



EU PUBLIC PROCUREMENT LAW

SECOND EDITION

CHRISTOPHER H. BOVIS



ELGAR EUROPEAN LAW

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Second Edition

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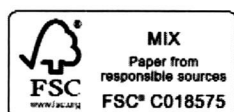
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European integration is the driving force behind constant evolution and change in the laws of the member states and the institutions of the European Union. This important series will offer short, state-of-the-art overviews of many specific areas of EU law, from competition law to consumer law and from environmental law to labour law. Whilst most books will take a thematic, vertical approach, others will offer a more horizontal approach and consider the overarching themes of EU law.

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EU Public Procurement Law
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Preface

The 21st century has begun with European Institutions striving for competitiveness and growth in the European Union. One of the most important drivers for both competitiveness and growth in the Member States is the regulation of public procurement.

The regulation of public procurement in the European Union has multiple dimensions, as a discipline of European law and policy, directly relevant to the fundamental principles of the common market and as a policy instrument in the hands of Member States. Its purpose is to insert a regime of competitiveness in the relevant markets and eliminate all non-tariff barriers to intra-community trade that emanate from preferential purchasing practices which favour national undertakings. The regulation of public procurement represents best practice in the delivery of public services by the state and its organs and facilitates the observance of well-embedded principles such as accountability for public expenditure, avoidance of corruption and political manipulation.

This book aims to provide the reader with a comprehensive analysis of the law and jurisprudence which have shaped the landscape of the regulation of public procurement in the European Union and its Member States.

In Chapter 1 public procurement is positioned within the context of the single market in the European Union. The objective of this chapter is to provide the necessary links between the regulation of public procurement and the remit of European law. This chapter reveals the concept of public markets and the economic policy dimension in the regulation of public procurement. It also points out the policy rationale of the relevant legal structure and the overall framework of Community and national competence. Chapter 1 examines the anti-trust dimension in public procurement regulation and justifies the influence of neo-classical economic theory upon the integration of public markets. This finding also reflects on the public policy dimension of public procurement and the interplay of public purchasing with state aid. As a result, the industrial policy dimension in public procurement emerges and the remit of public procurement regulation demonstrates its flexibility and complementary relation with other policies in the European integration process.

Chapter 2 covers the applicability of the public sector rules, the coverage and scope of the new Public Sector Directive, the requirements for adver-

tisement and publicity of public contracts, the process of qualitative selection of tenderers and candidates, the use of award procedures and award criteria. Chapter 3 reflects on the applicability of the utilities rules, the coverage and scope of the Utilities Directive, the activities which are covered and the activities which are excluded from the Utilities Directive, publicity and advertisement requirements, qualification and qualitative selection systems, award procedures, framework agreements and award criteria.

Chapter 4 deals with legal redress and compliance with the public procurement *acquis* in the Member States and reflects on remedies available to individuals at national level and access to justice in public procurement disputes. The objective of this chapter is to assess the progress made by Member States to decentralize enforcement of public procurement rules by creating the appropriate legal frameworks that encourage aggrieved contractors to seek redress and justice. This chapter covers the applicability and principles of the Remedies Directives, which supplement the application of the substantive Public Sector and Utilities Directives.

Chapter 5 addresses the doctrines and principles of public procurement regulation which have emerged through its evolution. The doctrines of public procurement regulation refer to the mechanism for the applicability and engagement of the relevant rules and provide for different notions and definitions which are necessary for the harmonization of national legal and political systems with a view to integrating their respective public markets. The principles of public procurement regulation include the principle transparency and accountability and their surrogate principles of non-discrimination and objectivity. The chapter provides for a comprehensive analysis of the interplay of these principles and the way they have influenced the evolution of public procurement regulation. Chapter 6 deals with the notion of contracting authorities as instrumental concept for the traction of the public and utilities procurement rules. The analysis in the chapter offers a codified approach of the concept of contracting authorities under the Court's jurisprudence and its recent developments, their relation with private sector undertakings, the conditions for pursuing services of general interest as part of public procurement contracts, especially the criteria for defining bodies governed by public law and the tests used by the Court to define the existence of state control over an entity which is construed as contracting authority. Chapter 7 covers the notion of public contracts as instrumental concept for the traction of the public and utilities procurement rules. The chapter offers a comprehensive analysis of jurisprudential developments relating to the notion of public contracts and deals with the notions of public contracts in cases of public service concessions, vertical procurement and subcontracting, procurement and state aid, procurement and services of general

