Question referred

On a proper interpretation of Article 204(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1] ('the Customs Code') does infringement of the obligation, in the case of non-Community goods which were in the customs warehousing procedure and acquired a new customs destination at the termination of that procedure, to record the removal of the goods from the customs warehouse in the apposite computer programme forthwith upon termination of the customs warehousing procedure — rather than considerably later — cause a customs debt to arise in respect of the goods?

[1] OJ 1992 L 302, p. 1

Reference for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal) lodged on 28 January 2011 — Amorim Energia BV v Ministério das Finanças e da Administração Pública

(Case C-38/11)

(2011/C 130/16)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Applicant: Amorim Energia BV

Defendant: Ministério das Finanças e da Administração Pública

Question referred

Do Articles 63 TFEU and 65 TFEU (formerly Articles 56 EC and 58 EC) preclude legislation of a Member State, such as Articles 46(1), 96(2) and (3), 14(3) and 89 of the Corporation Tax Code, which, in the context of elimination of economic double taxation of distributed profits, while complying with Council Directive 90/435/EEC [1] of 23 July 1990, does not enable shareholder companies resident in another Member State to secure repayment of the tax deducted at source in the same circumstances as shareholder companies resident in Portugal, requiring for that purpose a longer minimum period of share ownership and a minimum but significant shareholding, delaying or rendering impracticable the elimination of economic double taxation?

[1] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
OJ L 225, p. 6

Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 28 January 2011 — VBV — Vorsorgekasse AG v Finanzmarktaufsichtsbehörde (FMA)

(Case C-39/11)

(2011/C 130/17)

Language of the case: German

Referring court

Verwaltungsgerichtshof

Parties to the main proceedings

Applicant: VBV — Vorsorgekasse AG

Defendant: Finanzmarktaufsichtsbehörde (FMA)

Question referred

Is a provision which permits a severance fund to invest assets allocated to a collective investment fund only in shares in investment funds which are authorised to sell in Austria compatible with the freedom of movement of capital set out in Article 63 et seq. TFEU?

Appeal brought on 2 February 2011 by Deutsche Bahn AG against the judgment of the General Court (Eighth Chamber) delivered on 12 November 2010 in Case T-404/09 Deutsche Bahn AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case C-45/11 P)

(2011/C 130/18)

Language of the case: German

Parties

Appellant: Deutsche Bahn AG (represented by: K. Schmidt-Hern, Rechtsanwalt)

Other party to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (represented by: G. Schneider, acting as Agent)

Form of order sought

— Set aside the judgment of the General Court of the European Union of 12 November 2010 in Case T-404/09;

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 23 July 2009 (Case R 379/2009-1);

— Order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to pay the costs of both sets of proceedings.

Pleas in law and main arguments

The present appeal is against the judgment of the General Court by which that Court dismissed the appellant's action for annulment of the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market of 23 July 2009 relating to the rejection of its application for registration of a figurative mark, which consists of a horizontal combination of the colours grey and red.

The appellant relies on four grounds of appeal in support of its appeal, which is based on infringement of Article 7(1)(b) of Regulation (EC) No 207/2009.

First of all, the General Court based its examination of distinctive character on a sign other than the mark applied for. The General Court did not examine the sign in its entirety, but merely based that examination on a random combination of the colours light grey and traffic-light red. The specific features of the colour system were not taken into account in the present case although the specific arrangement of those colours in the mark at issue is a part of the trade mark application and makes the sign specific.

Secondly, in the course of the assessment of distinctive character, the General Court did not consider for which specific services the trade mark application has been filed and examined its inability to be protected with regard to completely different goods. The alleged lack of distinctive character of the mark was deduced in the judgment from the circumstance that particular items or goods usually bear the colours in question (parts of railway engines and safety enclosures for electrical equipment beside railway lines; traffic signs; level crossing barriers and rail transport traffic signs; trains and the borders of railway platforms). The trade mark application in respect of the mark at issue has not however been filed in respect of those goods. The General Court did not state a reason why the circumstance that the mark at issue may possibly be incapable of being protected in respect of certain goods from the transport or rail transport sector should also provide a reason why the mark applied for in the present case in respect of services should be incapable of being protected.

Thirdly, the General Court based its assessment of the mark's distinctive character on incorrect legal bases in that it assessed the distinctive character of marks in respect of goods and marks in respect of services in the same way. The General Court failed to recognise that the public does not necessarily perceive different categories of signs in the same way. Whereas the consumer may not be accustomed to deducing the origin of the goods from their colour or packaging in the absence of graphical or word elements since goods and packaging are usually coloured, the situation is completely different as regards services. As services are by nature colourless, the consumer's perception of colours for services is totally different from his perception of colours for goods. Consequently, a difference should be made between goods and services in assessing the distinctive character of colours.

Fourthly, in assessing the distinctive character of the mark in question the General Court distorted the relevant facts and did not sufficiently state the reasons for its judgment. The General Court assumed without any grounds that horizontal bands of colour are usually used as decorative elements on trains. In doing so, it failed to recognise that the present case relates to an assessment of the distinctive character of a specific colour mark and not to stripes on railway wagons in general. Likewise, the General Court failed to recognise that the trade mark application in respect of mark at issue was not filed in respect of railway wagons, but in respect of services in Class 39. Lastly, the appellant made extensive submissions on the point that colour elements in the rail transport sector are not understood as decorative elements, but as indications of origin. The General Court did not assess those arguments put forward by the appellant.

Action brought on 15 February 2011 — European Commission v Kingdom of the Netherlands

(Case C-65/11)

(2011/C 130/19)

Language of the case: Dutch

Parties

Applicant: European Commission (represented by: A. Nijenhuis and D. Triantafyllou, acting as Agents)

Defendant: Kingdom of the Netherlands

Form of order sought

— Declare that, by failing to consult the VAT Committee and by allowing non-taxable persons to join a fiscal unit, as is apparent from the resolution of 18 February 1991, No VB91/347, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 9 and 11 of Council Directive 2006/112/EC [1] of 28 November 2006 on the common system of value added tax;

— order Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

Article 9(1) of Directive 2006/112/EC provides that 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the results of that activity. Article 11 of the VAT Directive provides that after consulting the advisory committee on value added tax ('the VAT Committee') each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.