

The Commission finds that Denmark, although requested to do so, failed to carry out the calculations necessary to establish those amounts, which were not paid as own resources to the Community by reason of the Treaty infringement in question dating from the 1998 accounting year.

The Commission also finds that the amounts corresponding to the customs debt in question were not made available to the Commission before 31 March 2002.

The Commission accordingly finds that, by not establishing its own resources in respect of imports of military equipment and making those resources available to the Commission, Denmark has failed to fulfil its obligations under Articles 2, 9, 10 and 11 of Regulation (EEC, Euratom) No 1552/89 and of Regulation (EC, Euratom) No 1150/2000.

Action brought on 22 December 2005 by the Commission of the European Communities against the Kingdom of the Netherlands

(Case C-463/05)

(2006/C 48/36)

(Language of the case: Dutch)

An action against the Kingdom of the Netherlands was brought before the Court of Justice of the European Communities on 22 December 2005 by the Commission of the European Communities, represented by Dominique Maidani and Wouter Wils, acting as Agents.

The Commission claims that the Court should:

1. declare that, by not adopting the laws, regulations and administrative provisions necessary to give effect to Directive 2002/47/EC⁽¹⁾ of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, or in any event by not informing the Commission of those measures, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;
2. order the Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

Article 11 of Directive 2002/47 imposed an obligation on Member States to bring into force the provisions necessary to comply with that directive by 27 December 2003 at the latest and immediately to inform the Commission of those provisions.

The Commission finds that the Kingdom of the Netherlands has not yet adopted those measures or in any event has not notified it of them.

⁽¹⁾ OJ 2002 L 168, p. 43.

Appeal brought on 4 January 2006 by Groupe Danone against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 25 October 2005 in Case T-38/02: Groupe Danone v Commission of the European Communities

(Case C-3/06 P)

(2006/C 48/37)

(Language of the case: French)

An appeal against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 25 October 2005 in Case T-38/02 *Groupe Danone v Commission of the European Communities* was brought before the Court of Justice of the European Communities on 4 January 2006 by Groupe Danone, represented by A. Winckler and S. Sorinas, avocats.

The appellant claims that the Court should:

- set aside in part, on the basis of Article 225(1) EC and Article 61 of the Statute, the judgment given by the Court of First Instance on 25 October 2005 in Case T-38/02 *Groupe Danone v Commission of the European Communities* in so far as (i) it dismisses the plea that there was no basis for taking into account the applicant's repeated infringement as an aggravating circumstance and (ii) it varies the method of calculation used by the Commission for the fine imposed;
- grant the forms of order sought by Groupe Danone at first instance in relation to the plea that there was no basis for taking into account the applicant's repeated infringement as an aggravating circumstance and, consequently, on the basis of Article 229 EC and Article 17 of Regulation No 17⁽¹⁾, reduce the fine imposed by the Commission;
- reduce, on the basis of Article 229 EC and Article 17 of Regulation No 17, the amount of the fine pro rata to the decrease in the reduction for attenuating circumstances decided on by the Court of First Instance;
- order the Commission to pay the costs.

Pleas in law and main arguments

In support of the present appeal, the appellant raises five pleas to have the judgment under appeal set aside in part. Those pleas are based, firstly, on an incorrect interpretation by the Court of First Instance of the concept of 'repeated infringement' and, secondly, on the manifest unlawfulness of the amendment of the method of calculation of the fine which led to a decrease in the reduction of the fine granted for attenuating circumstances and, accordingly, an increase in the amount of the fine by comparison with that which would have been applicable had the Court of First Instance reduced the increase for aggravating circumstances from 50 % to 40 % without amending the method of calculation of the fine used by the Commission.

In support of its arguments in relation to the incorrect interpretation of the concept of repeated infringement, the appellant relies on three separate pleas.

- By the first plea, the appellant maintains that the Court of First Instance failed to take account of the principle that offences and penalties must be defined by law and its corollary, the principle of non-retroactivity of more severe criminal laws, by confirming the increase in the appellant's fine for the aggravating circumstance of repeated infringement, in the absence of a clear and sufficiently foreseeable legal basis.
- By its second plea, the appellant maintains that the Court of First Instance incorrectly applied the principle of legal certainty by refusing to limit in time the application of repeated infringement, contrary to the case-law of the Court of Justice.
- Finally, by its third plea, the appellant maintains that the judgment is vitiated by a contradiction in the grounds amounting to a defect in the statement of grounds in relation to the assessment of the link between repeated infringement and the need to ensure that fines be sufficiently deterrent.

The appellant raises two further pleas in support of its argument in relation to the manifestly unlawful nature of the increase in the amount of the fine decided on by the Court of First Instance following the change in the weighting applied for extenuating circumstances. The main plea relates to misuse of power, lack of jurisdiction and infringement of Articles 229 EC and 230 EC on the part of the Court of First Instance. That plea is divided into two parts.

- The first part is based on the fact that the Court of First Instance failed to observe the limits of its jurisdiction under Articles 229 EC and 230 EC by varying the Commission's decision in relation to the method of calculation of the fine.
- In the second part, the appellant complains that the Court of First Instance ruled *ultra petita* in amending the percentage reduction applied for attenuating circumstances and, consequently, increasing the amount of the fine imposed on the appellant.

In the alternative, the appellant puts forward a second plea based on infringement of the rights of the defence and the principle of non-retroactivity of penalties. By failing to allow discussion on its intention to amend the method of calculation of the fine and increase the amount of the fine, the Court of First Instance acted in breach of a fundamental principle of Community law with a real impact on the ability of the appellant to defend itself. The Court of First Instance also retroactively applied to the 'Belgian Beer' decision of 2001 case-law dating from 2003, clarifying the method of applying the weighting for attenuating circumstances in the method of calculation of the fine.

(¹) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

Appeal brought on 4 January 2006 by J. Ouariachi against the order of the Court of First Instance (Fifth Chamber) of 26 October 2005 in Case T-124/04: J. Ouariachi v Commission of the European Communities

(Case C-4/06 P)

(2006/C 48/38)

(Language of the case: French)

An appeal against the order of the Court of First Instance (Fifth Chamber) of 26 October 2005 in Case T-124/04 J. *Ouariachi v Commission of the European Communities* was brought before the Court of Justice of the European Communities on 4 January 2006 by J. Ouariachi, Rabat (Morocco), represented by L. Dupong, avocat.

The appellant claims that the Court should:

- annul the contested decision and, in so doing:
 - order all measures of inquiry necessary to establish the falsification by Mr Louis Charles of certain documents, his general conduct in connection with the abduction of the appellant's children and the connection between the falsification and the issue of visas to the appellant's children by the Sudanese authorities which made their abduction possible, including;
 - Mr Louis Charles' personal appearance before the Court;