interest, needs in general interest and contracts financing public services. Chapter 8 reflects on the process of awarding public procurement contracts and covers the selection and qualification of tenderers and candidates, where it examines jurisprudence on technical standards, selection and qualification requirements, consortia participation in tendering procedures, reliance of tenderers on other sources substitution of consortia members, and reasons for exclusion and disqualification of tenderers. In addition, the chapter examines award procedures and award criteria in public procurement. The objective of this chapter is to focus on the reasoning of the Court in its attempt to provide a dynamic analysis of the procedures applicable to the award of public contracts. It demonstrates the nature and characteristics of the award procedures, as viewed by the Court and their utilization by contracting authorities. It elaborates upon the restrictive interpretation of the negotiated procedures and attempts to define the framework for their utilization, the grounds for their legitimate use, and the justification and causality requirements for negotiated procedures without prior publicity, practically the use of negotiated procedure for technical reasons or reasons of extreme urgency, or as a result of repetition of similar works within three years. The chapter finally investigates the Court's case law in relation to award criteria and presents a comprehensive analysis of the two criteria laid down in the Public Procurement Directives. It provides for the conditions under which contracting authorities award public contracts. The Court has many opportunities to pronounce on the features of the award criteria, namely the lowest price or the most economically advantageous offer. The chapter explores the Court's views in relation to the following topics: the meaning of abnormally low offers, the compatibility of mathematical matrixes, the evaluation of the lowest offer, the factors included in the most economically advantageous offer and policy considerations, such as employment, protection of the environment as part of the award criteria.

Chapter 9 covers the evolution of the phenomenon of public-private partnerships and provides for a comprehensive analysis of the structure of remedies and access to justice at national level and the jurisprudence of the Court relating to compliance issues of public procurement regulation. The chapter evaluates the relation between public procurement and public-private partnerships and the surrogate development of public-public partnerships and concessions as instruments for delivering public services. It appraises recent legal, policy and judicial developments that have emerged as a result of the involvement of the private sector in the delivery of public services and in particular their financing. The concept of public-private partnerships is gaining momentum across the common market and policy makers are keen to see the relevant model as a credible and effective delivery mechanism. The chapter demonstrates that the

procurement of partnerships must adhere to the enshrined principles of transparency, objectivity and non-discrimination that underpin the public procurement regime and provides for a detailed analysis of legal developments in the field of concessions.

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Table of cases before the European Court of Justice

