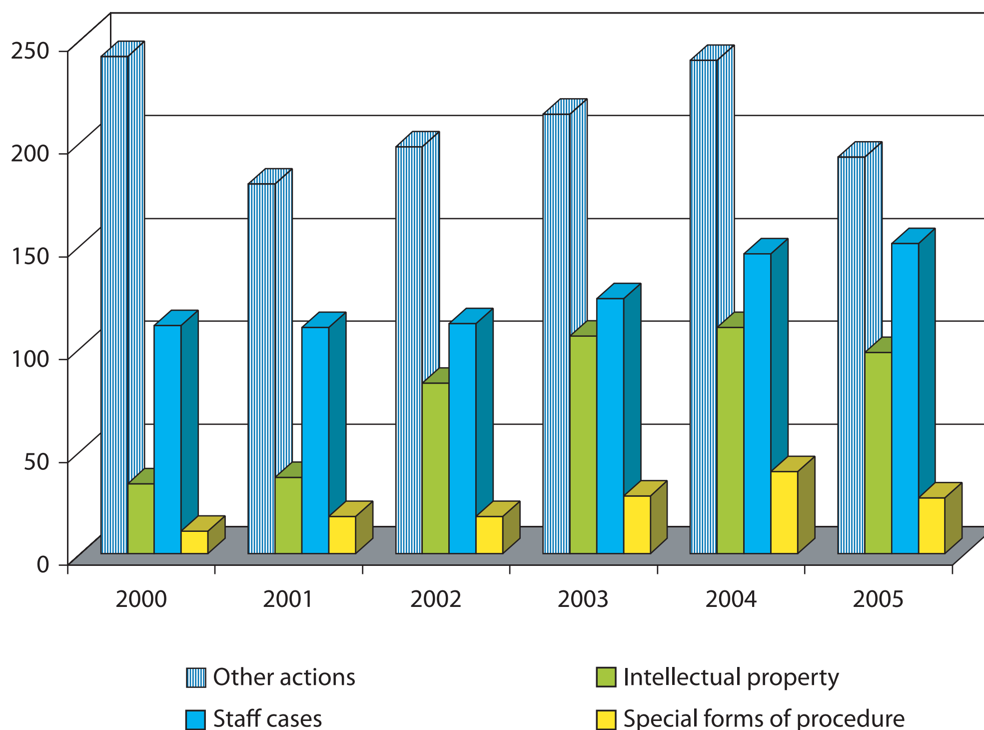


	2000	2001	2002	2003	2004	2005
New cases	398	345	411	466	536	469
Completed cases	343	340	331	339	361	610
Cases pending	787	792	872	999	1 174	1 033

([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 EC Statute; Article 122 of the Rules of Procedure of the Court of First Instance); third-party proceedings (Article 42 of the EC Statute; Article 123 of the Rules of Procedure); revision of a judgment (Article 44 of the EC Statute; Article 125 of the Rules of Procedure); interpretation of a judgment (Article 43 of the EC Statute; Article 129 of the Rules of Procedure); taxation of costs (Article 92 of the Rules of Procedure); legal aid (Article 94 of the Rules of Procedure), and rectification of a judgment (Article 84 of the Rules of Procedure).

New cases

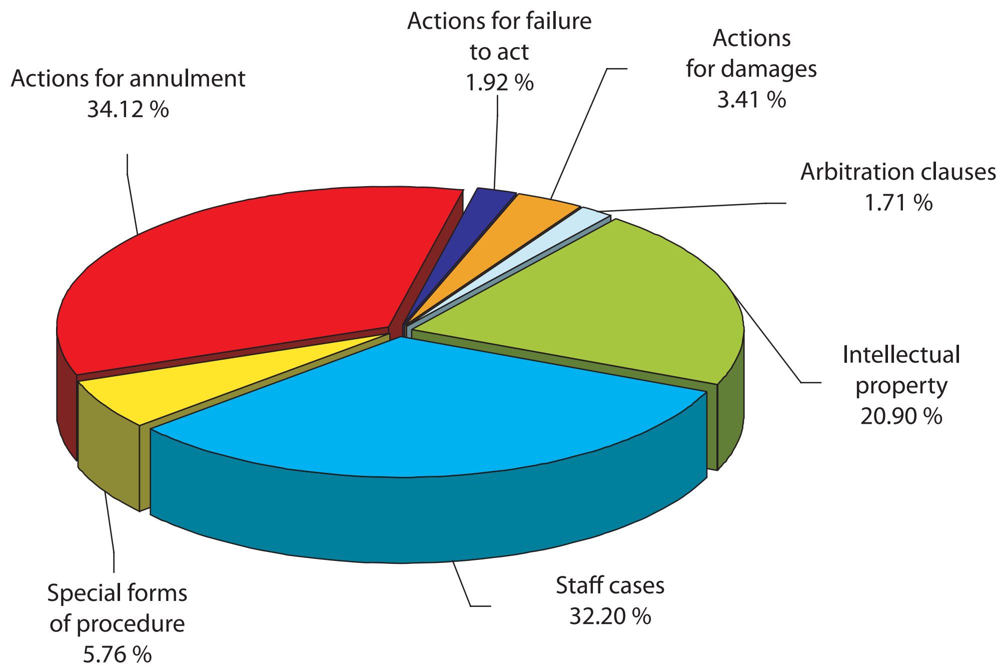
2. Nature of proceedings (2000–05) ([1])



