Action brought on 17 November 2003 by the Commission of the European Communities against the Federal Republic of Germany

(Case C-477/03)

(2004/C 21/31)

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 17 November 2003 by the Commission of the European Communities, represented by Claudia Schmidt and Wouter Wils, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. Declare that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways [1], or by failing to inform the Commission thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

2. Declare that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings [2], or by failing to inform the Commission thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

3. Declare that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [3], or by failing to inform the Commission thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

4. Order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of the directive expired on 15 March 2003.

[1] OJ 2001 L 75, p. 1.
[2] OJ 2001 L 75, p. 26.
[3] OJ 2001 L 75, p. 29.

Reference for a preliminary ruling by the House of Lords by order of that court dated 10 November 2003, in the case of Celtec Ltd against Astley and others

(Case C-478/03)

(2004/C 21/32)

Reference has been made to the Court of Justice of the European Communities by an order of the House of Lords dated 10 November 2003, which was received at the Court Registry on 17 November 2003, for a preliminary ruling in the case of Celtec Ltd and Astley and others on the following questions:

1. Are the words 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer' in Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation ofthe laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1] to be interpreted as meaning that there is a particular point in time at which the transfer of the undertaking or part thereof is deemed to have been completed and the transfer of rights and obligations pursuant to Article 3(1) is effected?

2. If the answer to question 1 is 'yes', how is that particular point in time to be identified?

3. If the answer to question 1 is 'no', how are the words 'on the date of a transfer' in Article 3(1) to be interpreted?

[1] OJ L 61, 5.3.1977, p. 26.

Action brought on 19 November 2003 by Commission of the European Communities against Kingdom of Spain

(Case C-485/03)

(2004/C 21/33)

An action against the Kingdom of Spain was brought before the Court of Justice of the European Communities on 19 November 2003 by Commission of the European Communities, represented by José Luis Buendía Sierra of its Legal Service, acting as Agent, with an address for service in Luxembourg.

The applicant claims that the Court should:

— declare that, by failing to adopt within the prescribed period all the measures necessary to comply with Articles 2 and 3 of the Commission Decision of 11/07/2001 relating to a State aid scheme applied by Spain to a number of undertakings in Álava (notified under No C(2001)1759) in the form of a tax credit of 45 % of the investments made, or, in any event, by failing to notify the Commission of such provisions in accordance with Article 4, the Kingdom of Spain has failed to fulfil its obligations under that decision;

— Order the kingdom of Spain to pay the costs.

Pleas in law and main arguments

1. Failure to fulfil the obligation to cancel the aid payments outstanding: the measures adopted by the Spanish authorities do not appear to ensure that the companies enjoying the tax benefits in question prior to the Commission decision of 11 July 2001 do not continue to enjoy them throughout the period initially envisaged. Consequently, the abovementioned measures do not represent fulfilment of the obligation to abolish any future payment, as provided for in Article 3(1) of the Commission decision as regards aid payments outstanding. For the same reason, those measures do not represent full compliance with the obligation to adopt the measures necessary to ensure that the aid scheme does not continue to operate in the future, as provided in Article 2 of the Commission decision.

2. Failure to fulfil the obligation to recover the aid already granted: despite the fact that the decision of 11 July 2001 required immediate recovery, without delay, of the aid granted, the only thing that the competent Spanish authorities had done by October 2001 was, in their own words, 'to commence contacts with the contributors affected' and in order to 'gather information'. By expressing itself in those terms, the Member State openly recognised that it had not to date taken any measure to secure effective recovery of the aid. The Spanish authorities have not even disclosed to the Commission the identity of the beneficiaries of the aid, despite numerous requests made to them.

3. There is no absolute impossibility of giving effect to the decision: according to settles case-law, the only defence on which a Member State may rely in the context of infringement proceedings brought by the Commission under Article 88 (2) of the Treaty is the absolute impossibility of correctly implementing the decision. Although the addressee of the decision, the Kingdom of Spain, did not bring any action against it, this was done both by the authority granting the aid, the Diputación Foral de Álava, and the Basque trade association, Confebask. The applicants in those proceedings did not at any time claim that implementation of the decision was absolutely impossible, merely that it was a complex matter because of various administrative difficulties of an internal nature.

4. Irrelevance of internal administrative difficulties: since Spanish law does not expressly provide for a mechanism for recovery of the unlawful and incompatible aid, it was decided to resort to proceedings for review, on the initiative of the authorities themselves, of the tax measures governing the grant of aid, as laid down in the General Tax Code of each of the Historic Territories. However, the national authorities deliberately chose a procedure which makes recovery extraordinarily difficult, namely proceedings for a declaration that certain measures susceptible of annulment have an adverse effect, which renders necessary the satisfaction of a series of cumulative conditions, which it is extremely difficult to fulfil, above all from a temporal point of view. Domestic law provides for a number of procedures which, at first sight, are less problematical, such as review of provisions and measures which are ipso jure void, a procedure which appears to be perfectly applicable to the aids granted in breach of the procedure laid down in Article 88 of the EEC Treaty. Recourse to that procedure would probably be less problematical, in so far as it allows a declaration of nullity by the Administration itself, without the need to fulfil the requirements laid down for the abovementioned declaration of adverse effects. The national authorities do not appear in this case to have chosen either the least problematical procedure or the most relevant procedure among those available to them within the domestic legal system.

5. The principle of genuine cooperation between the Commission and the Member State: the Commission has provided all clarifications requested of it, displaying availability and flexibility in order to facilitate the task of recovery to be undertaken by the national authorities. Commission officials have shown themselves to be willing to examine the possibility of applying the de minimis rule, the regulation on aid for SMEs or the guidelines on regional aid in relation to each individual case of recovery, provided that they are given a report setting out details of the progress achieved with recovery of the aids and the possible grounds on which each of the beneficiaries might qualify.