Secondly, the CFI erred by not following the consistent earlier case-law of the Court of Justice with respect to the SEE-concept, including inter alia, Sharp Corporation, Minolta Camera, Ricoh and Canon-II, which decided the opposite.

SECOND GROUND OF APPEAL — Burden of Proof and standard of review

This ground of appeal relates to the burden of proof and the standard of judicial review. The Commission considers that on this point, in paragraphs 180-190, the CFI commits various legal errors by not applying the appropriate standard of review. While citing the judgment in Kundan and Tata, the CFI failed to take into account of the fact that after that judgment the wording of Art. 2(10)(i) of the Basic Regulation was adapted precisely to cater for situations such as the one at issue. This clearly leaves a certain margin of discretion to the institutions. The CFI applied the incorrect legal test, consequently requiring a particularly high burden of proof from the institutions, in an area where they enjoy the normal wide discretion. Therefore, the CFI has not shown, as it should have done, that there has been a manifest error in the appraisal of the facts by the institutions.

THIRD GROUND OF APPEAL — Article 2(10) first paragraph of the Basic Regulation.

This third ground challenges points 193-197 of the contested Judgment. It follows that if the first and or second ground of appeal are well-founded, then as a corollary to the CFI's own reasoning, its finding that 2(10), first paragraph, has been violated by the Institutions, is wrong in law.

FOURTH GROUND OF APPEAL — THE RIGHTS OF DEFENCE

This ground is directed at points 200-211 of the Contested Judgment. The Commission considers that in those points, the CFI applied an excessively stringent and therefore unjustified test regarding the Applicant's rights of defence. The amount of the adjustment and the transactions it concerned had already been known to the Applicants for some time (since the first final information document). Moreover, the second final information document provided a clarification, in reaction to a comment which the Applicants had made after receiving that document; the Commission clarified, that the earlier mentioning of Art. 2(9) as a legal basis for the adjustment had been erroneous. Therefore, Applicants were informed, fully, of the exact reasons why the Commission intended to apply an adjustment, namely that it considered that Sepco acts as a trader which performs, for the Applicants, functions similar to those of an agent working on a commission basis.

The Commission considers that by providing this information, it provided the Applicants with sufficient information to allow them to exercise their rights of defence. Therefore, the CFI commits a legal error when it implies, in point 201, that more should have been added in the paragraph of the final disclosure relating to this point. Contrary to what the CFI implies, the Applicants were aware of the reason why the Commission intended to include this adjustment in its proposal to the Council, namely that Sepco's relation with the applicants was covered by Art. 2(10)(i) second sentence. Moreover, the Commission considers that its position is supported by earlier rulings of the Court of Justice (e.g., the EFMA-case).

Finally, the Commission considers that the CFI makes a legal error in point 209 when it 'mixes' the substantive issue whether it was lawful to apply the adjustment with the question whether the Applicants' rights of defence have been respected. It states: 'It has been shown …. above, that [the institutions acted unlawfully by applying the adjustment]. Therefore, it must be concluded that' by not furnishing its final motivation already at the time of the 2nd final disclosure, the institutions violated the Applicants' rights of defence. There is, however, contrary to what the CFI implies, no causal link between the two. The mere fact that the CFI finds that an adjustment was, in its view, unlawfully applied, does not mean that the Applicant's rights of defence were violated. The question is whether the institutions provided the Applicants', during the administrative procedure, with the necessary information to allow it to submit information. The fact that the CFI considers the adjustment to be unlawful does not mean that 'therefore' during the administrative procedure the rights of defence of the Applicants have been violated.

AS TO THE QUESTION WHETHER THE COURT OF JUSTICE CAN RULE ON THE PLEAS AT ISSUE ITSELF (or whether it should refer the matter back to the CFI)

In the Commission's view, should the Court rule that the above pleas in law are founded, and set aside point 1 of the operative part of the Contested Judgment, it would have a sufficiently developed file in front of it to rule on the relevant pleas itself (and to reject them). However, this is a matter for the Court and the Commission will not go into it further.

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 8 June 2009 — Flachglas Torgau GmbH v Federal Republic of Germany

(Case C-204/09)

(2009/C 193/14)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Applicant: Flachglas Torgau GmbH

Defendant: Federal Republic of Germany

Questions referred

1. (a) Is the second sentence of Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC ([1]) to be interpreted as meaning that only bodies and institutions for whom it is, under the law of the Member State, to take the final (binding) decision in the legislative process act in a legislative capacity, or do bodies and institutions which have been given certain functions and rights of involvement in the legislative process by the law of the Member State, in particular to table a draft law and to give opinions on draft laws, also act in a legislative capacity?

   (b) May the Member States always provide that the definition of 'public authority' does not cover bodies and institutions, in so far as they act in a judicial or legislative capacity, only if at the same time the constitutional provisions of those Member States did not provide, at the date of the adoption of the directive, for a review procedure within the meaning of Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC?

   (c) Are bodies and institutions, in so far as they act in a legislative capacity, excluded from the definition of 'public authority' only for the period until the conclusion of the legislative process?

2 (a) Is the confidentiality of proceedings within the meaning of indent (a) of Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC provided for by law where the national-law provision enacted to implement Directive 2003/4/EC lays down generally that a request for access to environmental information is to be refused if the disclosure of the information would adversely affect the confidentiality of the proceedings of authorities which are required to provide information, or is it necessary, for that purpose, for a separate statutory provision to provide for the confidentiality of the proceedings?

   (b) Is the confidentiality of proceedings within the meaning of indent (a) of Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC provided for by law where under national law there is a general unwritten legal principle that the administrative proceedings of public authorities are not public?

([1]) OJ L 41, p. 26

Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 10 June 2009 — Ilonka Sayn-Wittgenstein

(Case C-208/09)

(2009/C 193/15)

Language of the case: German

Referring court

Verwaltungsgerichtshof

Parties to the main proceedings

Applicant: Ilonka Sayn-Wittgenstein

Defendant: Landeshauptmann von Wien

Question referred

Does Article 18 EC preclude legislation pursuant to which the competent authorities of a Member State refuse to recognise that part of the surname of a (grown up) adopted child, determined in another Member State, which contains a title which is inadmissible in the former Member State, including under constitutional law?

Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 10 June 2009 — Lahti Energia Oy

(Case C-209/09)

(2009/C 193/16)

Language of the case: Finnish

Referring court

Korkein hallinto-oikeus

Parties to the main proceedings

Applicant: Lahti Energia Oy

Other parties to the proceedings: Lahden seudun ympäristölautakunta, Hämeen ympäristökeskus and Salpausselän luonnonystävät ry.