C-21–24/72, <i>International Fruit Co NV v. Produktschap voor Groenten en Fruit</i> , [1972] ECR 1236 202	C-18/84, <i>Commission v. France</i> , [1985] ECR 1339 36, 342
C-127/73, <i>BRT v. SABAM</i> , [1974] ECR 313 47, 269, 359	C-103/84, <i>Commission v. Italy</i> , [1986] ECR 1759 36, 342
C-173/73, <i>Italy v. Commission</i> , [1974] ECR 709 20, 42, 43, 44, 353	C-234/84, <i>Belgium v. Commission</i> , [1986] ECR 2263 40, 265, 342, 343, 349
C-36/74, <i>Walrave and Koch v. Association Union Cycliste Internationale et al</i> , (1974) ECR 1423 256, 288	C-24/85, <i>Spijkers v. Gebroeders Benedik Abbatoir CV</i> , [1986] ECR 1, 1123 283, 299
C-74/76, <i>Ianelli & Volpi Spa v. Ditta Paola Meroni</i> , [1977] 2 CMLR 688 36, 342	C- 40/85, <i>Belgium v. Commission</i> , [1986] ECR I-2321 43
C-249/81, <i>Commission v. Ireland</i> , [1982] ECR 4005 256, 288	C-67/85, 68/85 and 70/85, <i>Van der Kooy and Others v. Commission</i> , [1988] ECR 219 40, 343, 350
C-244/81, <i>Commission v. Ireland</i> , 1982, ECR 4005 36, 342	C-199/85, <i>Commission v. Italy</i> , [1987] ECR 1039 398, 400, 444
C-76/81, <i>SA Transporoute et Travaux v. Minister of Public Works</i> , [1982] ECR 457 24, 26, 45, 253, 272, 275, 345, 354, 378, 410, 423	C-310/85, <i>Deufil v. Commission</i> , [1987] ECR 901 40, 42, 43, 44, 343, 350
C-323/82, <i>Intermills v. Commission</i> [1984] ECR 3809 43	C-66/86, <i>Ahmed Saeed Flugreisen v. Commission</i> , [1989] ECR 803 269, 359, 479
C-240/83, <i>Procureur de la République v. ADBHU</i> , [1985] ECR 531 38, 264, 348, 359	C-27/86, 28/86, 29/86, <i>Constructions et Entreprises Industrielles SA (CEI) v. Association Intercommunale pour les Autoroutes des Ardennes, CEI and Bellini</i> , [1987] ECR 3347 23, 272, 273, 379, 380, 396, 413
C-152/84, <i>Marshall v. Southampton and South West Hampshire Area Health Authority</i> , [1986] ECR 723 257, 290	C-84/86, <i>Commission v. Hellenic Republic</i> , not reported 35, 341
	C-27/86, <i>Constructions et Entreprises Industrielles SA</i>

- (CEI) v. Association
*Intercommunale pour les
Autoroutes des Ardennes*, C-
28/86, *Ing.A. Bellini & Co. S.p.A.*
v. *Regie de Betiments*, C-29/86,
Ing.A. Bellini & Co. S.p.A. v.
Belgian State, [1987] ECR 3347
23, 272, 379, 386
- C-66/86, *Silver Line Reisebüro*,
[1989] ECR I-803 **269, 359, 479**
- C-45/87, *Commission v. Ireland*,
[1988] ECR 4929 **26, 270, 376,**
377, 378, 417, 487, 496
- C-31/87, *Gebroeders Beentjes BV v.*
the Netherlands, [1989] ECR
4365 **25, 30, 256, 272, 273, 279,**
282, 288, 300, 339, 380, 381,
386, 396, 408, 412, 418, 420, 484
- C-45/87, *Commission v. Ireland*,
[1988] ECR 4929 **26, 270, 376,**
377, 378, 417, 487, 496
- C-301/87, *France v. Commission*,
[1990] ECR I **20, 40, 343, 350**
- C-3/88, *Commission v. Italy*, [1989]
ECR 4035 **372, 398, 444**
- C-21/88, *Du Pont de Nemours*
Italiana SpA v. Unita Sanitaria
Locale N.2 di Carrara, [1990]
ECR 889 **35, 341**
- C-103/88, *Fratelli Costanzo S.p.A. v.*
Comune di Milano, [1989] ECR
1839 **25, 26, 45, 275, 345, 354,**
386, 410, 424
- C-351/88, *Lavatori Bruneau Slr. v.*
Unita Sanitaria Locale RM/24 di
Monterotondo, [1991] ECR I-
3641 **35, 341**
- C-303/88, *Italy v. Commission*,
[1991] ECR I-1433 **40, 343,**
350
- C-188/89, *Foster v. British Gas*,
[1990] ECR-1313 **286**
- C-247/89, *Commission v. Portugal*,
[1991] ECR I-3659 **286**
- C-261/89, *Italy v. Commission*,
[1991] ECR I-4437 **40, 343, 350**
- C-305/89, *Italy v. Commission* ('*Alfa*
Romeo'), [1991] ECR I-1603 **40,**
265, 342, 343, 349
- C-360/89, *Commission v. Italy*,
[1992] ECR I-3401 **30, 35, 279,**
341
- C-296/89, *Impresa Dona Alfonso di*
Dona Alfonso & Figli s.n.c. v.
Consorzio per lo Sviluppo
Industriale del Comune di
Monfalcone, judgment of 18 June
1991 **25, 26, 45, 275, 345, 353,**
354, 410, 424
- C-288/89, *Stichting Collectieve*
Antennevoorziening Gouda and
others v. Commissariaat voor de
Media, [1991] ECR I-04007 **478**
- C-41/90, *Höfner*, [1991] ECR I-1979
479
- C-179/90, *Merci Convenzionali*
Porto di Gevova, [1991] ECR I-
5889 **15, 261, 293**
- C-362/90, *Commission v. Italy*, judg-
ment of 31 March 1992 **35, 341**
- C-24/91, *Commission v. Kingdom of*
Spain, [1994] CMLR 621 **286,**
398, 407, 444
- C-29/91, *Dr Sophie Redmond*
Stichting v. Bartol, IRLR 369
283, 299
- C-209/91, *Rask v. ISS Kantinenservice*,
[1993] ECR I **283, 299**
- C-107/92, *Commission v. Italy*,
judgment of 2 August 1993 **398,**
407, 444
- C-296/92, *Commission v. Italy*, judg-
ment of 12 January 1994 **398,**
444

