

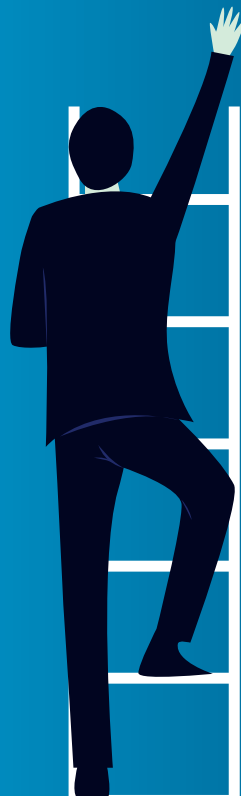
# D YOUNG & CO TRADE MARK NEWSLETTER *no.107*

November 2019

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Shooting for the stars? Have faith  
Why the Skykick case is important for brand owners



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We are pleased to report that our team has recently been again ranked as a top tier UK trade mark firm by Chambers and The Legal 500, retaining our top tier placement across the UK legal directories. Our congratulations also to Flora Cook who features as an IP STARS “Rising Star”. Now in its second year the Rising Stars survey acknowledges stand-out non-partners who have contributed to the success of their firm and clients in recent years. We are extremely grateful to those clients and contacts who contributed to the legal directories’ research. We have published further information about these awards at [www.dyoung.com/news](http://www.dyoung.com/news).

The D Young & Co trade mark team, November 2019

Events



19-22 November 2019

INTA Leadership Meeting, Austin US

Partners from our London, Munich and Southampton offices (Jeremy Pennant, Helen Cawley, Gemma Kirkland, Tamsin Holman and Jana Bogatz) will be attending the INTA leadership meeting.

[www.dyoung.com/news-events](http://www.dyoung.com/news-events)

Brexit news



We welcome your Brexit questions (email our advisors at [brexit@dyoung.com](mailto:brexit@dyoung.com)) and regularly publish news and advice regarding Brexit on our website: [www.dyoung.com/knowledgebank/ip-brexit](http://www.dyoung.com/knowledgebank/ip-brexit).

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Bad faith / clarity and precision

# Shooting for the stars? Have faith Why the Skykick case is important for brand owners

If, as expected, the Court of Justice in Europe (CJEU) confirms the Advocate General’s opinion early next year, not only will important but previously grey areas of the law have been clarified, but it will also alter the way in which brand owners clear, file for and enforce their trade mark rights in the EU.

How the dispute arose

Sky is a subscription TV provider also offering telephony and internet services. The dispute originally arose when Sky objected to Skykick’s use of its name supplying cloud migration services. Sky alleged infringement in relation to a number of their earlier registrations for SKY. In response Skykick applied to the Intellectual Property Enterprise Court (IPEC) in the UK for a declaration of non-infringement. Sky then sued for trade mark infringement in the High Court and the proceedings were joined with a judgment handed down by Justice Arnold early last year. The Judge referred a number of questions of pan-European importance to the CJEU on which the Advocate General has now issued his opinion.

The referred questions

The two most important and commercially relevant questions for brand owners were:

1. Can a trade mark registration be declared invalid because one or more of the terms in the specification (such as, for example, “computer software” or “telecommunication services”) is insufficiently clear and precise?
2. Can filing a trade mark application without any genuine intention to use the mark for the goods or services claimed constitute bad faith?

The Advocate General’s opinion

Advocate General Tanchev handed down his opinion on 16 October 2019. Early on, he acknowledged that the questions posed have a significance that goes well beyond the case in question and is liable to impact brand owners and their trade marks in Europe. He said: “...we have arrived at a point in trade mark law that grants the trade mark proprietor a position of absolute monopoly in the face

of which one can no longer defend himself in infringement proceedings – in spite of the fact that the mark has not been used, and is not likely to be used, for many of the goods and services in respect of which it was registered. Thus, this case illustrates the tension that exists today between the various interests which need to be balanced”.

1: Requirement of clarity and precision

The Advocate General concluded that a trade mark cannot be declared invalid on the sole ground that some or all of the terms in the specification lacks sufficient clarity and precision. He went on to state that a lack of clarity and precision may, nevertheless, be taken into consideration when assessing the scope of protection afforded to such a registration.

