The European Court–Recent Case Law

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I. Introduction

The European Union (EU) now has twenty-seven Member States comprised of almost 500 million people. Each Member State, however, maintains its own legal order, and the national law of the individual Member States is supplemented by European Community law, which applies in all Member States and has supremacy over national law. European law is applied by the national authorities and by the national courts of the twenty-seven different Member States. Obviously, there is a risk that the same legal rules might be interpreted and applied differently by the national courts in the various Member States.

A major function and responsibility of the European Court of Justice (ECJ) is to make sure that European law applies the same, meaning in a uniform manner in all Member States. Therefore, any national court may ask the ECJ how to interpret European law relevant to a case pending before it. Today, such preliminary references may concern a wide range of legal questions.

The desire to maintain peace was an important motive for the creation of the European Communities after the Second World War But integration really developed through the elimination of trade barriers. In the earlier times of European integration, most law consisted of business and trade law. Accordingly, the ECJ's docket was focused on eliminating trade barriers in the European Community with a view of creating the "internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital."[1] More precisely, the Founding Treaty guarantees the following "basic freedoms": (1) the freedom of movement for workers, including the prohibition of "discrimination based on the nationality of workers of the Member States as regards employment, remuneration and other conditions of work and employment;"[2] (2) the freedom of establishment, including national treatment for self-employed persons and undertakings from other Member States; (3) the freedom to provide cross-border services; and (4) the freedom of movement of capital.

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1. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 40, art. 3, para. 1(c), art. 14 [hereinafter EC Treaty].

2. Id. art. 39, para. 2.

As interpreted by the ECJ, the basic freedoms not only prohibit discrimination on the basis of nationality but also prohibit disproportionate restrictions. This means, for example, that lawyers from other Member States cannot be required to fulfill all the qualifications and to pass all the exams normally required to be admissible to the bar of the host state. Rather, the education and experience foreign lawyers have acquired in their home state must be recognized and taken into account. A subsequent Community Directive extended this position by granting the right to immediately practice in another Member State under the professional denomination acquired in the lawyer's home country. After three years of practical experience, the lawyer must be admitted to the bar of the host country.

Today, we are not only dealing with economic freedoms but also cases before the ECJ that may arise in all kinds of areas: environment, fundamental rights, protection against terrorism, immigration, and driving licenses. I would like to give you some examples of the recent case law from the following areas: (1) economic freedoms and direct taxation, (2) competition law, (3) union citizenship, (4) fundamental rights, and (5) combat of terrorism.

II. Examples of Recent Case Law

A. Economic Freedoms and Direct Taxation

Direct taxes are, in principle, a matter for the Member States. The European Community has only limited competence in the field of the harmonization of direct taxation. But Member States' jurisdiction for taxation does not mean Member States can easily create trade barriers or hinder the free movement of persons, undertakings, or capital through tax law, for example, by imposing exit taxes. Rather, Member States must exercise their competence in a manner consistent with European Community law.

The ECJ's interpretation of the basic freedoms in regard to taxation of multinational undertakings has great economic and political impact. The ECJ allows self-employed persons and undertakings to choose and combine, to a certain degree, the advantages of the different national company and tax legal orders. Member States can no longer hinder people and undertakings to move to another, more attractive Member State by imposing discriminatory taxes on transboundary economic activities. On the one hand, such freedom of establishment of undertakings is a natural element of the internal market. On the other hand, Member States fear an erosion of their tax basis through the free movement of undertakings and capital.

1. Marks & Spencer[3]

The *Marks & Spencer* (*M*&S) case is a recent example illustrating how national tax law can come into conflict with the exercise of the fundamental freedoms by companies. It deals with the freedom of establishment in practice, more precisely with the taxation of transboundary groups of companies.

M & S, one of the largest UK retailers, had subsidiaries in the UK and in a number of other Member States. In 2001, it ceased trading in continental Europe due to the losses

3. Case C-446/03, Marks & Spencer v. Halsey, 2005 ECR. I-10837.

recorded from the mid-1990s. M & S then claimed group relief from the UK tax authorities for losses incurred by its Belgian, German, and French subsidiaries. Under UK provisions, the resident companies in a group may offset their profits and losses among themselves, but they are not allowed to do so where the losses are incurred by subsidiaries that have no establishment in the UK and do not trade there. The reason underlying those provisions is that the UK, as other Member States, wants to hinder the loss of taxable revenue, which might occur if companies could "import" losses incurred in other Member States.

