The Court of First Instance held that the letters of October and December 2003 from the Commission to Italy embodied a genuine preliminary discussion of the measures introduced by Decree Law 326/2003. The Court of First Instance did not regard those letters as consisting merely in general requests and in the negative assertion that the possibility could not be ruled out that the measures might entail State aid incompatible with the common market.

Second plea in law: Breach of the principle of *audi alteram partem*.

In the decision initiating the formal investigation, the Commission had taken the fact that the tax concessions provided for were not available to companies established outside Italy as an indication that the measures were selective. In the final decision, on the other hand, the Commission held that the measures were selective because the tax concessions mainly favoured Italian undertakings — since they applied to their worldwide taxable income — as compared with Community companies, which are taxed in Italy only on the taxable income generated in that Member State. The Commission never warned the Italian Government of that change of approach and did not enable it to submit observations in that regard. The Court of First Instance erred in holding that the conduct of the Commission was lawful.

Third plea in law: Infringement of Article 87(1) EC.

In any case, an advantage, such as the tax concession at issue, cannot be regarded as selective where it is available to all companies — whether Italian or Community — which meet the conditions for being listed on a regulated market of the European Union. The fact that Italian companies reap a greater benefit is a consequence of the tax system, which provides that taxation is to be based on the criterion of residence; however, when all companies are on an equal footing in relation to the tax measure in question, the mere fact that some benefit more than others cannot mean that the tax measure is selective. The Court of First Instance erred in holding that even such a difference can amount to selectivity.

Fourth plea in law: Infringement of Article 87(1) EC. Failure to state adequate reasons.

The Court of First Instance erred in regarding the measure as selective in so far as it is not available to all companies. It is in fact available to all companies which meet the requirements for being listed on a regulated market. Furthermore, the decision to seek listing entails structural burdens of the highest order, which non-listed companies do not have to bear. The choice of listed companies is based on those objective criteria, and the advantage is consistent with and linked to the different situation — in terms of structural costs — in which the two categories of company are placed. That means that the measure is of general application and non-selective. The reasoning of the Court of First Instance, however, did not adequately address the evidence provided by Italy in that regard.

Fifth plea in law: Infringement of Article 87(1) EC.

The Court of First Instance erred in holding that the measures are in any event selective on account of their brief duration, which means that companies which decide to seek listing at a later date are excluded. The temporary nature of the tax concession can be explained by the need for budget balances and the experimental nature of the measures; however, that does not affect their structure, which is the sole criterion on the basis of which their selectivity or non-selectivity falls to be determined.

Sixth plea in law: Infringement of Article 87(3)(c) EC. Failure to state adequate reasons.

The measures, even if they are regarded as State aid, are compatible with the common market under Article 87(3)(c) EC, since they constitute investment aid to facilitate the development of certain economic activities. The Court of First Instance erred in regarding the measures as operating aid, disregarding the ongoing character of the effects produced by listing on the structure and operating effectiveness of the companies, and in not holding that the increase in listings on regulated markets is an activity considered worthy of fostering, even at Community level. The Court of First Instance should therefore have criticised the Commission for exercising its discretion in the matter without taking as a basis a correct assessment of the facts.

---

([1]) OJ L 83, 27.3.1999, p. 1.

---

**Appeal brought on 24 November 2009 by Dominio de la Vega, S. L against the judgment of the Court of First Instance (Seventh Chamber) of 16 September 2009 in Case T-458/07 Dominio de la Vega S.L. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) and Ambrosio Velasco, S.A.**

**(Case C-459/09 P)**

(2010/C 24/64)

*Language of the case: Spanish*

**Parties**

*Appellant:* Dominio de la Vega, S. L. (represented by: E. Caballero Oliver y A. Sanz-Bermell y Martínez, lawyers)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) and Ambrosio Velasco, S.A.

**Form of order sought**

— Set aside entirely the judgment under appeal in Case T-458/07 delivered on 16 September 2009, and consequently,

— Give final judgment in the case, declare that the signs at issue are not similar and therefore that there is no likelihood of confusion, and allow registration of the Community trade mark No 2 789 576 'Dominio de la Vega' in Class 33, since it is not prohibited by Article 8(1)(b) of Regulation (EC) No 40/94, now Regulation No 201/2009.

— Alternatively, if necessary, refer the case back to the Court of First Instance of the European Communities for judgment in accordance with the binding criteria established by the Court of Justice.

— Order OHIM and the intervening party to pay the costs, both of these proceedings and of the earlier proceedings before the Court of First Instance of the European Communities.

**Pleas in law and main arguments**

1. Infringement of Article 8(1)(b) and also of Article 8(2)(i) and (ii) of formerly Regulation (EC) No 40/94 [1] now Regulation (EC) No 207/2009 [2]. The earlier mark which is the ground of opposition in this case is the Community trade mark. An error of law is committed in the judgment under appeal, the fact that the mark is a Community mark is not taken into account, and the relevant public for the assessment of the likelihood of confusion between the marks at issue is considered to be a public which is incorrect and contrary to that prescribed in Regulation on the Community trade mark applicable to the case.

2. Error of Law in assessment and decision to hold documents produced as inadmissible, resulting in an incorrect assessment of the likelihood of confusion of the Spanish consumer. The Court of First Instance distorted the evidence in support of the coexistence of the marks in Spain, that error of law leading to an infringement of Article 8(1)(b) of Regulation No 40/94, now Regulation No 207/2009

[1] Council Regulation of 20 December 1993 on the Community trade mark, OJ L 11, p. 1.

[2] Council Regulation of 26 February 2009 on the Community trade mark (codified version) (Text with EEA relevance), OJ L 78, p. 1.

## Appeal brought on 20 November 2009 by Inalca SpA — Industria Alimentari Carni and Cremonini SpA against the order made on 4 September 2009 in Case T-174/06 Inalca and Cremonini v Commission

**(Case C-460/09 P)**

(2010/C 24/65)

*Language of the case: Italian*

**Parties**

*Appellants:* Inalca SpA — Industria Alimentari Carni and Cremonini SpA (represented by: F. Sciandone and C. D'Andria, avvocati)

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

**Form of order sought**

The appellants claim that the Court should:

— set aside the order under appeal and refer the case back to the Court of First Instance for a decision on the substance in the light of such guidance as the Court of Justice may provide;

— order the Commission to pay the costs of the present proceedings together with those incurred in Case T-174/06.

**Pleas in law and main arguments**

**A. The distinction between the procedural criterion relating to the point at which time starts to run for the purposes of bringing proceedings and verification that the conditions for liability have been satisfied: (i) contradictory nature of the grounds stated and (ii) non-compliance with Community case-law**

The grounds of the order under appeal are manifestly contradictory in so far as, on the one hand, the order refers to settled Community case-law according to which time for the purposes of bringing actions seeking to establish non-contractual liability on the part of the Community starts to run only upon fulfilment of all the conditions necessary for the creation of an obligation to pay compensation and, in particular, only when the damage in respect of which compensation is sought has become actual whereas, on the other hand, the order rejects the applicants' argument that the damaging effects of the letter at issue became certain only upon the adoption of the Commission decision of 3 October 2006. [1]