Unclear and imprecise terms such as, for example, “computer software”, may be considered contrary to the public interest. As a result, registrations with terms which are deemed to lack the necessary clarity and precision could be successfully partially invalidated.

2: Bad faith

In certain circumstances, the Advocate General confirmed that applying for the registration of a trade mark without any intention to use it in connection with the claimed goods or services, may constitute an element of bad faith. He referred, in particular, to the instance where the sole objective of the applicant is to prevent a third party from entering the market, including where there is evidence of an abusive filing strategy (multiple filings for the same mark in an attempt to “evergreen” the owner’s rights).

What happens next?

The Advocate General’s opinion will now be considered by the CJEU which will issue its judgment in the next few months.

➤ **Case details at a glance**

*Jurisdiction: England & Wales*

*Decision level: High Court*

*Parties: Sky plc, Sky International AG, Sky UK Limited v SkyKick UK Limited, SkyKick Inc*

*Date: 16 October 2019*

*Citation: C-371/18*

*Decision: <https://dycip.com/AG-c-37118>*

## IP & Brexit

# Brexit update Deadline extension

Whilst the court does not always follow the Advocate General's opinion it usually does and in this particular case we would be surprised if it was to depart significantly from the stance taken by the Advocate General.

### What action should brand owners take?

Assuming the CJEU does follow the Advocate General's opinion it seems likely that there will be a relatively rapid change in practice across the European Union in a number of key areas.

First, when filing applications trade mark owners will need to take care that the terms used in the specification have sufficient clarity and precision.

**Those offices that actively examine applications are likely to start raising formal objections to terms such as "computer software", "financial services" and the like. This will certainly include the EUIPO and the UKIPO.**

Second, brand owners will also have to review their existing registrations which may contain overly broad terms. Voluntary restrictions of the specifications can be filed however brand owners retaining broad specifications with insufficiently clear and precise terms will need to be aware that seeking to assert their rights may lead to a counterclaim for the partial invalidity of their registrations.

Third, when it comes to enforcement, brand owners will need to consider both the issues of clarity and precision and also bad faith. Where multiple registrations have been filed over a number of years for a trade mark with the intention of keeping third parties out of the marketplace or indeed to negate the proprietor's requirement for having to file proof of use, for example, in an opposition, it is quite likely that courts in the various countries in the European Union will uphold counterclaims for invalidation.

[www.dyoung.com/newsletters](http://www.dyoung.com/newsletters)

Finally, this case may also impact on brand owners who routinely undertake clearance searches for new names and logos.

With the increased prevalence of broad and lengthy specifications over recent years, clearing a mark for use has become increasingly difficult and requires additional research into the genuine commercial activities of the owners of earlier rights.

If the court upholds the Advocate General's opinion, clearing a mark may actually become easier simply because brand owners conducting searches can be confident that a registration covering, for example, "computer software" will not entitle the registered proprietor to assert its rights across all types of software. In practice they will only be able to maintain a legitimate claim for the software of commercial interest to them.

The Court of Justice's judgment is keenly awaited and we hope to be able to report further sometime during the first half of 2020.

**Author:**  
**Jeremy Pennant**



### Related article

See our article in our November 2018 newsletter (edition no.101) commenting on Hasbro and their internationally known MONOPOLY trade mark.



"Hasbro retains MONOPOLY trade mark", Richard Burton, 02 November 2018:

<https://dycip.com/genuine-monopoly>

### IP after Brexit



**T**he Brexit deadline has been extended to 31 January 2020 and a UK General Election will take place on Thursday 12 December 2019. The Brexit deadline extension agreement is flexible and if the UK Parliament approves the Withdrawal deal and legislation before this date, then the date of exit could be earlier but would include a transition period.

For D Young & Co, both in the run up to Brexit and beyond, it is business as usual. As a European firm with an office in Munich, we are able to continue to represent you both in the UK and at the EUIPO regardless of the form Brexit takes and when it happens. There will be no change to the level of service that we provide following the UK's departure from the EU.

### D Young & Co guide to IP & Brexit

We encourage readers to read our "IP After Brexit" guide for further information regarding trade marks, designs, patents, copyright and associated IP matters.



The guide can be accessed via our website at [www.dyoung.com/knowledgebank/ip-brexit](http://www.dyoung.com/knowledgebank/ip-brexit). If you would prefer a PDF or print copy please send us your contact details at [brexit@dyoung.com](mailto:brexit@dyoung.com).