Such discrimination between UK companies with domestic subsidiaries and those with foreign subsidiaries, however, may violate the freedom of establishment. As is usual in tax cases, the ECJ reiterated that although direct taxation is within the competence of the Member States, the latter must exercise that competence in a manner consistent with Community law. The court then found there to be a restriction on the freedom of establishment. Applying less favorable treatment to losses incurred by a non-resident subsidiary, the UK rules discourage undertakings from setting up subsidiaries in other Member States.

European governments, particularly the German government, had much feared this decision. They fought against the vision that large companies might shift all of their profits to countries with a low tax burden and all of their losses to countries with high taxes. The ECJ took those fears into account, to a certain extent, by admitting three justifications for disadvantageous tax treatment of companies with foreign subsidiaries. Those three justifications clarified in the *M & S* case are: (1) to protect 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; (2) to avoid the risk of the double use of losses; and (3) to avoid the risk of tax avoidance. Taken together, those three reasons could, in principle, justify the British regime that reserved group relief to companies only with domestic subsidiaries. The court found, however, the British regime disproportionate when applied to a subsidiary that had exhausted all possibilities available in its state of residence to have the losses taken into account there.

Consequently, where in one Member State the resident parent company demonstrates to the tax authorities that her foreign subsidiary has no possibility to deduct its losses from its tax burden in its state of residence, the parent company must be allowed to deduct those losses of its non-resident subsidiary from its taxable profits in that Member State. Thus, the British parent of M & S could, for example, deduct the losses from its French subsidiary, as the French subsidiary had gone bankrupt; thus, there were no more ways to deduct losses. Of course, it will not always be easy to apply this ruling to concrete cases, namely to find out whether there is really any possibility to use the losses in the subsidiary's state of residence.

2. Cadbury Schweppes[4]

Recall that Member States have fiscal sovereignty. As a result, the level of corporation taxes in the various Member States is very different, ranging from 10 to 35 percent. Member States fear that the ECJ's interpretation of the freedom of establishment allows

4. Case C-196/04, Cadbury Schweppes v. Comm'rs of Inland Revenue, 2006 ECR. I-7995.

multinational undertakings to transfer their profits to tax havens within the EU. Some politicians also fear that "unfair tax competition" might lead to a race to the bottom.

Cadbury Schweppes concerned a multinational undertaking that took advantage of the differences in the tax levels between Member States. Like *M&S*, the *Cadbury* case also concerned British tax legislation. Under UK tax legislation, a resident company is not generally taxed on the profits of its subsidiaries as they arise. However, the profits of a foreign company in which a UK resident company owns a holding of more than 50 percent, called a Controlled Foreign Company (CFC), are attributed to the resident company and taxed in its hands when the corporation tax in the other Member State is less than three-fourths of the rate applicable in the UK. That system is designed to make the resident company pay the difference between the tax paid in the foreign country and the higher tax that would have been paid if the company had been a resident in the UK.

An important exception applies when a company shows that it was neither the main purpose of the transactions nor the main reason of the foreign controlled company's existence to achieve a reduction in the UK tax burden. The ECJ clarified that companies may be established in other Member States for the purpose of benefiting from a lower level of taxation. The British CFC legislation, therefore, constitutes a restriction of the freedom of establishment. It can be justified only where it specifically relates to wholly artificial arrangements aimed solely at escaping the national tax normally due. On the basis of that interpretation of the freedom of establishment given by the ECJ, the British national court had to decide the case, namely whether British CFC legislation covered only wholly artificial arrangements aimed at tax avoidance or whether it was overbroad.

3. Viking Line[5]

Similarly, the *Viking Line* case concerns the freedom of establishment and the problem of undertakings "escaping" to low-standards countries. Whereas *Cadbury* dealt with "escaping" to low-tax countries, *Viking Line* concerns "escape" to a low-wage country. Viking Line intended to reflag its vessel *Rosella* from the Finnish flag to the Estonian flag. This change would allow cheaper running of the vessel, as Estonian crew wages are lower than Finnish crew wages. Trade unions did not like that idea and organized collective action to force Viking Line to maintain, in any case, the Finnish wage level.

In the meantime, the ECJ has decided that collective action of trade unions against a private undertaking, hindering it to benefit from reflagging a vessel to another Member State, can violate the freedom of establishment. Among other interesting issues, the court judgment deals with the rights of trade unions and the question of whether a private company can rely on the freedom of establishment against restrictions set up by another private organization. Briefly speaking, the ECJ applies a proportionality test; it held that collective action of trade unions violates the freedom of establishment if it is not proportionate.

5. Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line, 2006 O.J. (C 60) 16.

4. SEVIC Systems[6]

The court dealt with another kind of restriction on the freedom of establishment. Under German legislation, cross-border mergers were treated differently from mergers between two domestic companies. In Germany, two companies can merge by transferring all of the assets from one company to the other. The first company is integrated into the second without liquidation, whereas in a cross-border situation, the foreign company must be wound up first.

In its judgment, the ECJ emphasized that cross-border merger operations constitute particular forms of the exercise of the freedom of establishment, which are important for the proper functioning of the internal market. The court noted that a difference in treatment between companies, according to the internal or cross-border nature of the merger, constitutes a restriction on the right of establishment. Such discrepancies in treatment can be allowed only if they pursue a legitimate objective compatible with the Founding Treaty and are justified by overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, preservation of the effectiveness of fiscal supervision, and the fairness of commercial transactions. Generally, a Member State's refusal to register a merger between a company established in that State and a company whose establishment is situated in another Member State in the commercial register prevents the realization of cross-border mergers even if the previously mentioned public interests are not threatened. Such a rule goes beyond what is necessary to attain the objectives designed to protect those interests.

5. Wilson & Commission v. Luxembourg[7]

Two other recent cases concerned the possibilities for lawyers to work in other Member States. There has already been a well-developed body of case law on this issue, in particular with regard to the consequences of fundamental freedoms. But in this case, for the first time, the ECJ had to work with a new directive.[8] Under this directive, every lawyer enrolled at the bar of a Member State is entitled to practice as a lawyer in every other Member State. However, they must practice under their home-country professional titles. For example, a German lawyer must use the title "Rechtsanwalt", even when practicing in the UK.

Luxembourg attached additional conditions to the exercise of a lawyer's profession. Most importantly, lawyers had to demonstrate proficiency in that country's languages, that is, in French, German, and Luxembourgish. However, the Court stated that the directive precludes a prior test of linguistic knowledge. Only a certificate attesting registration with the competent authority of the home Member State is necessary in order to be registered with a bar in the host Member State. To compensate for the exclusion of this prior testing, rules of professional conduct exist to ensure the protection of consumers and the proper administration of justice. Therefore, subject to disciplinary sanctions, a

6. Case C-411/03, SEVIC Systems v. Amtsgericht Neuwied, 2005 ECR. I-10805.

7. Case C-506/04, Wilson v. Luxembourg, 2006 ECR. I-8613; Case C-193/05, Comm'n v. Luxembourg, 2006 ECR. I-8673.

8. Council Directive 98/5, 1998 O.J. (L 177) 36-43 (EC) (facilitating the practice of law on a permanent basis in a Member State other than that in which the qualification was obtained).

European lawyer must respect those rules, both the rules of the home Member State and those of the host Member State. Among those obligations is the duty of a lawyer not to handle cases that require linguistic knowledge that he or she does not possess. Furthermore, according to the directive, a European lawyer who wishes to join the profession of the host Member State and practice under the professional title of that state must show that he has effectively and regularly pursued an activity for a period of at least three years in the law of that Member State.

Luxembourg also prohibited European lawyers from accepting service on behalf of companies in Luxembourg. This prohibition effectively served to reserve this market for local lawyers. That condition was also declared incompatible with the directive because European lawyers are entitled to pursue the same professional activities as lawyers practicing under the professional title of the host Member State. Exceptions must be provided for by the directive itself. An exception for service on behalf of companies is not mentioned in the directive.

B. Competition Law

In the *Manfredi* case,[9] the ECJ recently had an opportunity to clarify certain aspects of private enforcement of the EU's antitrust rules. Certain insurance companies active in Italy had implemented an unlawful agreement for the purpose of exchanging information on the insurance sector. They thereby facilitated a practice of illegitimately increasing premiums for civil liability insurance relating to accidents caused by motor vehicles. Mr. Manfredi and others brought actions before an Italian judge claiming money back from the insurance companies insofar as their insurance premiums had been excessively high. The Italian court referred several questions to the ECJ for a preliminary ruling concerning European antitrust law (Article 81 of the EC Treaty).

The ECJ held that European Community antitrust law, as laid down in Article 81 of the EC Treaty, produces direct effects in relations between individuals. Accordingly, any individual can rely on this law to claim the invalidity of an arrangement or practice prohibited under Article 81 and claim compensation for the harm suffered where there is a causal link between that harm and the arrangement or practice prohibited. The ECJ also clarified several details relating to actions for compensation based on infringements of the EU's antitrust rules, such as limitation periods or the possibility to obtain exemplary or punitive damages.

