**Form of order sought**

— annul the decision of the European Commission of 3 March 2010 in Case PL/2009/1019, concerning the national wholesale market for IP traffic exchange (IP transit), and in Case PL/2009/1020, concerning the national wholesale market for IP traffic exchange (IP peering) with the network of Telekomunikacja Polska S.A.;

— order the European Commission to pay the costs.

**Pleas in law and main arguments**

The application seeks the annulment of Decision C(2010) 1234 of the European Commission of 3 March 2010 adopted pursuant to Article 7(4) of Directive 2002/21/EC of the European Parliament and of the Council (Framework Directive), [1] in which the Commission has required the Prezes Urzędu Komunikacji Elektronicznej (President of the Office for Electronic Communications) to withdraw draft decisions concerning the wholesale market for IP traffic exchange (IP transit) and the wholesale market for IP peering with the network of Telekomunikacja Polska S.A, which were notified to the Commission on 27 November 2009 and registered under the numbers PL/2009/1019 and PL/2009/1020.

The applicant sets out three pleas in law in support of his action.

The applicant submits in the first plea that, in adopting the contested decision, the Commission infringed essential procedural requirements, including the principle of good administration, the principle of effective cooperation and the consultation mechanism laid down in Article 7 of the Framework Directive, on the ground that the determination made in the contested decision was based on an incorrect translation of the draft decisions submitted by the applicant in the notification procedure, thereby causing the Commission to make erroneous findings on the factual situation which constitutes the framework for the determination notified. Furthermore, the Commission infringed essential procedural requirements by not stating adequate reasons for the contested decision, by reason of the lack of a detailed and objective analysis of the grounds which led the Commission to make the determination requiring withdrawal of the draft decisions notified.

Second, the applicant pleads that the Commission made a manifest error of assessment in finding that IP peering and IP transit services are mutually substitutable. IP peering and IP transit services are not mutually substitutable because they differ as to the extent of IP traffic exchanged between telecommunications undertakings, as to methods for calculating payments for services provided, as to the very definition of service provider (ISP) and as to service quality.

Third, in the applicant's submission, the Commission also infringed Article 4(3) TEU and Article 102 TFEU in conjunction with Articles 7(4), 8(2)(b) and (c), 14(2), 15(3) and 16(4) of the Framework Directive in considering that the wholesale markets for IP traffic exchange in Poland (IP transit and IP peering) are not two separate markets, that they are not susceptible to *ex ante* regulation and that Telekomunikacja Polska S.A does not have significant power on both those markets. The applicant contends that, in accordance with the requirements contained in the recommendation [2] and the guidelines, [3] he carried out a market analysis from the point of view of the justification for *ex ante* regulation and incontestably examined the three relevant criteria. That examination fully confirmed that the markets for IP peering and IP transit traffic exchange are susceptible to *ex ante* regulation because they are characterised by high and non-transitory barriers, their structure does not tend towards effective competition within the relevant time horizon and application of competition law alone would not adequately address the market failures concerned.

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[1] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2008 L 108, p. 33).

[2] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (OJ 2007 L 344, p. 65).

[3] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ 2002 C 165, p. 6).

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## Action brought on 21 May 2010 — Spain v Commission

## (Case T-230/10)

(2010/C 209/65)

*Language of the case: Spanish*

**Parties**

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

*Defendant:* European Commission

**Form of order sought**

— Annul Commission Decision 2010/152/EU of 11 March 2010 excluding from European Union financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), to the extent that it is the subject of this action for annulment, and

— order the European Commission to pay the costs.

**Pleas in law and main arguments**

This action is brought against two of the financial corrections decided by the Commission, and is based on the infringement of the provisions of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables, [1] Commission Regulation (EC) No 1433/2003 of 11 August 2003 laying down detailed rules for the application of Council Regulation (EC) No 2200/96 as regards operational funds, operational programmes and financial assistance, [2] and Commission Regulation (EC) No 1432/2003 of 11 August 2003 laying down detailed rules for the application of Council Regulation (EC) No 2200/96 regarding the conditions for recognition of producer organisations and preliminary recognition of producer groups, [3] relied on by the Commission as the basis for those corrections:

As regards the exclusion of the costs of environmental management of packaging, the Commission interprets Article 15(5) of Regulation 2200/96 and Annex I of Regulation 1433/2003 as meaning that, when fixing the flat rate for aid, Member States must comply with the rule that aid is only granted in respect of expenditure borne by the producer organisations, and direct evidence is required of that fact.

The Kingdom of Spain considers that, taking into consideration the objectives and the wording of the abovementioned provisions, it cannot be necessary to require reliable proof that the costs have been borne by the producer organisations. Further, in any event, the reality is that the producer organisations do bear the costs of environmental management of packaging, given that the distributors pass the cost to them by means of paying a lower price for their products.

As regards weaknesses in the system for the control of recognition of the SAT Royal producer organisation, the Commission considers that the rule that no single member of a producer organisation may have more than 20 % of the voting rights must also apply to the natural persons who are shareholders in bodies which, in turn, are members of a producer organisation. The Kingdom of Spain considers that the rule laid down in Article 14(2) of Regulation 1432/2003 applies only to those who are members of the organisation, and there is no requirement to analyse the share structure of the bodies which make up the producer organisation.

[1] OJ L 297, 21.11.1996, p. 1
[2] OJ L 203, 12.8.2003, p. 25
[3] OJ L 203, 12.8.2003, p. 18

## Action brought on 21 May 2010 — Merlin and Others v OHIM — Dusyma (Games)

**(Case T-231/10)**

(2010/C 209/66)

*Language in which the application was lodged: German*

**Parties**

*Applicants:* Merlin Handelsgesellschaft mbH (Forchtenberg, Germany), Rolf Krämer (Forchtenberg), BLS Basteln, Lernen, Spielen GmbH (Forchtenberg), Andreas Hohl (Künzelsau, Germany), represented by: R. Kramer, lawyer

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

*Other party to the proceedings before the Board of Appeal of OHIM:* Dusyma Kindergartenbedarf GmbH (Schorndorf, Germany)

**Form of order sought**

— annul the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 17 March 2010 in Case R 879/2009-3 and declare Community design No 526 801-0011 invalid;

— in the alternative, annul the decision of the Third Board of Appeal and refer the case back to the Board of Appeal;

— order the defendant to pay the costs.

**Pleas in law and main arguments**

*Registered Community design in respect of which a declaration of invalidity has been sought:* Community design No 526 801-0011 for the products 'Games (including educational games)'.

*Proprietor of the Community trade mark:* Dusyma Kindergartenbedarf GmbH.

*Applicant for the declaration of invalidity:* the Applicants.

*Decision of the Cancellation Division:* Rejection of the application for a declaration of invalidity.