# Radiator grille Audi remains the lord of the four rings

➤ Case details at a glance

Jurisdiction: Germany

Decision level: Federal Court of Justice

Parties: Audi AG (name of defendant unknown)

Date: 07 March 2019

Citation: I ZR 61/18

Decision: [dycip.com/audi-radiator](https://dycip.com/audi-radiator)

In a recent judgment, the German Federal Court of Justice decided that an independent seller of spare parts infringed Audi's figurative mark by offering and selling radiator grilles featuring a four-ring-shaped mounting fixture.

The case shows the limits that apply for spare parts sellers, who have no contract with the motor vehicle manufacturer, for the sale of products using the manufacturer's logo in order to avoid trade mark infringement.

## The parties

The plaintiff Audi, a German car manufacturer, is the owner of a number of well known trade marks among which is the famous four-ring-shaped logo that is registered as a European Union trade mark (no. 000018762):



The trade mark is registered, amongst others, in class 12 in respect of land vehicles and their parts.

The defendant is a seller of spare parts who has no contractual relationship with Audi. In August 2016, the seller offered for sale a radiator grille "Audi A6 C6 4f Limo Kombi 04-08", which had not been manufactured by Audi, on an online platform. The mounting fixture intended to receive the Audi logo looked like this:



The buyer received the following slightly different model:



Upon receiving a warning letter from Audi, the seller signed a cease-and-desist declaration, but objected to Audi's further claims such as information or damages.

Audi brought legal action and won in first and second instance. The seller appealed on the law to the German Federal Court of Justice.

## German Federal Court of Justice

Audi claimed that the use of the four-ring-shaped mounting fixtures infringed its well known trade mark. The court examined

- whether there existed likelihood of confusion between the mounting fixtures and the Audi logo;
- whether the defendant used the sign as a trade mark;
- whether the defendant could invoke the spare parts exception of Article 14(1)(c) of the European Union Trade Mark Regulation (EUTMR).

## Likelihood of confusion

The court found that the defendant had infringed Audi's mark since there existed likelihood of confusion between the signs.

## Use as a trade mark

Furthermore, the ring-shaped mounting fixtures were assumed to be understood by the relevant public both as an indication of the intended purpose of a spare part, but also of the origin of the products.

## No limitation to Audi's trade mark right

Despite having found that the mounting fixtures served, amongst others, as an

indication of the intended purpose of the spare parts, the court denied the defendant the spare parts exception of Article 14 EUTMR. The court did not accept that the ring-shaped form of the mounting fixtures was "necessary" to indicate the intended purpose of the radiator grilles since it did not represent the only possible means of providing the public with comprehensible and complete information on their intended purpose. The defendant could have informed the public in the text of the offer or the delivery note.

## Compliance with honest practices?

The court did not have to decide whether the use of the signs was in accordance with honest practices in industrial or commercial matters according to Article 14(2) EUTMR.

The court acknowledged that customers expect for car spare parts to look identical to the original parts. However, the defendant had not argued that the specific form of the mounting fixture was necessary to make the radiator grille look identical to a grille manufactured by Audi.

## Author:

Carolyn Golling



## In short

This decision further strengthens the position of trade mark owners by not making life for independent spare part manufacturers easier.

The German Federal Court of Justice again applied a very strict approach for the use of marks for spare parts.

Use will be especially hard if the logo of the manufacturer is a famous one.



# The colour purple No passing off in Glaxo v Sandoz

➤ **Case details at a glance**  
Jurisdiction: England & Wales  
Decision level: High Court  
Parties: Glaxo Wellcome UK Ltd & Anor v Sandoz Ltd & Ors  
Date: 04 October 2019  
Citation: [2019] EWHC 2545 (Ch)  
Decision: [dycip.com/glaxo-sandoz-inhalers](https://dycip.com/glaxo-sandoz-inhalers)

**T**he England and Wales High Court has recently rejected a claim by Glaxo against Sandoz relating to use of the colour purple for inhalers to treat asthma and chronic obstructive pulmonary disease (COPD).