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

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

3. Type of action (2000–05)



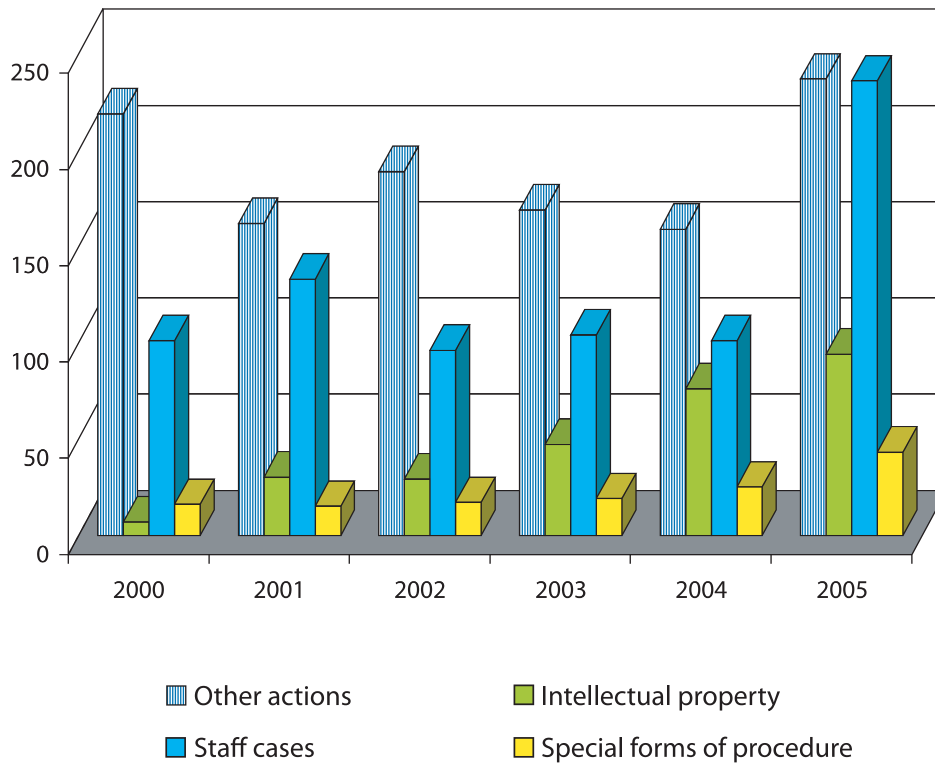
	2000	2001	2002	2003	2004	2005
Actions for annulment	219	134	172	174	199	160
Actions for annulment	6	17	12	13	15	9
Actions for damages	17	21	12	24	18	16
Arbitration clauses		8	2	3	8	8
Intellectual property	34	37	83	100	110	98
Staff cases	111	110	112	124	146	151
Special forms of procedure	11	18	18	28	40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

