question to be considered and that question must relate to the quality, safety or efficacy of the product. The applicant claims that these conditions were not satisfied.

The applicant furthermore claims that the contested decision infringed essential procedural requirements. According to the applicant, the procedure breached the applicant's rights of defence and its right to be heard. The applicant was not given the opportunity to comment on the key amendments to the Capoten Summary of Product Characteristics. The procedure also infringed the timetable provided for in Article 32 of Directive 12001/83 and in the Commission's Notice to Applicants (1998 version).

The applicant invokes also the infringement of rules of Community law, like the principle of equal treatment, the duty to give reasons, the principle of legitimate expectations and the principle of proportionality.

Finally, the applicant claims that the contested decision is vitiated by manifest errors of assessment.

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(1) Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ 1965, p. 369).

(2) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, p. 67).

Action brought on 5 December 2002 by Deutsche Post AG and DHL International S.r.l. against the Commission of the European Communities

(Case T-358/02)

(2003/C 44/62)

(Language of the Case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 5 December 2002 by Deutsche Post AG, established in Bonn (Germany), and DHL International S.r.l., established in Rozzano (Italy), represented by J. Sedemund and T. Lübbig, lawyers.

The applicants claim that the Court should:

— annul Commission Decision 2002/782/EC of 12 March 2002 on the aid granted by Italy to Poste Italiane SpA (1);

— order the defendant to pay the costs.

Pleas in law and main arguments

In the applicants' submission, it is apparent from the contested decision that Poste Italiane SpA was continuously in deficit in the postal services sector from 1994 to 1999 and that it received State resources which served to offset the deficits. In Article 2 of the decision, the Commission decided that that State subsidy to Poste Italiane SpA did not constitute State aid under Article 87(1) EC.

The applicants submit that, so far as concerns the offsetting of losses of those postal services which, although forming part of the universal service, have been opened up to competition, the decision is incompatible with Article 87(1) EC as interpreted in the Commission decision of 19 June 2002 (2). By that decision the Commission established that the use of State resources to offset losses recorded by a postal undertaking in the sector of postal services that form part of the universal service but are opened up to competition infringes Article 87(1) of the Treaty as a cross-subsidy not capable of being approved where the losses are caused by rates of charges which do not cover costs and which the postal undertaking is not required to apply by a State measure.

The applicants contend that the decision is all the less compatible with Article 87(1) EC in so far as it relates to loss-making postal services which do not form part of the universal service and have been opened up to competition for a long time. Since the Italian postal operator has been recording only losses for 50 years and those losses can therefore only have been covered by State resources, the Commission should not have 'neglected' the offsetting in respect of those postal services from State resources but would have been obliged in that respect too to examine whether there was a cross-subsidy incompatible with Article 87(1) EC.

The applicants further submit that no reason is stated as to why the Commission in the contested decision, in contrast to its decision of 19 June 2002, recognised the cross-subsidy as involving a net extra cost which could be offset in the 'general economic interest'. At the same time, therefore, there is an infringement of the duty to state reasons under Article 253 EC.

Finally, the decision infringes the general prohibition of discrimination under Article 12 EC, since the Commission has

accorded the Italian postal operator preferential treatment vis-à-vis the applicants, which are in competition with it in the very sector of postal services which have been opened up to competition.

(1) OJ L 282, 19.10.2002, p. 29.
(2) Commission Decision on measures implemented by the Federal Republic of Germany for Deutsche Post AG (OJ L 247, 14.9.2002, p. 27).

Action brought on 5 December 2002 by Deutsche Bahn AG against the Commission of the European Communities

(Case T-361/02)

(2003/C 44/63)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 5 December 2002 by Deutsche Bahn AG, Berlin, Germany, represented by M. Schütte, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court should:

— find that the Commission infringed its obligations under Article 87 and Article 88(1) EC in failing to adopt a decision on the matters submitted to it by the applicant in its complaint of 5 July 2002, and in any event, in failing to initiate an investigation of State aid;

— order the Commission to pay the costs.

Pleas in law and main arguments

The action has the same origin as that in Case T-351/02 (Deutsche Bahn v Commission).

In the present action the applicant submits that the Commission infringed its obligations under Article 87 and Article 88(1) EC because, despite having been called upon to act in accordance with paragraphs 2 and 3 of Article 232 EC, it failed to investigate the compatibility of Paragraph 4(1), Head 3(a), of the German Law on the taxation on mineral oil with the State-aid provisions of the EC Treaty and to adopt a binding decision in that regard. No such decision can be discerned in the Commission's letter of 21 September 2002 and the Commission's failure to act is not justified by objective reasons.

The applicant's other pleas in law and arguments are the same as those set out in Case T-351/02.

Action brought on 5 December 2002 by Muswellbrook Limited against the Office for Harmonisation in the Internal Market (OHIM)

(Case T-362/02)

(2003/C 44/64)

(Language of the case: Spanish)

An action against the Office for Harmonisation in the Internal Market (OHIM) was brought before the Court of First Instance of the European Communities on 5 December 2002 by Muswellbrook Limited, established in Dublin (Ireland), represented by J. Casulá Oliver, lawyer.

The applicant claims that the Court should:

— declare incompatible with Regulation (EC) No 40/94 on the Community trade mark, in particular Article 15(2)(a) and/or Article 42(2) and (3) thereof, the decision of the First Board of Appeal of the OHIM of 30 September 2002 in case No R 16/2000-1, inasmuch as it declares that the opponent has failed to prove genuine use in the Community of the Spanish trade mark No 88222 to distinguish ready-to-wear and other items of clothing in Class 25 during the five years preceding the publication of the application for a Community trade mark;

— annul that decision in its entirety;

— agree to vary that decision so as to declare that an assessment of and a ruling on the merits of the opposition to registration of Community trade mark No 278028 is appropriate, to which end the Court's judgment should declare that Community trade mark No 278028 is refused, or, in the alternative, refer the case back to the First Board of Appeal of the OHIM;

— order the defendant and, where appropriate, the intervener to pay all the costs of the proceedings and those incurred at the administrative stages of the opposition and appeal proceedings.