## Background

Glaxo markets a combination of salmeterol and fluticasone for the treatment of asthma and COPD under the trade mark Seretide, in two different types of inhaler branded Accuhaler and Evohaler, which are coloured shades of purple. In 2010 and 2011 Seretide had over 42 per cent of the UK inhaler market and current UK sales still exceed £400 million per annum. From 1999 to May 2015, the Seretide Accuhaler and Evohaler were the only inhalers on the UK market which were coloured purple. In 2015, Sandoz launched a branded generic competitor to the Seretide Accuhaler called the AirFluSal Forspiro, which was also purple. Glaxo brought an action before the court claiming that Sandoz had passed off the AirFluSal Forspiro as being (i) connected in the course of trade with Glaxo and/or (ii) equivalent to the Seretide Accuhaler by virtue of its get-up and packaging, as a result of use of the colour purple.



Glaxo's Seretide Accuhaler

Sandoz's AirFluSal Forspiro

## Decision of the court - preliminary points

Both the Seretide Accuhaler and the AirFluSal Forspiro are prescription-only medicines, which are not generally marketed directly to patients. Prescriptions are increasingly written by brand name and not generically.

Initially, Glaxo argued that the deception as to trade origin impacted both healthcare professionals and patients themselves,

## The case related to inhalers to treat asthma and chronic obstructive pulmonary disease



but by trial this was confined to the issue of deception of patients only. There was some common ground between the parties that informal colour conventions had arisen in relation to the treatment of asthma in the UK, for example, use of the colour blue for SABA relievers. There was a safety element to this because patients often had more than one type of inhaler and needed to be able to quickly tell them apart. Sandoz also argued that it was common practice for generics to adopt similar colour schemes to the originator products, as this promoted familiarity amongst patients and adherence to drug regimes.

The AirFluSal Forspiro was not licensed for asthma (only COPD) until 2017.

## Decision of the court - passing off: connected in course of trade with Glaxo due to use of colour purple

The judge considered that Glaxo had failed to demonstrate that in 2015 the colour purple was distinctive of the trade origin of Seretide in the mind of the relevant public. The judge was persuaded by (i) the presence of other generic salmeterol/fluticasone combination inhalers on the market which were purple and which were apparently unchallenged by Glaxo, (ii) the informal colour conventions which existed in relation to inhalers in the UK and (iii) the fact that there was no evidence of any confusion or deception suffered by any patients since 2015.

## Decision of the court - passing off: equivalent to Seretide Accuhaler due to use of colour purple

The judge found that Glaxo had failed to demonstrate that in 2015 the colour purple was distinctive of the relevant characteristics of the Seretide Accuhaler.

The judge considered (i) the fact that Glaxo itself used different shades of purple for different strengths of Accuhaler, (ii) the very different name, packaging, shape, colour mechanism and mode of operation of the Glaxo and Sandoz inhalers and (iii) the fact that the evidence demonstrated that healthcare professionals would not make assumptions about the scope of a product's marketing authorisations on the basis of colour. The judge concluded that there was no evidence that the use of the colour purple misrepresented that the AirFluSal Forspiro had the same marketing authorisations as the Seretide Accuhaler.

Author:  
Anna Reid



## In short

This decision underlines the difficulties of proving goodwill and passing off in colours and get up in the UK.

# #darferdas? Applicant intent and likely uses

➤ *Case details at a glance*  
Jurisdiction: European Union  
Decision level: CJEU (preliminary ruling)  
Parties: AS v Deutsches  
Patent- und Markenamt  
Date: 12 September 2019  
Citation: C-541/18  
Decision: <https://dycip.com/c-53118>

A preliminary ruling from the Court of Justice of the European Union (CJEU), following a referral from the Federal Court of Justice in Germany, suggests that trade mark offices assessing inherent registrability can take account of the way applicants intend to use their marks rather than just considering likely uses.

## Background

AS applied to register the mark #darferdas? (“Can he do that?” in German) as a trade mark in connection with “Clothing, in particular tee-shirts; footwear; headgear”. The German Patent and Trade Mark Office (DPMA) raised a distinctiveness objection on the basis that the mark was a simple interrogative phrase.

Consumers are not typically in the habit of interpreting promotional/advertising phrases as badges of trade origin (unless they have been exposed to extensive use of the mark by the owner of the slogan). Marks containing hashtags (#) can be seen as a type of slogan, and can be found to be inherently non-distinctive.