The *Manfredi* judgment can be considered a step forward on the way to private enforcement of competition rules, an issue that has been well-known in the United States for quite some time. As far as Europe is concerned, I think it is fair to say that our sensitivity for private enforcement of antitrust rules has at least increased in recent years.

C. Union Citizenship

Union citizenship was introduced into the Founding Treaties by the Treaty of Maastricht in 1992. Traditionally, basic freedoms were only granted to workers, self-employed persons, and service providers—thus in conjunction with some economic activity. Union

9. Joined Cases C-295/04 to C-298/04, Manfredi v. Assicurazioni, Cannito v. Fondiaria, Tricarico, Murgolo, 2006 ECR. I-6619.

citizenship includes the freedom of movement and non-discrimination in the Union independently of economic activity. However, Member States may require that Union citizens from other Member States have sufficient means to maintain themselves and not become a burden on the host country's social welfare system. One group of people that benefit from Union citizenship are students. The following are two examples from the ECJ's recent case law on Union citizenship.

1. *Bidar*[10]

In England and Wales, assistance with maintenance costs for students is provided by means of student loans from the state. Nationals of other Member States are entitled to receive such loans if they are "settled" in the UK and have been a resident there for three years. However, it is not possible to become settled if one resides in the UK solely to study.

Dany Bidar, a French national, lived in the UK for three years and undertook his last three years of secondary education there. Afterwards, he enrolled at the University College London and applied for financial aid. He was refused a maintenance loan on the basis that he was not "settled" in the UK.

The court made clear that a national of a Member State who goes to another Member State to study exercises the freedom of movement guaranteed to Union citizens by Article 18 of the EC Treaty and that assistance given to cover the maintenance costs of students who are lawful residents in a Member State falls within the scope of application of the EC Treaty. However, the ECJ considers it legitimate for a host Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of the host state. Otherwise, maintenance costs for students from other Member States may become an unreasonable burden, which could have consequences for the overall level of assistance that may be granted in the host state. The British legislation, however, which precluded any possibility of a national of another Member State to obtain settled status as a student and thus precluded maintenance loans for the students, was held to be incompatible with European Community law.

2. Commission v. Austria[11]

Commission v. Austria dealt with restrictions to university education for foreigners in Austria. As a background to this case, it is important to know that university education in Austria, like in many other European countries, is practically free of charge. Education, including university education, is paid out of tax revenue in Austria.

In *Commission v. Austria*, the ECJ held that making access for students that have obtained their secondary education diploma in another Member State subject not only to the general Austrian admission requirements but also to the requirements for immediate admission to the chosen course of study in that other State constitutes indirect discrimination on grounds of nationality. As a consequence of this judgment, Austrian universities are oversubscribed, particularly with German students of medicine whose grades do not allow them to study in Germany. The Austrian government does not appreciate this re-

10. Case C-209/03, Bidar, 2005 ECR. I-2119.
11. Case C-147/03, Comm'n v. Austria, 2005 ECR. I-5969.

sult. Some maintain that Member States should be free to ensure the education of sufficient doctors and other professionals for their country without being forced to introduce entry examinations or minimum grades.

The ECJ, however, saw no justification for the indirect discrimination of students from other Member States. Rather, excessive demand for access to specific courses can be met by the adoption of specific non-discriminatory measures, such as entry exams or minimum grades. Austria has now introduced a quota for foreign students and might be sued again by the Commission for violation of the EU's rules on Union citizenship.

D. Fundamental Rights/Affirmative Action

The Founding Treaties contain the basic freedoms but no catalogue of human rights. But, the ECJ has recognized the existence of human rights at the EU level in its case law. Meanwhile, the EU Treaty also provides that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[12] Human rights are thus part of the European Community legal order. When applying European Community law, Member States must observe the fundamental human rights as interpreted by the ECJ.

In the *Mangold* case, the ECJ held that the prohibition of age discrimination is a fundamental principle of European Community law.[13] A difference in treatment directly on grounds of age, as a rule, constitutes discrimination prohibited by European Community law. But, Member States may provide for such differences in treatment if they are justified objectively and reasonably by a legitimate aim, in particular, by legitimate employment policies and labor market objectives.