- C-71/92, *Commission v. Spain*, judgment of 30 June 1993 **273, 380, 396, 403**
- C-89/92, *Ballast Nedam Groep NV v. Belgische Staat*, [1994] 2 CMLR **379**
- C-278/92 to C-280/92, *Spain v. Commission*, [1994] ECR I-4103 **40, 343, 349**
- C-296/92, *Commission v. Italy*, judgment of 12 January 1994 **398, 444**
- C-364/92, *SAT Fluggesellschafteten*, [1994] ECR I-43 **262, 294**
- C-382/92, *Commission v. United Kingdom*, [1994] ECR I **283, 299**
- C-387/92, *Banco Exterior*, [1994] ECR I-877 **38, 40, 264, 343, 348**
- C-392/92, *Schmidt v. Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen*, [1994] ECR I, 1320 **283, 299**
- C-382/92, *Commission v. United Kingdom*, [1994] ECR I **283, 299**
- C-56/93, *Belgium v. Commission*, [1996] ECR I-723 **40, 42, 43, 343, 350, 353**
- C-359/93, *Commission v. the Netherlands*, judgment of 24 January 1995 **26, 200, 270, 376, 378**
- C-280/93, *Germany v. Council*, judgment of 5 October 1994 **202, 388**
- C-324/93, *R. v. The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*, judgment of 28 March 1995 **273, 282, 412**
- C-392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC*, OJ 1993, C 287/6 **46, 263, 287, 357**
- C-39/94, *SFEI and Others*, [1996] ECR I-3547 **40, 343, 350**
- C-48/94, *Rygaard v. Stro Molle Akustik*, judgment of 19 September 1995 **283, 299**
- C-57/94, *Commission v. Italy*, judgment of 18 May 1995 **398, 400, 403, 444**
- T-67/94, *Ladbroke Racing v. Commission*, [1998] ECR II-1 **40, 343, 350**
- C-79/94, *Commission v. Greece*, judgment of 4 May 1995 **200**
- C-87/94R, *Commission v. Belgium*, order of 22 April 1994 **372, 384, 409, 497**
- C-157/94, *Commission v Netherlands*, [1997] ECR I-5699. **47, 269, 359**
- C-158/94, *Commission v. Italy*, [1997] ECR I-5789 **47, 269, 359**
- C-159/94, *Commission v. France*, [1997] ECR I-5815 **47, 269, 359**
- C-160/94, *Commission v. Spain*, [1997] ECR I-5851 **47, 269, 359**
- C-241/94, *France v. Commission*, [1996] ECR I-4551 **42, 43, 44, 353**
- T-358/94, *Air France v. Commission*, [1996] ECR II-2109 **40, 343, 350**
- T-106/95, *FFSA and Others v. Commission*, [1997] ECR II-229 **38, 264, 348**
- C-343/95, *Diego Cali et Figli*, [1997] ECR I-1547 **262, 294, 484**
- T-16/96, *Cityflyer Express v. Commission*, [1998] ECR II-757 **40, 43, 343, 350**