4. Subject matter of the action (2000–05)

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

Completed cases

5. Nature of proceedings (2000–05)



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

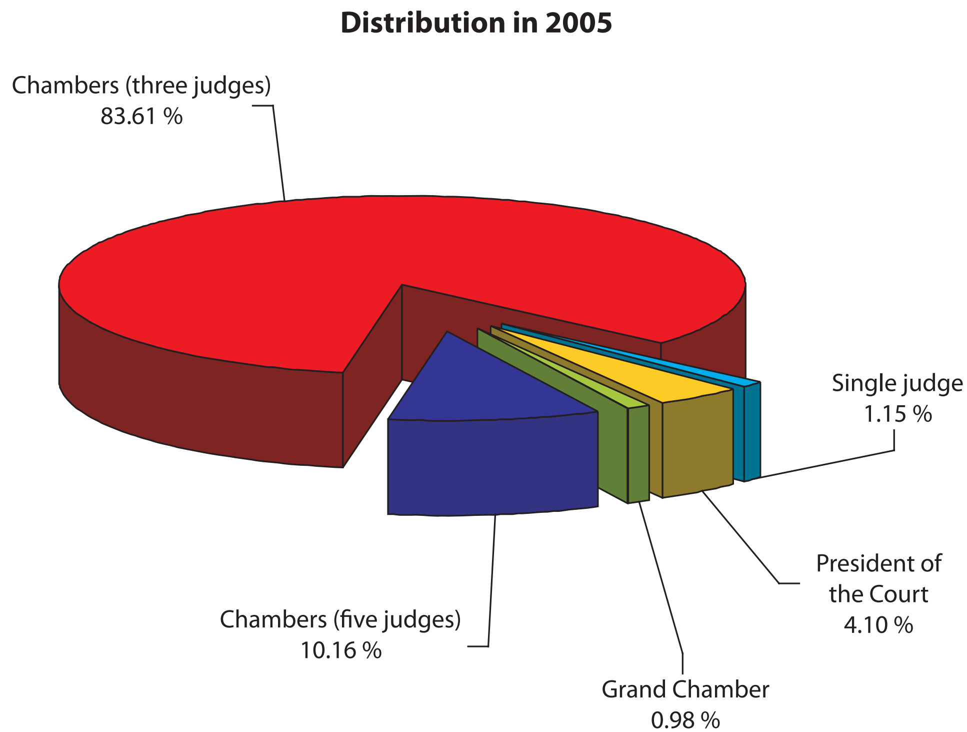
6. Subject matter of the action (2005)

	Judgments	Orders	Total
Agriculture	5	29	34
Arbitration clause		1	1
Association of the Overseas Countries and Territories	1	3	4
Commercial policy	3	4	7
Common foreign and security policy	2	3	5
Company law	2	4	6
Competition	23	12	35
Customs union	4	3	7
Environment and consumers	6	13	19
External relations	7	4	11
Fisheries policy	1	1	2
Free movement of goods		1	1
Freedom of establishment		1	1
Freedom of movement for persons	1		1
Intellectual property	69	25	94
Justice and home affairs		1	1
Law governing the institutions	8	27	35
Regional policy	3	1	4
Research, information, education and statistics		1	1
Social policy	1	5	6
State aid	12	41	53
Transport		1	1
Total EC Treaty	**148**	**181**	**329**
Total CS Treaty		**1**	**1**
Total EA Treaty	**1**		**1**
Staff Regulations	73	163	236
Special forms of procedure		43	43
OVERALL TOTAL	**222**	**388**	**610**