AS appealed to the Federal Court of Justice (Bundesgerichtshof). According to German case law, it is not necessary for every conceivable use of a sign to be considered “trade mark use”. Rather, it is sufficient that a particular manner of use is plausible and for there to be practically significant possibilities for using the sign in a way which a consumer would interpret as a trade mark. For instance, in the clothing sector the use of the sign can appear on the front of clothing, as well as on the label sewn into garments.

The Bundesgerichtshof sought clarification as earlier case law (in particular, *Deichmann v OHIM*, C-307/11P) suggested that only the most likely types of use should be considered by the examining office.

## Should trade mark offices take into account intent of use rather than just likely use?



## Question from the Bundesgerichtshof

The question referred to the CJEU was: “Does a sign have distinctive character where there are in practice significant and plausible possibilities for it to be used as an indication of origin in respect of goods or services, **even if this is not the most likely form of use?**” (emphasis added)

In answering the question, the CJEU reiterated that distinctiveness should be assessed by taking account of consumer perception and all the relevant facts and circumstances. It acknowledged that an applicant does not need to indicate or know precisely how their mark will be used at the time of filing an application (taking account of the five year non-use grace period to enable applicants to decide how they will use their marks). As a result, the relevant trade mark offices usually have to make a judgment call based on the way marks are typically used according to the customs of the relevant sector of goods/services.

With this in mind, the CJEU stated that the relevant trade mark office, when considering distinctiveness, has to consider **likely uses** of the mark and the way it will probably be shown to the average consumer. Further, consideration does not need to be given to types of use which are not practically significant in the relevant sector of goods/services and therefore seem unlikely, except where the applicant provides evidence showing examples of use which makes that otherwise unusual use in the sector more likely. In other words, the offices are not obligated to consider every conceivable type of use, only those which are likely or where examples of alternate use have been provided by the applicant.

The CJEU went on to state: “It is for the national court having jurisdiction to determine whether the average consumer, when he sees the sign #darferdas? on the front of a tee-shirt or the label placed on the inside of it, will perceive that sign as an indication of the commercial origin of the item and not simply as a decorative element or social message”. (Paragraph 31.)

## Summary

The case looks at the generally accepted customs in the clothing sector – placement of marks on the exterior of goods, as well as on labels sewn inside them. These two types of use can be considered **practically significant** in that sector. Consumers viewing the former type of use would probably consider it to be decorative (and inherently non-distinctive), whereas the latter type would be more likely to be viewed as an indicator of origin. Trade mark offices have to decide whether the average consumer viewing the mark, taking account of those uses, would perceive it as a trade mark.

The ruling is applicable to all types of trade marks (not just slogans or ‘#’ marks) and indicates that an applicant can provide (and the examining office should consider) examples of how their mark will be used with a view to improving the chances of obtaining registration. This does not necessarily mean that obtaining registration in borderline cases will be easy going forward, but it does suggest a potential shift in examination practice in favour of the trade mark applicant.

Author:  
Flora Cook



# AMS Neve v Heritage Audio CJEU clarifies international jurisdiction provisions

The Court of Justice of the European Union (CJEU) in *AMS Neve v Heritage Audio* (C-172/18) has confirmed that owners of EU trade marks can bring infringement proceedings in the member state where online infringing activity is targeted, as opposed to the member state where the alleged infringer is physically located.

This decision brings some clarity to the international jurisdiction provisions of the EU Trade Mark Regulation and confirms owners of EU trade marks have a choice of forums in which to attack online infringers.

## Intellectual Property Enterprise Court

AMS Neve, a company based in the UK which sells audio equipment, sued Heritage Audio, a Spanish company, in the UK's Intellectual Property Enterprise Court (IPEC) in relation to infringement of two UK trade marks and one EU trade mark.

