JUDGMENT OF THE COURT

(Sixth Chamber)

of 27 November 2003

in Case C-283/01 (Reference for a preliminary ruling from the Hoge Raad der Nederlanden): Shield Mark BV v Joost Kist h.o.d.n. Memex [1]

(Trade marks — Approximation of laws — Directive 89/104/EEC — Article 2 — Signs of which a trade mark may consist — Signs capable of being represented graphically — Sound signs — Musical notation — Written description — Onomatopoeia)

(2004/C 21/07)

(Language of the case: Dutch)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-283/01: Reference to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between Shield Mark BV and Joost Kist h.o.d.n. Memex, on the interpretation of Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), the Court (Sixth Chamber), composed of: V. Skouris, acting for the President of the Sixth Chamber, J. N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges; D. Ruiz-Jarabo Colomer, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, has given a judgment on 27 November 2003, in which it has ruled:

1. *Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks is to be interpreted as meaning that sound signs must be capable of being regarded as trade marks provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are capable of being represented graphically.*

2. *Article 2 of Directive 89/104 must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that its representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.*

   In the case of a sound sign, those requirements are not satisfied when the sign is represented graphically by means of a description using the written language, such as an indication that the sign consists of the notes going to make up a musical work, or the indication that it is the cry of an animal, or by means of a simple onomatopoeia, without more, or by means of a sequence of musical notes, without more. On the other hand, those requirements are satisfied where the sign is represented by a stave divided into measures and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and, where necessary, accidentals.

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[1] OJ C 275 of 29.9.2001.

JUDGMENT OF THE COURT

(Sixth Chamber)

of 27 November 2003

in Case C-429/01: Commission of the European Communities v French Republic [1]

(Failure of a Member State to fulfil obligations — Failure to transpose Directive 90/219/EEC — Genetically modified organisms — Contained use)

(2004/C 21/08)

(Language of the case: French)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-429/01, Commission of the European Communities (Agent: G. zur Hausen, assisted by M. van der Woude and V. Landes) with an address for service in Luxembourg, v French Republic (Agent: initially by G. de Bergues and D. Colas, then by G. de Bergues and C. Isidoro), with an address for service in Luxembourg, APPLICATION for a declaration that, by failing to transpose correctly and in full Articles 14(a) and (b), 15(1) and (2), 16(1) and 19(2) to (4) of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (OJ 1990 L 117, p. 1), as amended by Commission Directive 94/51/EC of 7 November 1994 adapting to technical progress Directive 90/219 (OJ 1994 L 297, p. 29), and by failing to transpose the provisions of that directive in respect of certain contained use by the Ministry of Defence, the French Republic has failed to fulfil its obligations under that directive and Article 249 EC, the Court (Sixth Chamber), composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, F. Macken and N. Colneric (Rapporteur), Judges; F.G. Jacobs, Advocate General; R. Grass, Registrar, has given a judgment on 27 November 2003, in which it:

1. *Declares that, by failing to transpose correctly and in full Article 14(a) and (b), first subparagraph, third sentence, and Article 19(2) to (4) of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms, as amended by Commission Directive 94/51/EC of 7 November 1994 adapting to technical progress*

Directive 90/219, and by failing to transpose the provisions of that directive in respect of certain contained use by the Ministry of Defence, the French Republic has failed to fulfil its obligations under that directive;

2. *Dismisses the remainder of the action;*

3. *Orders each party to bear its own costs.*

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(1) OJ C 369 of 22.12.2001.

JUDGMENT OF THE COURT

(Sixth Chamber)

of 4 December 2003

in Case C-448/01 (Reference for a preliminary ruling from the Bundesvergabeamt): EVN AG, Wienstrom GmbH v Republik Österreich, third parties: Stadtwerke Klagenfurt AG and Kärntner Elektrizitäts-AG (1)

(Directive 93/36/EEC — Public supply contracts — Concept of the most economically advantageous tender — Award criterion giving preference to electricity produced from renewable energy sources — Directive 89/665/EEC — Public procurement review proceedings — Unlawful decisions — Possibility of annulment only in the case of material influence on the outcome of the tender procedure — Illegality of an award criterion — Obligation to cancel the invitation to tender)

(2004/C 21/09)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-448/01: Reference to the Court under Article 234 EC by the Bundesvergabeamt (Austria) for a preliminary ruling in the proceedings pending before that body between EVN AG, Wienstrom GmbH and Republik Österreich, third parties: Stadtwerke Klagenfurt AG and Kärntner Elektrizitäts-AG, on the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and of Articles 1 and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the Court (Sixth Chamber), composed of: V. Skouris (Rapporteur), acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and N. Colneric, Judges; J. Mischo, Advocate General; H. A. Rühl, Principal Administrator, for the Registrar, has given a judgment on 4 December 2003, in which it has ruled:

1. *The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45 % which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.*

   On the other hand, that legislation does preclude such a criterion where

   — *It is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,*

   — *it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.*

   It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

2. *The Community legislation on public procurement requires the contracting authority to cancel an invitation to tender if it transpires in review proceedings under Article 1 of Directive 89/665 that a decision relating to one of the award criteria laid down by that authority is unlawful and it is therefore annulled by the review body.*

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(1) OJ C 84 of 6.4.2002.

JUDGMENT OF THE COURT

(Fifth Chamber)

of 27 November 2003

in Case C-497/01 (Reference for a preliminary ruling from the Tribunal d'arrondissement de Luxembourg): Zita Modes Sàrl v Administration de l'enregistrement et des domaines (1)

(Sixth VAT Directive — Article 5(8) — Transfer of a totality of assets — Continuation by the transferee in the same branch of business as the transferor — Legal authorisation to pursue the activity)

(2004/C 21/10)

(Language of the case: French)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-497/01: Reference to the Court under Article 234 EC by the Tribunal d'arrondissement de Luxembourg (Luxem-