Mangold dealt with a German law that authorized fixed-term contracts of employment, specifically once a worker reached the age of fifty-two. Normally, only unlimited contracts are allowed in Germany. Special reasons must be given for an exception to this rule, such as the need to replace a worker who is temporarily unavailable. But under the law in question, no special reasons were necessary to conclude fixed-term contracts with persons over the age of fifty-two. This law was meant to serve as an affirmative action measure to promote the integration of unemployed elderly workers into working life. For various reasons, such elderly workers meet considerable difficulties in finding work in Germany.

The Court admitted that Member States enjoy broad discretion in their choice of measures capable of attaining their objectives in the field of social and employment policy. However, the ECJ found that it is disproportionate to treat all workers over fifty-two the same way with regard to fixed-term contracts, regardless of whether they have been unemployed and for how long. Thus, Germany can no longer apply its law on fixed-term contracts to people over fifty-two.

Some found it courageous of the ECJ to consider the prohibition of age discrimination a fundamental principle of European Community law. Also, questions were raised as to what happens with bona fide fixed-term contracts entered into before the ECJ judgment.

12. Consolidated Version of the Treaty on the European Union, Dec. 24, 2002, 2002 O.J. (C 325) 12, art. 6, para. 2 [hereinafter EU Treaty].

13. Case C-144/04, Mangold v. Helm, 2005 ECR. I-9981.

Are they retroactively transformed into contracts of unlimited duration? And how about other age-related working conditions, such as pension age or level of salary? This judgment is in line with the ECJ's case law on affirmative action in the field of gender discrimination: the ECJ only allows affirmative action within the limits of the principle of proportionality.[14]

E. Combat of Terrorism

1. *Passenger Name Records:* Parliament v. Council and Commission[15]

Following the terrorist attacks of September 11, 2001, the United States passed legislation providing that air carriers operating flights to, from, or across U.S. territory must provide U.S. authorities with electronic access to the data contained in their reservation and departure control systems, the so-called Passenger Name Records (P.N.R.). That data includes, for example, credit card details or special dietary requirements, such as a vegetarian meal.

Since the Commission, as the European Communities' supranational executive body, considered those provisions could conflict with European Community legislation as well as that of the Member States on data protection, it entered into negotiations with U.S. authorities. Following those negotiations and upon several guarantees given by the United States, the Commission, in 2004, adopted a decision, finding that the U.S. Bureau on Customs and Border Protection ensures an adequate level of protection for P.N.R data transferred from the Community.[16] A few days later, the Council adopted a decision[17] approving the conclusion of an agreement between the European Community and the United States on the processing and transfer of P.N.R. data by air carriers established in a Member State of the Community to the U.S. Bureau of Customs and Border Protection.[18]

The European Parliament, which consists "of representatives of the peoples of the States brought together in the Community,"[19] lodged an application to the ECJ to annul the Council and Commission decisions that declared U.S. data protection was adequate. The ECJ annulled both the Council decision, which concerned the conclusion of an agreement between the European Community and the United States on the processing and transfer of personal data, and the Commission decision on the adequate protection of that data. However, the judgment declaring the annulment neither dealt with the right to privacy nor with data protection. Rather, the Court set forth that the matter was the combat of terrorism.[20] Combating terrorism, however, is a matter for Member States and not covered by European Community competence. More precisely, the combat of terror-

14. Case C-450/93, Kalanke v. Bremen, 1995 ECR. I-3051; Case C-212/94, Marschall, 1996 ECR. I-389.

15. Joined Cases C-317/04 & C-318/04, Parliament v. Council, Comm'n, 2006 ECR. I-4721.

16. Commission Decision 2004/535, 2004 O.J. (L 235) 11 (EC).

17. Council Decision 2004/496, 2005 O.J. (L 255) 168 (EC).

18. This agreement was signed and entered into force in Washington on May 28, 2004.

19. EC Treaty art. 189 (also stating that the number of representatives "shall not exceed 732"); *see also* EC Treaty art. 190 (stating that representatives shall be elected "by direct universal suffrage . . . Germany 99 . . . United Kingdom 78 . . . Malta 5").

20. More precisely, the ECJ specified, "not data processing necessary for a supply of services," in the sense of the EC Treaty, "but data processing regarded as necessary for safeguarding public security and for law - enforcement purposes." Case C-317/04, Parliament v. Council, 2006 ECR. I-4721.

ism falls under the so-called intergovernmental "third pillar" of the EU. Thus, Member State representatives coming together in the European Council may conclude such an agreement without being subject to the "supranational framework" of the EC Treaty.