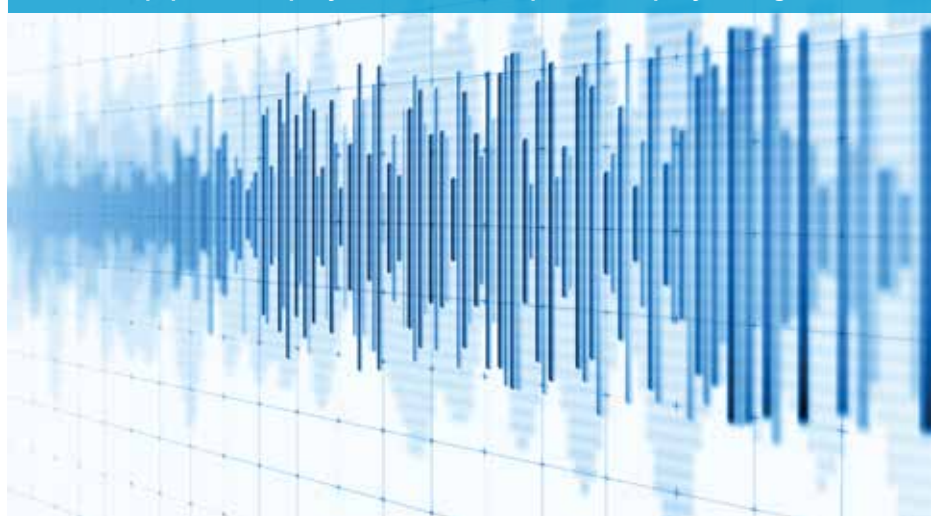
Under the national marks, the IPEC concluded it did have jurisdiction under the Brussels I (Recast) Regulation (1215/2012), being in the member state where EU Trade Mark Regulation the harm had occurred and where the rights subsisted.

Under the EU marks, however, the IPEC concluded that infringement, in accordance with article 97(5) of the Community Trade Mark Regulation (as it was) was subject to the jurisdiction of the member state where the defendant had taken steps to put the offending sign on the website (that is, "where the act was committed").

## Court of Appeal

On appeal, the Court of Appeal stayed proceedings to refer the question to the CJEU, asking it in circumstances where an undertaking is domiciled in member state A and has taken steps to advertise

## UK audio equipment company AMS Neve sued Spanish company Heritage Audio



on a website targeted at consumers in member state B, whether the court in B has jurisdiction to hear a claim for infringement in respect of the advertisement in B.

## CJEU

The core of the CJEU's decision was in respect of the proper interpretation of article 97(5), which the court said is to provide trade mark proprietors with a targeted action where an infringing act occurs in a single member state.

Accordingly, the CJEU confirmed, "the act of infringement" must be understood to relate to acts committed or threatened in the territory where the commercial content of the advertisement has been made accessible to customers to whom it was directed.

An alternative interpretation would mean that infringers outside of the EU could avoid infringement altogether, or proprietors would be forced to bring "similar" actions in different member states as against an infringer, depending on whether it asserts

its national or EU-wide mark. The case law which had troubled the IPEC (Coty Germany C-360/12 and Wintersteiger C-523/10) was distinguished.

The CJEU has restored some balance to what was considered to be a slightly askew interpretation of the relevant provisions. While this decision will remain an important clarification for owners of EU-wide trade marks, in a post-Brexit UK its relevance may be of limited use, assuming the UK leaves the EU with 'no deal' (31 January 2020 at time of writing) and the EU Trade Mark Regulation (and other EU jurisdictional law) ceases to have direct effect in the UK. Regardless, the decision is a healthy reminder that EU-wide trade marks remain an important tool for brand owners intent on trading in Europe post-Brexit and filing both EUTMs and UK national marks remains best practice to ensure the broadest protection in a post-Brexit landscape.

## Author:

Jake Hayes



## Related article

Our previous article "The importance of UK national marks" by Matthew Dick and Anna Reid, 28 October 2016 provides further background on the first instance decision:

<https://dycip.com/ipec-heritage-amsneve>



# D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

## General Court Specialised IP Chambers

### Expansion and organisation of the General Court



**T**he General Court in Luxembourg recently welcomed seven new judges and is now composed of 53 judges. In view of this increase in size and to enable the enlarged college to work effectively, the General Court adopted various internal structural changes.

Most importantly, out of the ten chambers a total of six chambers will now deal with all cases of intellectual property (in 2018: 301 out of a total of 732 cases).

The other four chambers deal with all staff cases (2018: 93 cases) and

the remaining cases (2018: 338) are distributed among all ten chambers.

**The new system applies  
as of 27 September 2019  
(and until 31 August 2022).**

For further details see CJEU  
press release no. 111/19:

<http://dycip.com/pr-11119>

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