In support of its action, the applicant puts forward 11 pleas in law alleging infringement of: Article 81 EC; the duty to state reasons; the 2006 Guidelines on the method of setting fines ([1]); and the principles of proportionality, the presumption of innocence, legal certainty, equal treatment and that the penalty should fit the offence, in that the Commission:

— held that the practices relating to waxes and paraffin, on the one hand, and to slack wax, on the other, constituted a single and continuous infringement, and held the practices in relation to slack wax to be an agreement;

— wrongly found a single and continuous infringement consisting of an agreement for price-fixing; market and/or customer sharing, even if it was merely an exchange of information concerning the state of the paraffin market; prices and future strategies in relation to tariffs; the customers and the volumes which could be attributed to the applicant;

— first, misinterpreted the Community case-law on undertakings publicly distancing themselves by holding the applicant responsible for the entire duration of the wax and paraffin aspect of the cartel, although the applicant had ceased to participate in 'technical meetings' after the meeting of 11 and 12 May 2004, that is to say, nearly one year before the end of the infringement and, second, allowed the intended withdrawal of Repsol from the cartel before the end of the infringement, and not that of the applicant, although the applicant was in an equivalent situation;

— required the applicant to prove that it publicly distanced itself from the cartel;

— did not take account of the applicant's failure to implement the cartel;

— used the value of sales from the last three financial years in which the applicant had participated in the cartel, instead of the value of sales for the last year in which it had participated;

— found a percentage of the value of sales for the slack wax aspect of the infringement which was too high;

— applied the method for setting the fine laid down in point 24 of the Guidelines which is contrary to Article 23(3) of Regulation No 1/2003 and to the principles of proportionality, equal treatment and presumption of innocence;

— applied an additional amount for deterrent effect without, however, providing sufficient reasons for that;

— imposed a fine representing 410 % of the turnover obtained in one year by the applicant on the relevant market;

— held the parent company, Total SA, responsible for the applicant's behaviour.

([1]) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

## Appeal brought on 19 December 2008 by Bart Nijs against the judgment of the Civil Service Tribunal delivered on 9 October 2008 in Case F-49/06 Nijs v Court of Auditors

**(Case T-567/08 P)**

(2009/C 55/70)

*Language of the case: French*

### Parties

*Appellant:* Bart Nijs (Bereldange, Luxembourg) (represented by F. Rollinger, lawyer)

*Other party to the proceedings:* Court of Auditors of the European Communities

### Form of order sought by the appellant

— declare the appeal admissible;

— declare the appeal founded;

— accordingly, annul the order of 9 October 2008 in Case F-5/07 *Bart Nijs* v *Court of Auditors of the European Communities*.

### Pleas in law and main arguments

By this appeal, the applicant seeks annulment the judgment of the Civil Service Tribunal (the Tribunal) of 9 October 2008 in Case F-49/06 *Nijs* v *Court of Auditors* dismissing, as partially inadmissible and partially unfounded, the action for, first, annulment of the decision not to promote the applicant to grade A*11 for the 2005 promotion procedure and, second, damages.

In support of his appeal, the applicant puts forward four grounds of appeal:

— distortion of the application and the reply inasmuch as the judgment under appeal replaces a plea alleging that there was no decision by the appointing authority, implying a total lack of motivation, by a completely different plea;

— disregard and/or distortion of the evidence, the Tribunal having excluded it;

— wrong attribution of the burden of proof inasmuch as the Tribunal should have required proof of the defendant's allegations;

— breach of the principle of the presumption of innocence concerning the order that the appellant pay the costs at first instance.