7. Subject matter of the action (2000–05) (judgments and orders)

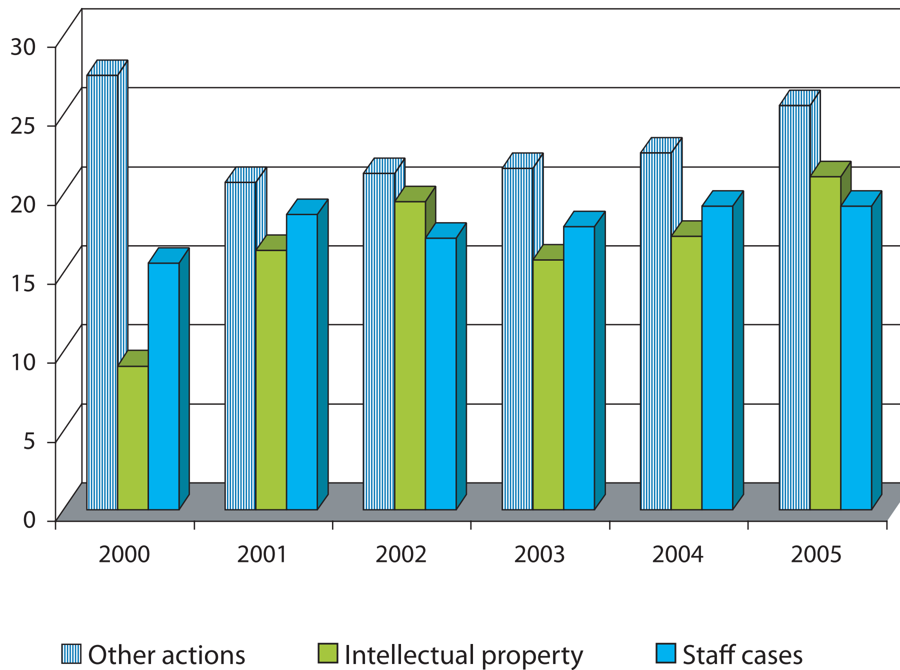
	2000	2001	2002	2003	2004	2005
Accession of new States				1		
Agriculture	14	47	28	21	15	34
Approximation of laws			2	1	3	
Arbitration clause	2			1	2	1
Association of the Overseas Countries and Territories	1	2	6	4		4
Commercial policy	17	5	6	6	1	7
Common Customs Tariff		3		2		
Common foreign and security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

8. Bench hearing action (2000–05)



	2000	2001	2002	2003	2004	2005
Grand Chamber						6
Chambers (five judges)	112	42	64	39	64	62
Chambers (three judges)	213	280	257	277	276	510
Single judge	15	12	6	15	14	7
President of the Court	3	6	4	8	7	25
Total	**343**	**340**	**331**	**339**	**361**	**610**

9. Duration of proceedings in months (2000–05) [1] (judgments and orders)



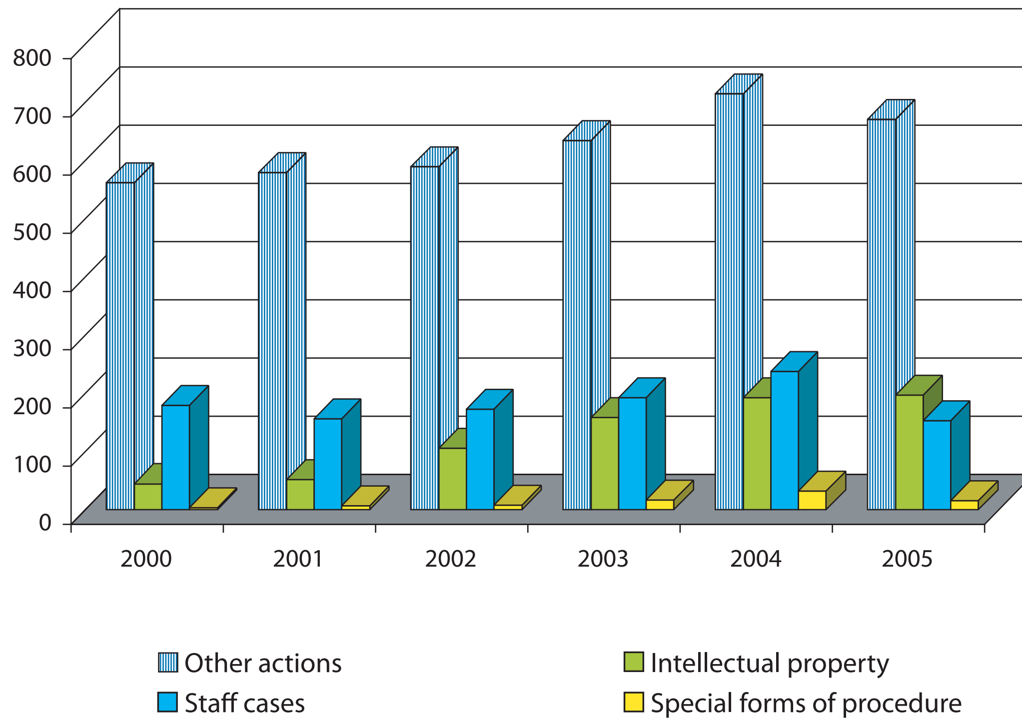
	2000	2001	2002	2003	2004	2005
Other actions	27.5	20.7	21.3	21.6	22.6	25.6
Intellectual property	9.1	16.4	19.5	15.8	17.3	21.1
Staff cases	15.6	18.7	17.2	17.9	19.2	19.2

