

In a letter of 30 October 2001 the Commission notified France of its decision to initiate proceedings under Article 88(2) of the EC Treaty relating to the exemption from excise rights on mineral oils used as fuel for alumina production in the Gardanne region <sup>(1)</sup>. On 7 December 2005, in consequence of this procedure, the Commission adopted the disputed decision <sup>(2)</sup> finding that exemptions from excise duty on mineral oils used as fuel for alumina production in the Gardanne region, the Shannon region and Sardinia, implemented by France, Ireland and Italy respectively, constituted State aid within the meaning of Article 87(1) EC that is in part incompatible with the common market, and thus ordered the Member States concerned to recover all such aid.

France seeks by this action to have that decision annulled in part in so far as it affects the exemption granted by France to the Gardanne region.

In support of its action it relies on several pleas, the first deriving from infringement of the concept of State aid within the meaning of Article 87(1) EC. It submits that the Commission committed an error of law in holding that State aid existed even though not all the conditions required to establish the existence of aid, as laid down in the Altmark case <sup>(3)</sup>, had been fulfilled, particularly the condition that competition be restricted or that the function of the internal market be distorted. It maintains that the Commission cannot, on the one hand, propose that the Council adopt a decision on the foundation of Directive 92/81/EEC authorising an exemption of excise duty and object not to that exemption's being extended and, on the other hand, find that that exemption constitutes State aid incompatible with the common market.

The second plea raised by the applicant alleges a failure to give reasons in that the decision contested contains a contradiction in the Commission's reasoning relating to the finding of a restriction on competition.

The applicant's third plea, submitted in the alternative, is that the demand for recovery set out in Article 5 of the contested decision breaches the principles of protection of legitimate expectations, legal certainty and observance of a reasonable period. It claims that the beneficiaries of the exemption are entitled to rely on the principles of legal certainty and protection of legitimate expectations until the decision in dispute is adopted, rather than until the date of publication of the decision to initiate formal investigation proceedings, as the Commission maintains. The applicant also asserts that the Commission's failure to act for a period of four years between the decision to initiate proceedings and the final decision constitutes a breach of the principles of protection of legitimate

expectations, legal certainty and observance of a reasonable period.

<sup>(1)</sup> Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils

<sup>(2)</sup> Published in OJ 2002 C 30

<sup>(3)</sup> Decision C (2005) 4436 final, State aid Nos C 78-79-80/2001

<sup>(4)</sup> Decision of the Court of 24 July 2004, Altmark Trans, C-280/00, ECR p. I-7747

### Action brought on 17 February 2006 — Marly v OHIM

(Case T -57/06)

(2006/C 96/39)

*Language in which the application was lodged: French*

#### Parties

*Applicant:* Marly SA (Brussels, Belgium) (represented by: B. Mouffe, lawyer)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal of OHIM: Erdal Gesellschaft m.b.H. (Hallein, Austria)

#### Form of order sought

The applicant claims that the Court should:

- annul the decision of the Board of Appeal of OHIM in so far as it upholds the opposition by the proprietor of the word mark 'TOFIX';
- order the defendant to pay the costs, including expenses necessarily incurred during proceedings before the Board of Appeal, incurred by the party initiating the proceedings and as calculated in the decision under appeal.

#### Pleas in law and main arguments

Applicant for a Community trade mark: the applicant

*Community trade mark concerned:* the figurative mark 'TOPIX' for goods in Class 3 (application No 2 326 072)

Proprietor of the mark or sign cited in the opposition proceedings: Erdal Gesellschaft m.b.H.

*Mark or sign cited in opposition:* the international word mark 'TOPIX' for goods in Classes 3 and 4

*Decision of the Opposition Division:* opposition upheld in respect of all the disputed goods

Decision of the Board of Appeal: appeal dismissed

*Pleas in law:* infringement of Article 8(1)(b) of Council Regulation (EC) No 40/94 in that there is a visual and conceptual difference between the conflicting trade marks and a very great difference between the goods to which the two trade marks relate.

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**Action brought on 22 February 2006 — H.A.L.T.E. v Commission**

(Case T-58/06)

(2006/C 96/40)

*Language of the case:* French

#### Parties

*Applicant:* Honorable Association de Logisticiens et de Transporteurs Européens — H.A.L.T.E. (Neuilly-sur-Seine, France) (represented by: J.-L. Lesquins, lawyer)

*Defendant:* Commission of the European Communities

#### Form of order sought

The applicant claims that the Court should:

- declare, in accordance with Article 232 of the EC Treaty, that the Commission has failed in its obligation to act by failing to define its position after having been called upon to do so in accordance with Articles 87 and 88 of that Treaty;
- order the Commission to take all measures necessary to comply with the judgment in its entirety;
- order the European Commission to pay the costs.

#### Pleas in law and main arguments

By this action, an association of companies operating in the parcel service, transport and logistics sector seeks a declaration by the Court that the Commission has failed to act in that the latter refrained from initiating formal investigation proceedings as provided for under Article 88 EC and from ordering interim measures suspending the payment of the aid disputed in a complaint by the applicant relating to restructuring aid granted by the SNCF, a public company wholly owned by the French State, to the goods transport company SCS SERNAM.

In support of its action for a declaration of failure to act, the applicant relies on arguments that can be grouped together as two pleas as regards their substance.

The first plea alleges an infringement of Article 88(2) of the EC Treaty. The applicant submits that the fact that a period of over six months elapsed following its first complaint, although the Commission was familiar with the case, because it had previous given decisions the infringement of which formed the subject-matter of the complaint, constitutes an indication of the serious difficulties encountered by the Commission in assessing whether the aid in question was compatible with the common market. The Commission is accordingly obliged, according to the applicant, to initiate the formal investigation proceeding into the aid referred to in the complaint. The applicant furthermore claims that even if the French authorities failed to give notice of the aid this cannot release the Commission from its obligations of due diligence, and that it is obliged to employ its powers of investigation as soon as it comes into possession of information on State measures which could be contrary to the principles of the common market, especially in the context of a complaint directed at an infringement of its previous decision fixing the conditions of compatibility of State aid with the common market <sup>(1)</sup>.

The second plea alleges an infringement of Article 11 of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 88) <sup>(2)</sup>. The applicant claims that the Commission should have ordered interim measures suspending the payment of the aid in that, according to the applicant, one condition of objective urgency was met.

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<sup>(1)</sup> The decision in question is the Commission Decision of 20 October 2004 relating to State aid put into effect by France in part in favour of the Sernam company, C (2004) 3940 final

<sup>(2)</sup> OJ 2004 L, p. 1, most recently amended by Commission Regulation No 794/2004 of 21 April 2004 (OJ 2004 L 182, p. 2)