

3. Third plea in law, alleging failure to state reasons and/or error of law and/or manifest error of assessment in concluding that there would be a significant impediment to effective competition due to the elimination of the close competitive relationship between Aegean and Olympic, as:

— The Decision fails to state what the precise theory of harm is; and

— The Commission fails to provide consistent and cogent evidence to show that passengers of one of the applicants would not switch to ferries in the event of a 5-10 % rise in air fares, which would be the relevant question.

4. Fourth plea in law, alleging manifest error of assessment and/or error of law in concluding there are barriers to entry which make post-merger entry unlikely, as:

— The Commission has applied the wrong legal test, requiring definite and substantiated entry plans pre-merger, which is an impossible test to meet; and

— The Commission's factual assessment is flawed, based on highly selective evidence and fails completely to undertake a diligent investigation.

5. Fifth plea in law, alleging breach of essential procedural requirements and/or manifest error of assessment in the analysis of the counterfactual, as:

— As regards the counterfactual of Aegean, the conclusions of the Decision rest entirely on a breach of the applicants' rights of defence. Despite extensive submissions by the applicants the Commission failed to discuss the Aegean counterfactual during the administrative procedure and substantiated its views for the first time in the Decision. Furthermore, the Commission's assessment is erroneous, being based merely on ex post analysis; and

— With regard to the counterfactual of Olympic, the Commission's analysis limits itself to a criticism of the model put forward by Marfin and fails to conduct a proper ex ante assessment mainly because it does not go beyond the IATA summer 2011 season. Moreover, its conclusions are mere assertions, not based on any data.

6. Sixth plea in law, alleging breach of applicants' fundamental rights, as:

— The administrative procedure before the Commission failed to meet the standards of administrative fairness as reflected in the right to a fair hearing provided by

Article 6(1) of the European Convention on Human Rights and the duty of good administration enshrined in Article 41 of the Charter of Fundamental Rights. The Commission failed to comply with its duty of a diligent investigation, thereby effectively reversing the burden of proof onto the applicants.

(<sup>1</sup>) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)

**Action brought on 4 April 2011 — Spain v Commission**  
(Case T-204/11)

(2011/C 160/41)

*Language of the case: Spanish*

**Parties**

*Applicant:* Kingdom of Spain (represented by: M. Muñoz Pérez)

*Defendant:* European Commission

**Form of order sought**

The applicant claims that the General Court should:

— annul Commission Regulation (EU) No 15/2011 of 10 January 2011 amending Regulation (EC) No 2074/2005 as regards recognised testing methods for detecting marine biotoxins in live bivalve molluscs, and

— order the Commission to pay the costs.

**Pleas in law and main arguments**

In the contested regulation the Commission decided to impose the liquid chromatography-mass spectrometry (LC-MS/MS) method as the reference method for the detection of marine lipophilic toxins, replacing the mouse bioassay method.

In support of the action, the applicant relies on three pleas in law.

1. First plea in law, alleging infringement of Article 168 TFEU and the principle of proportionality which should govern the adoption of decisions by the institutions of the European Union.

— It is stated in this regard that the new reference method established for the detection of lipophilic toxins is no more beneficial for the protection of public health than mouse bioassay.

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2. Second plea in law, alleging infringement of the principle of proportionality.
- It is stated in this regard that by adopting the decision to replace mouse bioassay with LC-MS/MS as the reference method for the detection of lipophilic toxins, the Commission did not assess all the relevant facts and circumstances of the situation that it intended to regulate, in that it failed to take into consideration the economic impact that such a change would have on the productive sector concerned.
3. Third plea in law, alleging failure to observe the principle of legitimate expectations.
- According to the applicant State, the producers of live bivalve molluscs were entitled to expect that the Commission would not decide to replace mouse bioassay as the reference method for the detection of lipophilic toxins until the conditions set out in point 4 of Part B of Chapter III of Annex III to Regulation No 2074/2005, in its original wording, had been fulfilled.
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