- C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73 **11, 18, 29, 42, 258, 261, 266, 278, 293, 300, 301, 307, 309, 312, 317, 322, 323, 324, 339, 345, 347, 352, 412, 482, 284**
- C-323/96, *Commission v. Kingdom of Belgium*, [1998] ECR I-5063 **256, 289, 399**
- C-342/96, *Spain v. Commission*, [1999] ECR I-2459 **40, 343, 350**
- C-353/96, *Commission v. Ireland* and C-306/97, *Connemara Machine Turf Co Ltd v. Coillte Teoranta*, [1998] ECR I-8565 **256, 288**
- C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821 **11, 17, 29, 41, 261, 262, 266, 278, 293, 294, 300, 305, 307, 312, 315, 324, 334, 335, 337, 339, 343, 346, 350, 412, 435, 447, 448, 450, 482, 484**
- C-5/97, *Ballast Nedam Groep NV v. Belgische Staat*, judgment of 18 December 1997 **379**
- C-6/97, *Italy v. Commission*, [1999] ECR I-2981 **40, 343, 350**
- T-46/97, [2000] ECR II-2125 **38, 264, 348**
- C-75/97, *Belgium v. Commission*, [1999] ECR I-3671 **40, 343, 350**
- C-144/97, *Commission v France*, [1998] ECR I-613 **289**
- C-174/97 P, [1998] ECR I-1303 **38, 364, 348**
- T-204/97 and T-270/97, *EPAC v. Commission*, [2000] ECR II-2267 **40, 343, 350**
- C-256/97, *DM Transport*, [1999] ECR I-3913 **40, 343, 350**
- T-613/97, *Ufex and Others v. Commission*, [2000] ECR II-4055 **41, 266, 351**
- T-266/97, *Vlaamse Televisie Maatschappij*, [1999] ECR II-2329 **479**
- C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjät (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-06067 **478**
- C-107/98, *Teckal Srl v. Commune di Viano*, [1999] ECR I-8121 **46, 257, 260, 268, 292, 298, 303, 325, 339, 356, 364, 385, 392, 467, 484**
- C-156/98, *Germany v. Commission*, [2000] ECR I-6857 **40, 343, 350**
- C-176/98, *Holst Italia v. Comune di Cagliari*, [1999] ECR I-8607 **340, 341, 379, 389**
- C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR 8035 **29, 217, 257, 278, 290, 292, 314, 320, 325, 371, 412, 484**
- C-324/98, *Telaustria Verlags GmbH, Telefonadress GmbH and Telekom Austria AG*, [2000] ECR I-10745 **217, 334, 336, 338, 369, 371, 372, 373, 383, 395, 408, 435, 446, 449, 450, 484, 497**
- C-94/99, *ARGE Gewässerschutz v. Bundesministerium für Land- und Forstwirtschaft*, [2000] ECR I-11037 **32, 45, 276, 302, 345, 354, 380, 411, 424**
- C-223/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di*

