

**Reference for a preliminary ruling from the Juzgado Contencioso-Administrativo de Granada (Spain) lodged on 18 December 2008 — Carlos Sáez Sánchez and Patricia Rueda Vargas v Junta de Andalucía and Manuel Jalón Morente and Others, co-defendants**

(Case C-563/08)

(2009/C 69/37)

*Language of the case: Spanish*

**Referring court**

Juzgado Contencioso-Administrativo de Granada

**Parties to the main proceedings**

*Applicants:* Carlos Sáez Sánchez and Patricia Rueda Vargas

*Defendants:* Junta de Andalucía and Manuel Jalón Morente and Others

**Question referred**

Are Articles 2.3 and 2.4 of State Law 16/1997 of 25 April on pharmaceutical services, in so far as they define territorial and demographic limits on the opening of pharmacies, contrary to Article 43 of the Treaty establishing the European Economic Community, in that they constitute a disproportionate, even counterproductive, system for limiting the number of pharmacies, in terms of the objective of the proper provision of medicines in the relevant territory?

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**Appeal brought on 18 December 2008 by SGL Carbon AG against the judgment of the Court of First Instance (Fifth Chamber) delivered on 8 October 2008 in Case T-68/04 SGL Carbon AG v Commission of the European Communities**

(Case C-564/08 P)

(2009/C 69/38)

*Language of the case: German*

**Parties**

*Appellant:* SGL Carbon AG (represented by: M. Klusmann and K. Beckmann, Rechtsanwälte)

*Other party to the proceedings:* Commission of the European Communities

**Form of order sought**

- set aside the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 8 October 2008 in Case T-68/04 SGL Carbon AG v Commission;
- reduce, as appropriate, the amount of the fine imposed on the appellant in Article 2 of the contested Commission decision of 3 December 2003;

- in the alternative, refer the case back to the Court of First Instance for a fresh decision;
- order the respondent to pay the costs.

**Grounds of appeal and main arguments**

The subject-matter of this appeal is the judgment of the Court of First Instance, which dismissed the appellant's action against Commission Decision 2004/420/EC of 3 December 2003 relating to a cartel on the market for electrical and mechanical carbon and graphite products.

The appellant relies on two grounds in support of its appeal, alleging that the Court of First Instance infringed Community law and made a procedural error.

By its first ground of appeal the appellant submits that the Court of First Instance erred in law by failing to have regard to its submission at first instance that turnover which was internal to the group of affiliated companies had wrongly been included in the market volumes used to establish the amounts on which the fine was based. It also submits that the substantively excessive nature of the amount on which the fine established in respect of the appellant was based is an infringement of the principle of non-discrimination and the principle of proportionality as well as an infringement of Article 253 EC.

By its second ground of appeal, the appellant submits that the Court of First Instance made an error of assessment, and exceeded the scope of its discretion, in establishing the amount on which the appellant's fine was based. The Court of First Instance thus also infringed the principle of non-discrimination and the principle of proportionality. It is submitted that the Court of First Instance departed, without any legal basis, from its own case-law, to the detriment of the appellant, as regards the issue of the permissibility of a flat-rate for fines according to market share categories. Whereas the Court of First Instance had regarded market share categories or 'portions' with a margin of fluctuation of 5 % as appropriate in similar earlier judgments, it based its decision in the present case on market share categories of 10 %, to the significant detriment of the appellant as an undertaking which is grouped at the bottom end of its category.

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**Reference for a preliminary ruling from the Rechtbank Assen (Netherlands) lodged on 22 December 2008 — 1. Combinatie Spijker Infrabouw/De Jonge Konstruktie; 2. Van Spijker Infrabouw B.V.; 3. De Jonge Konstruktie B.V. v Provincie Drenthe**

(Case C-568/08)

(2009/C 69/39)

*Language of the case: Dutch*

**Referring court**

Rechtbank Assen

**Parties to the main proceedings**

Applicants:

1. Combinatie Spijker Infrabouw/De Jonge Konstruktie
2. Van Spijker Infrabouw B.V.
3. De Jonge Konstruktie B.V.

*Defendant:* Provincie Drenthe**Questions referred**

- 1 (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC <sup>(1)</sup> be interpreted as meaning that they have not been complied with if the legal protection to be afforded by national courts in disputes relating to tendering procedures governed by European law is impeded by the fact that conflicting decisions may arise under a system in which both administrative courts and civil courts may have jurisdiction with respect to the same decision and its consequences?
- (b) Is it permissible in this context for the administrative courts to be confined to forming an opinion and ruling on the tendering decision, and if so, why and/or under what conditions?
- (c) Is it permissible in this context for the Algemene wet bestuursrecht (Netherlands General Law on Administrative Law), which, as a rule, governs applications for access to the administrative courts, to exclude such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers, and if so, why and/or under what conditions?
- (d) Is the answer to Question 2 of relevance in this context?
- 2 (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC be interpreted as meaning that they have not been complied with if the only procedure for obtaining a rapid decision is characterised by the fact that it is in principle geared to a rapid mandatory measure, that lawyers have no right to exchange views, that [no] evidence is, as a rule, presented in other than written form and that statutory rules on evidence are not applicable?
- (b) If not, does this also apply if the decision does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision?
- (c) Does it make a difference in this context if the decision is binding only on the parties to the proceedings, even though other parties may have an interest?
3. Is it compatible with Directive 89/665/EEC for a court, in interim relief proceedings, to order the contracting public authority to take a tendering decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European law?
4. (a) If the answer to the previous question is in the negative, must the contracting public authority be deemed liable in that regard, and if so, in what sense?
  - (b) Does the same apply if the answer to that question is in the affirmative?
  - (c) If that authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?
  - (d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?
5. If it in fact appears to be impossible, or extremely difficult, under national law and/or with the aid of the answers to the above questions to attribute liability, what must the national court do?

<sup>(1)</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

**Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 22 December 2008 — Internetportal und Marketing GmbH v Richard Schlicht**

(Case C-569/08)

(2009/C 69/40)

*Language of the case:* German**Referring court**

Oberster Gerichtshof

**Parties to the main proceedings***Applicant:* Internetportal und Marketing GmbH*Defendant:* Richard Schlicht