JUDGMENT OF THE COURT

(Fifth Chamber)

of 10 April 2003

In Joined Cases C-20/01 and C-28/01: Commission of the European Communities v Federal Republic of Germany [1]

(Failure by a Member State to fulfil its obligations — Admissibility — Legal interest in bringing proceedings — Directive 92/50/EEC — Procedures for the award of public service contracts — Negotiated procedure without prior publication of a contract notice — Conditions)

(2003/C 146/09)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Joined Cases C-20/01 and C-28/01, Commission of the European Communities (Agent: J. Schieferer) v Federal Republic of Germany (Agent: W.-D. Plessing, assisted by H.-J. Prieß) supported by United Kingdom of Great Britain and Northern Ireland (Agent: R. Magrill, assisted by R. Williams, barrister): Applications for declarations that:

— by failing to invite tenders for the award of the contract for the collection of waste water in the Municipality of Bockhorn (Germany) and to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1);

— at the time of the award of a public service contract, the Federal Republic of Germany failed to fulfil its obligations under Article 8 and Article 11(3)(b) of Directive 92/50 by virtue of the fact that the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down by Article 11(3) for an award of a contract by privately negotiated procedure without a Community-wide invitation to tender had not been met,

the Court (Fifth Chamber), composed of: M. Wathelet, President of the Chamber, D. A. O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges; L. A. Geelhoed, Advocate General; M.-F. Contet, Administrator, for the Registrar, has given a judgment on 10 April 2003, in which it:

1. *Declares that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;*

2. *Declares that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive;*

3. *Orders the Federal Republic of Germany to pay the costs;*

4. *Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.*

[1] OJ C 61 of 24.2.2001.

JUDGMENT OF THE COURT

of 6 May 2003

in Case C-104/01 (Reference for a preliminary ruling from the Hoge Raad der Nederlanden): Libertel Groep BV v Benelux-Merkenbureau, [1]

(Trade marks — Approximation of laws — Directive 89/104/EEC — Signs capable of constituting a trade mark— Distinctive character — Colour per se — Orange)

(2003/C 146/10)

(Language of the case: Dutch)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-104/01: Reference to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between Libertel Groep BV and Benelux-Merkenbureau, on the interpretation of Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40,

p. 1), the Court, composed of: J.-P. Puissochet, President of the Sixth Chamber, acting for the President, M. Wathelet and C. W. A. Timmermans, Presidents of Chambers, C. Gulmann, D. A. O. Edward, P. Jann, F. Macken, S. von Bahr and J. N. Cunha Rodrigues (Rapporteur), Judges; P. Léger, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, has given a judgment on 6 May 2003, in which it has ruled:

1. *A colour per se, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, provided that, inter alia, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code.*

2. *In assessing the potential distinctiveness of a given colour as a trade mark, regard must be had to the general interest in not unduly restricting the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought.*

3. *A colour per se may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of Directive 89/104, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings.*

4. *The fact that registration as a trade mark of a colour per se is sought for a large number of goods or services, or for a specific product or service or for a specific group of goods or services, is relevant, together with all the other circumstances of the particular case, to assessing both the distinctive character of the colour in respect of which registration is sought, and whether its registration would run counter to the general interest in not unduly limiting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought.*

5. *In assessing whether a trade mark has distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of Directive 89/104, the competent authority for registering trade marks must carry out an examination by reference to the actual situation, taking account of all the circumstances of the case and in particular any use which has been made of the mark.*

(1) OJ C 200 of 14.7.2001.

JUDGMENT OF THE COURT

(Fifth Chamber)

of 8 May 2003

in Case C-111/01 (Reference for a preliminary ruling from the Oberster Gerichtshof): Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV (1)

(Brussels Convention — Article 21 — Lis pendens — Set-off)

(2003/C 146/11)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-111/01: Reference to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between Gantner Electronic GmbH and Basch Exploitatie Maatschappij BV, on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1), the Court (Fifth Chamber), composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges; P. Léger, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, has given a judgment on 8 May 2003, in which it has ruled:

Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same