- Milano and C-260/99 Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605 **11, 18, 41, 261, 262, 266, 293, 294, 325, 339, 343, 350, 482, 484**
- C-237/99, *Commission v. France*, [2001] ECR 934 **29, 257, 278, 290, 292, 312, 315, 325, 412, 484**
- C-285/99 & 286/99, *Impresa Lombardini SpA v. ANAS*, [2001] ECR I-9233 **25, 26, 276, 383, 393, 408, 424, 484**
- C-513/99, *Concordia Bus Finlandia v. Helsingin Kaupunki et HKL-Bussiliikenne*, [2000] ECR I-7213 **25, 274, 283, 381, 384, 406, 414, 415, 484**
- C-470/99, *Universale-Bau AG, Bietergemeinschaft*, ECR [2002] I-11617 **205, 224, 228, 239, 246, 285, 301, 312, 313, 320, 322, 323, 407, 408, 421, 484**
- C-53/00, *Ferring SA v. Agence centrale des organismes de s?curit? sociale (ACOSS)*, [2001] ECR I-09067 **38, 264, 348**
- C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht*, [2003] ECR 1432 **38, 39, 264, 268, 348, 358**
- C-214/00, *Commission of the European Communities v. Kingdom of Spain*, ECR [2003] I-4667 **207, 241, 301, 309, 322, 323**
- C-92/00, *Hospital Ingenieure Krankenhaus-technik Planungs-GmbH (HI) and Stadt Wien*, ECR [2002] I-5553 **213, 214, 227, 229, 233, 243, 245, 285, 371, 395, 408, 487, 496**
- C-283/00, *Commission of the European Communities v. Kingdom of Spain*, [2003] ECR I-11697 **301, 303, 322, 324**
- C-327/00, *Santex SpA and Unità Socio Sanitaria Locale n. 42 di Pavia*, [2003] ECR I-1877 **232, 244, 246**
- C-373/00, *Adolf Truley GmbH and Bestattung Wien GmbH*, [2003] ECR I-1931 **292, 310, 312, 323, 346, 484**
- C-411/00, *Felix Swoboda GmbH and Österreichische Nationalbank*, [2002] ECR I-10567 **360, 362**
- C-5/01, *Belgium v. Commission*, [2002] ECR I-3452 **42, 43, 44, 231, 240, 353, 380, 382, 481, 484**
- C-83/01 P, C-93/01 P and C-94/01. *Chronopost and Others*, [2003] ECR I-6993 **41, 266, 351**
- C-126/01, *Ministre de l'économie, des finances et de l'industrie v. GEMO SA*, [2003] ECR 3454 **42**
- C-314/01, *Siemens AG Österreich, ARGE Telekom & Partner and Hauptverband der österreichischen Sozialversicherungsträger*, [2004] ECR I-2549 **219, 340, 341, 389, 484**
- C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich*, [2003] ECR I-14527 **220, 274, 419, 422**
- C-249/01, *Werner Hackermüller and Bundesimmobiliengesellschaft mbH (BIG), Wiener Entwicklungsgesellschaft mbH für*

- den Donaauraum AG (WED)*, ECR [2003] I-6319 **223, 226, 242**
- C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)*, ECR [2003] I-6351 **231, 240, 380, 382, 421, 484**
- C-410/01, *Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others and Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*, ECR [2003] I-11547 **204, 205, 224, 225, 244**
- C-421/01, *Traunfellner GmbH and Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*, [2003] ECR I-11941 **418, 419**
- C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa and Varkauden Taitotalo Oy*, [2003] ECR I-5321 **310, 316, 323, 324, 340, 484**
- Joined Cases C-20/01 and C-28/01, *Commission of the European Communities v. Federal Republic of Germany*, [2003] ECR I-3609 **248, 404, 407**
- C-57/01, *Makedoniko Metro, Mikhaniki AE and Elliniko Dimosio*, [2003] ECR I-1091 **213, 227, 233, 390, 394, 484, 487, 496**
- C-243/01, *Gambelli*, [2003] ECR I 13031 **478**
- C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich*, [2004] ECR I-1829 **204, 223, 244, 245**
- C-212/02, *Commission of the European Communities v. Republic of Austria*, unpublished **206, 222, 242, 244, 285**
- Joined Cases C-21/03 and C-34/03, *Fabricom SA v. État Belge*, not yet reported.
- C-84/03, *Commission of the European Communities v. Kingdom of Spain*, not yet reported **383, 384, 385, 388, 484, 487, 496**
- C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, not yet reported **212, 214, 222, 243, 244, 301, 323, 327, 329, 331, 339, 340, 389, 465, 468, 484**
- C-126/03, *Commission of the European Communities v. Federal Republic of Germany*, [2005] ECR I-00001 **339, 340, 389, 484**
- C-264/03, *Commission v. France*, [2005] ECR I-8831 **366, 476, 487, 496**
- C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-08585 **326, 327, 329, 369, 372, 469, 497**
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- C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti*, [2005] ECR I-07287 **329, 369, 370, 371, 372, 470, 496**
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