Action brought on 15 January 2003 by Mrs Elizabeth Afari against the European Central Bank

(Case T-11/03)

(2003/C 70/43)

(Language of the case: English)

An action against the European Central Bank was brought before the Court of First Instance of the European Communities on 15 January 2003 by Mrs Elizabeth Afari, Frankfurt, Germany, represented by Mr Georges Vandersanden and Mr Laure Levi, Lawyers.

The applicant claims that the Court should:

— annul the disciplinary decision of the ECB of 5 November 2002 imposing on the Appellant a written reprimand;

— order that the ECB pays 1 euro as compensation for the moral predudice;

— order that the ECB pays the costs.

Pleas in law and main arguments

The Appellant in the present case challenges the decision of the defendant's Administration imposing on her a disciplinary measure consisting of a written reprimand. The main charges against her were that she made allegations of racism and accused members of the management of the ECB of encouraging xenophobia.

She complains that at the beginning of this disciplinary procedure there was a difficult relationship with a colleague who put her under very strong pressure, harassment and discriminated against her in many ways. The conflict escalated to a written complaint, as she unsuccessfully called the attention of her management on that situation.

The Appellant invokes the following as pleas in law:

— Violation of the duty to state reasons, of the right to good administration and of the obligation of due care.

— Violation of the rights of defense, in so far as the burden of the proof would have been illegally put on the applicant's shoulders and her right to be heard, as well as the principle of impartiality, would have been ignored.

— Manifest error of appreciation in relation to the substance of the case. Concretely, it is submitted that the applicant has violated neither Article 4(1) of Conditions of Employment for Staff of the ECB, nor the ECB Code of Conduct.

— Violation of the principle of proportionality as to the penalty.

— Violation of the Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treament between persons irrespective of racial and ethnic origin [1].

[1] Official Journal L 180, of 19.7.2000, p. 22.

Action brought on 16 January 2003 by Nintendo Co., Ltd. and Nintendo of Europe GmbH against the Commission of the European Communities

(Case T-13/03)

(2003/C 70/44)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 16 January 2003 by Nintendo Co., Ltd., Kyoto, Japan and Nintendo of Europe GmbH, Großostheim, Germany, represented by Mr Ian Forrester, QC, Mr John Pheasant, Solicitor, Mr Mark Powell, Solicitor, Ms Ciara Kennedy-Loest, Solicitor and Mr James Killick, Barrister.

The applicant claims that the Court should:

— annul Article 3 of the decision to the extent that it imposes an unlawfully large fine on Nintendo;

— set a lower fine (if any) in such amount as may appear appropriate to the Court in the exercise of its unlimited discretion pursuant to Article 229 EC;

— order the Commission to pay the applicant's costs

— take such other or further steps as justice may require

Pleas in law and main arguments

The applicants contest the decision of the Commission decision C(2002) 4072 final of 30 October 2002 in Cases COMP/35.587 PO Video games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega-Nintendo, regarding an infringement of Article 81 (1) of the EC Treaty insofar as it imposes an unlawfully large fine on the applicants.

In support of their application, the applicants claim that the Commission has infringed essential procedural requirements such as the rights of defence, the principle of impartiality and fairness, the obligation to state the reasons for a decision and the obligation to make decisions within a reasonable period. The applicants furthermore invoke violations of general principles of law such as the principle of proportionality, equal treatment, non bis in idem, legitimate expectations and transparency, coherence and non-discrimination.

According to the applicants, the fine imposed on them was unlawful in that its amount was manifestly exorbitant and that several steps by which this amount was calculated were individually unlawful. The applicants submit that the setting of the amount of the fine for gravity was made on the manifestly inappropriate basis of the applicants' share of sales of Nintendo's products. If there were other considerations, these were, according to the applicants, insufficiently stated.

The decision then applied an increase for deterrence where, according to the applicants, none was appropriate and in a manner that conflicted with previous policy, was based on an error of law, involved double counting and infringed the rights of defence. The applicants also state that a multiplier of 3 for deterrence was contrary to the principle of equal treatment, without giving sufficient reasons and on the basis of an inappropriate methodology.

The applicants furthermore submit that the decision imposed an increase on the fine of 10 % for each full year of the infringement although the infringement was not of a continuous intensity. According to the applicants, the increase to the fine for the first full year of the infringement is also contrary to the Commission's guidelines.

With regard to an increase of 75 % to the fine for aggravating circumstances, the applicants submit that this is based on manifest errors of assessment of the applicants' situation and behaviour and is contrary to the Commission's previous policy and practice.

The applicants finally submit that the granting of a reduction of 25 % for attenuating circumstances did not give proper regard to the criteria specified in the Leniency Notice and the Commission's previous policy and practice thereunder. It was also not consistent with the treatment given to other undertakings in this case and did not take proper account of the behaviour of the applicants who had voluntarily approached the Commission to inform it of the infringing conduct. The altered assessment of the applicants' cooperation during the administrative procedure, also infringed, according to the applicants, on its rights of defence.

Action brought on 15 January 2003 by José Luis Zuazaga Meabe against Office for Harmonisation in the Internal Market (trade marks and designs) (OHIM)

(Case T-15/03)

(2003/C 70/45)

(Language of the case: Spanish)

An action against Office for Harmonisation in the Internal Market (trade marks and designs) (OHIM) was brought before the Court of First Instance of the European Communities on 15 January 2003 by José Luis Zuazaga Meabe, residing in Bilbao (Spain), represented by José Antonio Calderón Chavero.

The applicant claims that the Court should:

— set aside the decision of the Second Board of Appeal of the OHIM of 24 October 2002 in Case R-918/2001;

— uphold in its entirety the opposition submitted in proceeding B 290157;

— uphold the arguments submitted by the applicant and allow the appropriate Opposition Division of the OHIM to refuse to register the trade mark in question; and

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark:	BANCO BILBAO VIZCAYA ARGENTARIA S.A.
The Community trade mark concerned:	'BLUE' — Application No 1345974, for goods and services in Classes 9, 36 and 38
Proprietor of the right to the trade mark or sign asserted by way of opposition in the opposition proceedings:	The applicant
Trade mark or sign asserted by way of opposition in the opposition proceedings:	Spanish word mark BILBAO BLUE for services in Class 36
Decision of the Opposition Division:	Partial refusal of the application in respect of certain services in Class 36 (Insurance services; financial affairs; monetary affairs and real estate affairs)