2. Second plea in law, alleging incorrect application of Article 107 (1) TFEU –absence of selectivity:

In the applicant's opinion, neither *de iure* selectivity nor *de facto* selectivity can be considered to exist. Even if that is assumed from the fact that Section 22c ÖSG leads to a departure from the reference price system, that departure appears justified by the rationale and internal structure of the system for the support of green electricity.

3. Third plea in law, alleging incorrect application of Article 107 (1) TFEU — misuse of discretion:

If the proposed measure were nonetheless to be deemed to be aid, the measure falls, in the applicant's opinion, within the scope of the Community guidelines on State aid for environmental protection: There is moreover an analogy to be drawn between the notified compensatory payment under Section 22c ÖSG and the rules for the assessment of exemptions from energy taxes covered by Community legislation under Section 4 of the Guidelines; consequently, on the basis of that analogy, the compensatory arrangement ought to have been permitted. In addition to the application by analogy of the Guidelines, an analogy with Article 25 of the general block exemption regulation is also conceivable.

4. Fourth plea in law: Different treatment by the European Commission of comparable situations in terms of competition:

In the applicant's opinion, the question arises why comparable situations in terms of competition — with reference to the similarities between the ÖSG and the German Renewable Energy Act, particularly in respect of the economic and competitive effects — have manifestly been treated differently. That appears incompatible with the general principle of equal treatment.

Appeal brought on 26 May 2011 by the European Commission against the judgment of the Civil Service Tribunal of 15 March 2011 in Case F-120/07 Strack v Commission

(Case T-268/11 P)

(2011/C 232/56)

Language of the case: German

Parties

Appellant: European Commission (represented by: J. Curral and B. Eggers, Agents

Other party to the proceedings: Guido Strack (Cologne, Germany)

Form of order sought by the appellant

The appellant claims that the General Court should:

— set aside the judgment of the Civil Service Tribunal of 15 March 2011 in Case F-120/07 *Strack* v *Commission*;

— order both parties to bear their own costs of the proceedings at first instance and of this appeal.

Pleas in law and main arguments

In support of the appeal, the appellant relies essentially on three grounds of appeal.

1. First ground of appeal: infringement of European Union law in the interpretation of Article 4 of Annex V to the Staff Regulations of officials of the European Union (the Staff Regulations):

First, the Civil Service Tribunal infringed European Union law and settled case-law by interpreting the first paragraph of Article 4 of Annex V to the Staff Regulations to mean that it did not apply to the carrying over of the right to leave in cases of long term illness.

2. Second ground of appeal: Infringement of European Union law in the legally erroneous determination of the scope and legal effect of the second paragraph of Article 1(e) of the Staff Regulations:

Secondly, the Tribunal infringed European Union law and failed to state sufficient reasons in its erroneous interpretation of the scope of the second paragraph of Article 1(e) of the Staff Regulations as imposing a comprehensive duty on the institutions to guarantee as a minimum to officials, with reference to all working conditions relating to health protection, the standards in Directives adopted pursuant to Article 153 TFEU. The objective however of the second paragraph of Article 1(e), which was introduced as part of the 2004 reform of the Staff Regulations, is merely to remedy a lacuna in respect of technical provisions lacking in the Staff Regulations for the safeguarding of the health and safety of the staff in the premises of the institutions (for example. fire protection, hazardous substances, ventilation, ergonomics, etc.). The Staff Regulations accordingly now allow the application of the technical minimum standards in the respective Directives transposed into national law. However, the provision cannot and should not affect working conditions in respect of carrying over leave and compensation for unused leave which are determined exclusively by the bodies enacting the Staff Regulations. In so far as the Tribunal so decided, the decision was contrary not only to the current provisions of the Staff Regulations and the Tribunals' case-law, but also was in breach of the principle of legal certainty.

3. Third ground of appeal: Procedural infringement:

Third, the Tribunal infringed procedural requirements, since of its own motion it interpreted the applicant's first claim as an infringement of the second paragraph of Article 1(e) of the Staff Regulations and de facto nullified a provision of the Staff Regulations when there was no plea of illegality and the Council and the Parliament of the European Union had no opportunity to intervene.
