3. If the answer to Question 1 is no, is Article 28 of the EC Treaty to be interpreted as meaning that it in principle precludes the current ban on imports despite the obligation of the Systembolaget to obtain, upon request, alcoholic beverages which it does not hold in stock?

4. If the answer to Question 3 is yes, can such a ban on imports be considered justified and proportional in order to protect health and life of humans?on the following question:

Appeal brought on 8 April 2004 (Fax: 6.4.04) by Deutsche SiSi-Werke GmbH & Co. Betriebs KG against the judgment delivered on 28 January 2004 by the Second Chamber of the Court of First Instance of the European Communities in Joined Cases T-146/02 to T-153/02 between Deutsche SiSi-Werke GmbH & Co. Betriebs KG and the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case C-173/04 P)

(2004/C 156/09)

An appeal against the judgment delivered on 28 January 2004 by the Second Chamber of the Court of First Instance of the European Communities in Joined Cases T-146/02 to T-153/02 between Deutsche SiSi-Werke GmbH & Co. Betriebs KG and the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before the Court of Justice of the European Communities on 8 April 2004 (Fax: 6.4.04) by Deutsche SiSi-Werke GmbH & Co. Betriebs KG, represented by its lawyer, Anja Franke, Grünecker Kinkeldey Stockmair & Schwanhäusser, Maximilianstr. 58, D-80538, Münich, and by Martin Augenanger, patent attorney, Maximilianstr. 58, D-80538, Münich.

The appellant claims that the Court should:

1. set aside the judgment of the Court of First Instance of 28 January 2004 in Joined Cases T-146/02 to T-153/02; ([1])

2. order OHIM to pay the costs both at first instance and on appeal.

Pleas in law and main arguments

The appeal alleges that the Court of First Instance infringed Community law.

— The Court was mistaken as to the relevant sector and consequently the shapes of the packaging, which under Article 7(1)(b) of Regulation No 40/94 are to be taken into account as a point of comparison for the purpose of assessing the distinctive character of the trade marks for which registration is sought. The Court's assessment was not based on the shapes of packaging available on the market for the products specifically applied for ('fruit drinks and fruit juices') but on the market for 'liquids for human consumption' in general. No consideration was given to the question of the extent to which the marks applied for are different from the usual packaging for drinks. The Court's examination was conducted solely by reference to an assumed basic shape of the marks applied for and to the possible future use of stand-up pouches for 'fruit drinks and fruit juices'.

— By applying that test, the Court of First Instance imposed requirements in relation to the shape of the marks applied for, which were too stringent in view of the low degree of distinctiveness required.

— In its consideration of the general interest for the purposes of Article 7(1)(b) of Regulation No 40/94, the Court focused solely on the general interest of potential competitors and thereby failed to take account of the actual situation, namely that the appellant has been using stand-up pouches for decades without being imitated. The general interest of consumers was not taken into account at all.

([1]) Not yet published in the *Official Journal of the European Communities*.

Action brought on 13 April 2004 by the Commission of the European Communities against the Italian Republic

(Case C-174/04)

(2004/C 156/10)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 13 April 2004 by the Commission of the European Communities, represented by Enrico Traversa and Claudio Loggi, acting as Agents.

The applicant claims that the Court should:

— Declare that Decree-Law No 192 of 25 May 2001, converted to Law No 301 of 20 July 2001, entitled 'Urgent provisions to ensure the liberalisation and privatisation of particular public service sectors' is incompatible with Article 56 of the EC Treaty in so far as it automatically suspends the voting rights attached to shareholdings exceeding 2 % of the share capital of companies in the electricity and gas sectors;

— Order the Italian Republic to pay the costs.

Decree-Law 192/2001 conflicts with Article 56 of the EC Treaty because it automatically suspends the voting rights attached to shareholdings exceeding 2 % of the share capital of companies in the electricity and gas sectors. That threshold engenders a separate and restrictive treatment of investments on the part of a particular category of investors and therefore obstructs the free movement of capital within the European Community. In particular, that restriction is a disincentive to any public undertakings which might wish to acquire shares in the companies in question since such undertakings will be unable to take any active role in the decision-making of the company and exercise any influence over its management.