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

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

Cases pending as at 31 December

10. Nature of proceedings (2000–05)



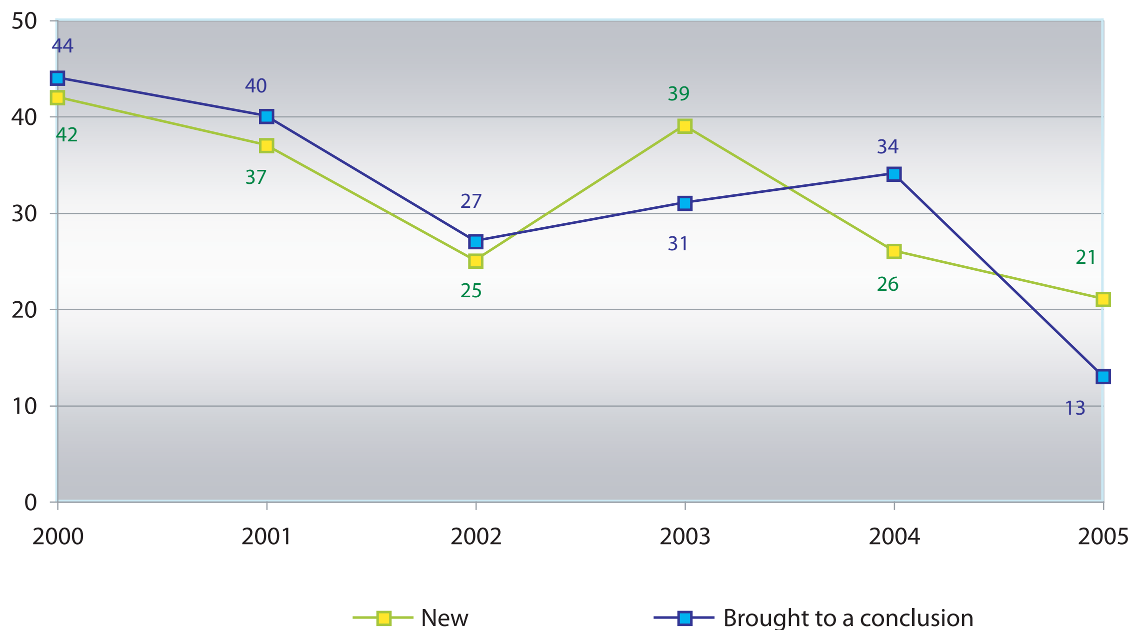
	2000	2001	2002	2003	2004	2005
Other actions	561	579	588	633	714	670
Intellectual property	44	51	105	158	192	196
Staff cases	179	156	172	192	237	152
Special forms of procedure	3	6	7	16	31	15
Total	**787**	**792**	**872**	**999**	**1 174**	**1 033**

11. Subject matter of the action (2000–05)

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

Miscellaneous

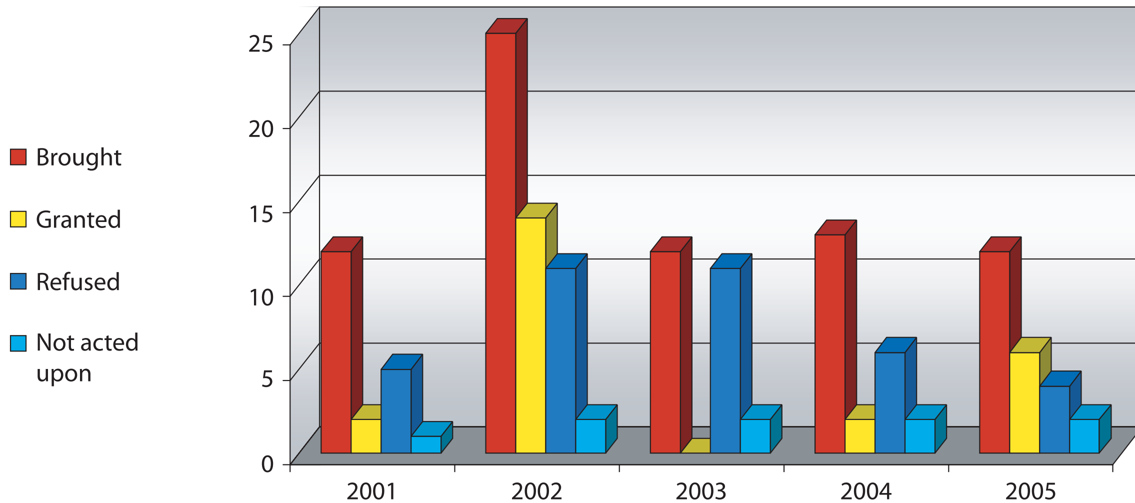
12. Proceedings for interim measures (2000–05)