In the end, the Parliament won a case but lost the battle. Meanwhile, the Council concluded a new agreement with the United States without the participation of the Parliament, as this time the Council merely acted on the basis of its competence in the field of police cooperation. Legal protection against that new agreement is difficult, as the ECJ has only limited competencies in this field of policy.

2. Gestoras pro Amnistia v. Council[21]

The case of *Gestoras pro Amnistia v. Council*, which was pending when this presentation was originally delivered, further highlights the problem of meager legal protection in the area of police and judicial cooperation on criminal matters. Gestoras pro Amnistia is an organization based in Spain whose purpose is to defend human rights in the Basque territory, in particular those of political prisoners and exiles. Gestoras has, however, been considered to be related to the terrorist group Euskadi Ta Askatasuna (ETA), which seeks independence from Spain for the Basque territory, using violent methods. On September 28, 2001, the Security Council of the United Nations adopted a resolution[22] in which it decided, in particular, that all states are to afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts. In December 2001, the Council of the European Union adopted a common position,[23] according to which persons, groups, or entities suspected of terrorism must be included on a list. The names of persons and entities on that list shall be reviewed at least every six months to ensure that there are still grounds for keeping them on the list.

Gestoras, which had been put on the EU's list of terrorist organizations, applied for damages before the European Court of First Instance (C.F.I.). The C.F.I. dismissed the action, holding, in particular, that it patently lacked jurisdiction with regard to damages allegedly caused by the inclusion of Gestoras on the list of persons, groups, and entities suspected of terrorism pursuant to the common position. In the appeal proceedings before the ECJ, Advocate General Mengozzi[24] presented his conclusions on October 26, 2006.[25]

The EU Treaty[26] does not provide for an action to obtain compensation for damages caused by the activities of the EU in the field of police and judicial cooperation in criminal matters. Consequently, persons and entities listed as terrorists have no legal remedies under European Community law. This statement, however, seems difficult to reconcile with the fundamental right to effective judicial protection. Emphasizing the importance

21. Case C-354/04 P, Gestoras pro Amnistia v. Council, judgment of 27 Feb. 2007; see also Case C-355/04 P, Segi v. Council, judgment of 27 Feb. 2007.

22. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

23. Common Council Position (CFSP) No 931/2001 of 27 Dec. 2001, 2001 O.J. (L 344) 93.

24. An advocate general is a member of the Court who presents independent legal opinions to prepare the court's decision.

25. Case C-354/04 P, Gestoras Pro Amnistia v. Council, opinion of 26 Oct. 2006; *see also* Case C-355/04 P, Segi v. Council, opinion of 26 Oct. 2006.

26. *Cf.* EU Treaty art. 35.

of the fundamental right to judicial protection and the rule of law, Advocate General Mengozzi concluded that such protection must be obtained from national courts, not from the ECJ[27]

The ECJ, in its decision of February 27, 2007, adopted a similar approach: direct action by individuals or NGOs in the EU courts is not possible. However, Member State courts must strive to provide sufficient access to justice, if necessary and possible, by submitting preliminary references to the ECJ under Article 35 of the EU Treaty. It remains to be seen if this approach arrives at workable results.

III. Concluding Remarks

There are, of course, many other interesting cases in the ECJ's current case law. Some of you might have expected to hear the latest about the Microsoft case. To recall, in 2004, the Commission found that Microsoft abused its dominant position under Article 82 of the Treaty. This case, however, is not even pending before us. It was pending before the C.F.I. when this presentation was originally delivered. In the meantime, the C.F.I. has given its judgment in which it dismissed Microsoft's action, except for a minor procedural detail.[28]

My intention in giving this overview was only to show you the wide and ever-growing range of subject matters covered today by the ECJ's jurisdiction. I think it is remarkable how a supranational court handles all of the different cases that come to it from twenty-seven different legal systems and in the twenty-three official languages of the EU—surely a very interesting and multi-sided task.

27. More precisely, Advocate General Mengozzi stated, "under Union law the appellants enjoy the right to compensation in the national courts for possible infringement of their (fundamental) right caused by the . . . common positions." This finding, however, does not affect the Court of First Instance's declaration of lack of jurisdiction. Therefore, after pointing to the problem of lacking judicial protection in matters of police and judicial cooperation, Advocate General Mengozzi proposed that the court dismiss Gestoras's appeals. Case C-354/04 P, Gestoras Pro Amnistia v. Council, opinion of 26 Oct. 2006.

28. Case T-201/04, Microsoft Corp. v. Comm'n, 2004 O.J. (C 179) 18.