Distribution in 2005

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Dismissed	Granted	Removal from the register/no need to adjudicate
State aid	2	1			1
Competition	2				
Company law	6	5	3		2
Environment and consumers	5	3	3		
Regional policy	1	1	1		
Total EC Treaty	**16**	**10**	**7**		
Staff Regulations	5	3	1		2
OVERALL TOTAL	**21**	**13**	**8**		**5**

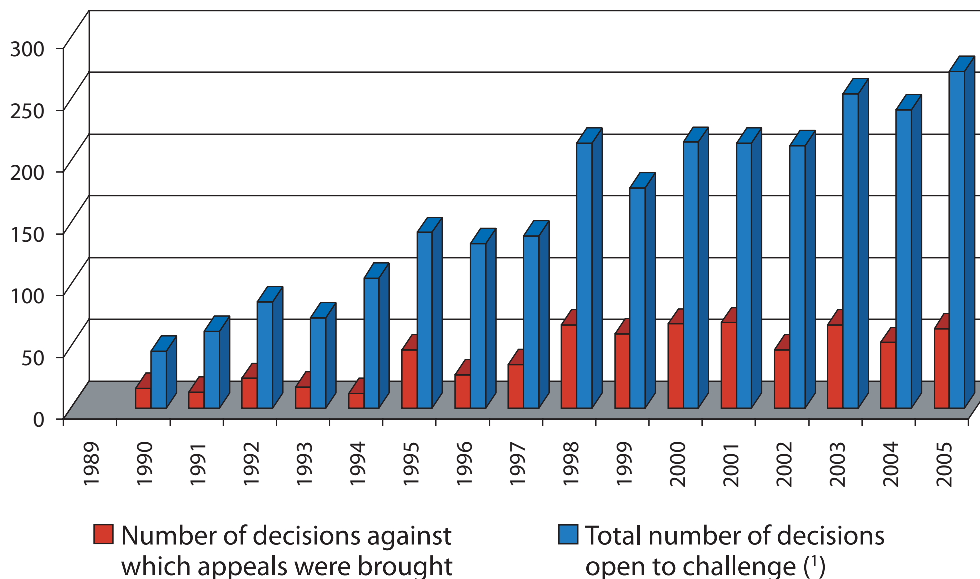
13. Expedited procedures (2001–05)



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

NB: The Court of First Instance may decide pursuant to Article 76a of the Rules of Procedure to deal with a case before it under an expedited procedure. That provision has been applicable since 1 February 2001. The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

14. Appeals against decisions of the Court of First Instance (1989–2005)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge ([1])
1989		
1990	16	46
1991	13	62
1992	24	86
1993	17	73
1994	12	105
1995	47	142
1996	27	133
1997	35	139
1998	67	214
1999	60	178
2000	68	215
2001	69	214
2002	47	212
2003	67	254
2004	53	241
2005	64	272

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

15. Results of appeals (2005) (judgments and orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Agriculture	1	1			2
Approximation of laws	2				2
Association of the Overseas Countries and Territories	2				2
Commercial policy	1				1
Common Customs Tariff	1				1
Competition	12	2		1	15
Customs union		1			1
Environment and consumers	1	1			2
External relations	2				2
Freedom of movement for persons	1				1
Intellectual property	3	1		1	5
Law governing the institutions	8				8
Staff Regulations	5				5
State aid	2	1			3
Total	**41**	**7**		**2**	**50**

16. General trend (1989–2005)
(new cases, completed cases, cases pending)

	New cases [1]	Completed cases [2]	Cases pending as at 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
Total	**5 824**	**4 791**	

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

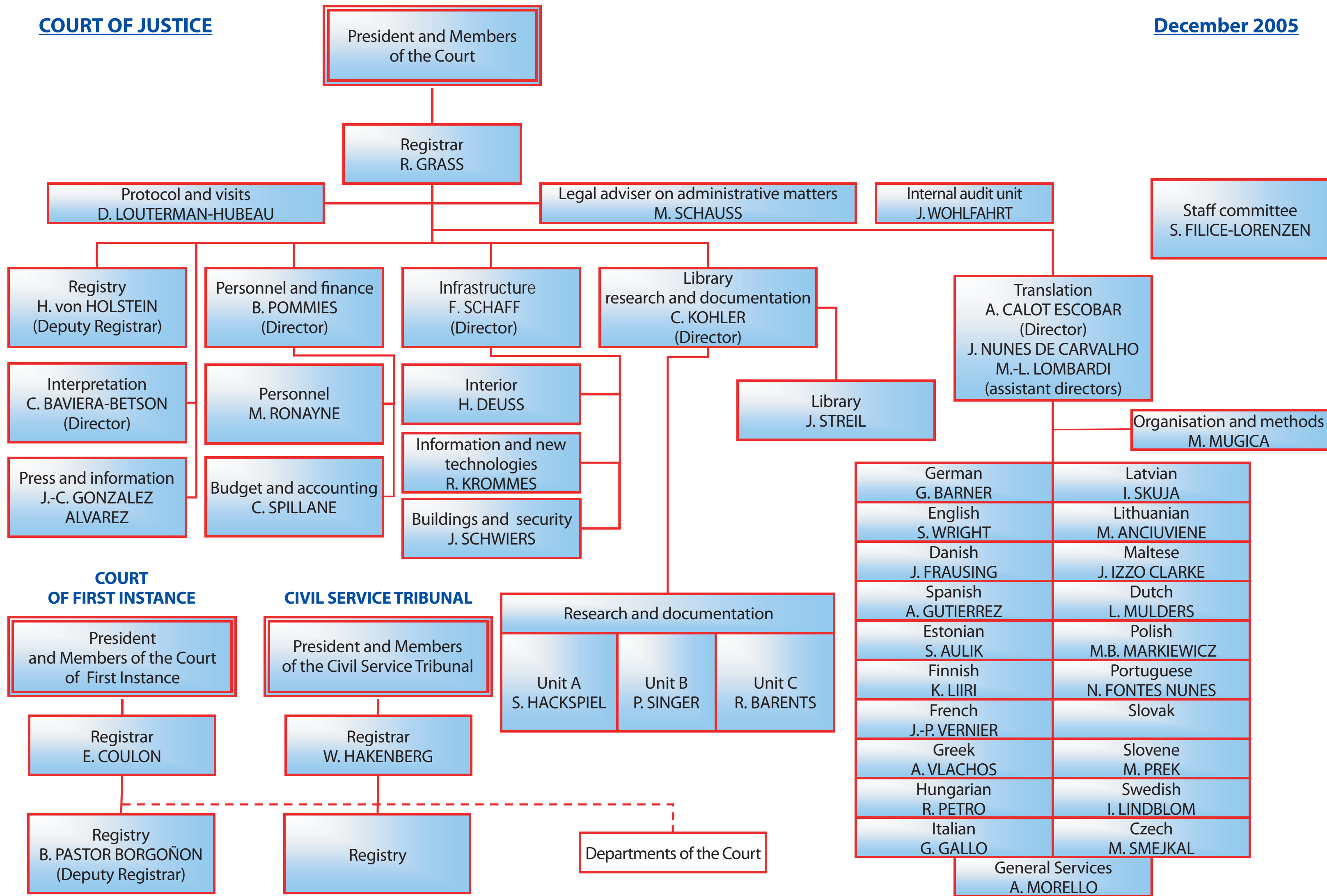
1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.

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

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

(2) 2005: the Court of First Instance referred 117 cases to the newly created Civil Service Tribunal.

Abridged organisational chart



Contact details for the Court of Justice

The Court of Justice may be contacted at:

Court of Justice of the European Communities

Postal address:	L-2925 Luxembourg
Telephone:	(352) 43 03-1
Telex (Registry):	2510 CURIA LU
Telegraphic address:	CURIA
Fax (Court):	(352) 43 03-2600
Fax (Press and Information Division):	(352) 43 03-2500
Fax (Internal Services Division — Publications Section):	(352) 43 03-2650
Internet:	www.curia.eu.int

Court of Justice of the European Communities

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