

**Form of order sought**

- Set aside the judgment of the Court of First Instance of the European Communities (Second Chamber) of 10 October 2006 in Case T-302/03;
- Order the defendant and respondent to pay the costs.

**Pleas in law and main arguments**

The judgment of the Court of First Instance of 10 October 2006 infringes Article 7(1)(b) of Regulation No 40/94 <sup>(1)</sup>. The Court of First Instance wrongly considered that there is a 'specific and direct relationship' between the designation 'map&guide' and the 'computer software' product and 'computer programming' services and that the designation 'map&guide' allows for an 'immediate identification' of that product and those services (paragraph 40 of the judgment). Furthermore, the Court of First Instance erred in law when it assumed that the sign 'map&guide' enables the relevant public 'to establish immediately, and without reflection, a specific and direct relationship with the computer software [product] and the computer programming services for computers providing the function of (city) maps and (travel) guides' (paragraph 47 of the judgment). Finally, it is claimed in the judgment that the 'computer software' product group and the 'computer programming' services group may also include goods and services which have the function of providing (city) maps and (travel) guides.

The interpretation of Article 7(1)(b) of Regulation No 40/94 adopted by the Court of First Instance in the judgment is incorrect. Contrary to the assumption of the Court of First Instance the mark applied for does not lack distinctive character. The mark applied for is not descriptive. A 'specific and direct relationship' and an 'immediate identification' may only be assumed to exist if the term at issue is one which directly designates the product or services in question or describes characteristics which 'attach to' the particular goods or services immediately or per se. That does not apply to the designation 'map&guide'. It neither designates the 'computer software' product or the 'computer programming' services directly nor makes a statement regarding an essential characteristic which is immediately associated with the product or services. The public does not have the opportunity 'to establish immediately, and without reflection, a specific and direct relationship with the computer software [product] and the computer programming services for computers providing the function of (city) maps and (travel) guides'. Furthermore, neither the 'computer programming' services nor the 'computer software' product can 'provide' the function of a (city) map or a (travel) guide.

The connection which the Court of First Instance in the judgment assumed to exist between the designation 'map&guide' and the specifically referred to 'computer software' product and 'computer programming' services is not present at the outset, but is only artificially contrived.

<sup>(1)</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

**Appeal brought on 18 December 2006 by Commission of the European Communities against the judgment of the Court of First Instance (Fourth Chamber, Extended Composition) delivered on 27 September 2006 in Case T-168/01: GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission of the European Communities**

(Case C-513/06 P)

(2007/C 42/22)

*Language of the case: English*

**Parties**

*Appellant:* Commission of the European Communities (represented by: T. Christoforou, F. Castillo de la Torre et E. Gippini Fournier, Agents)

*Other parties to the proceedings:* European Association of Euro Pharmaceutical Companies (EAEP), Bundesverband der Arzneimittel-Importeure eV, Spain Pharma, SA, Asociación de exportadores españoles de productos farmacéuticos (Aseprofar), GlaxoSmithKline Services Unlimited, anciennement Glaxo Wellcome plc

**Form of order sought**

The applicant claims that the Court should:

- set aside points 1 and 3 to 5 of the operative part of the judgment of the Court of First Instance of 27 September 2006 in Case T-168/01, GlaxoSmithKline Services Ltd. v. Commission of the European Communities;
- give final judgment in the matter by dismissing the application for annulment in Case T-168/01 as unfounded;
- order the Applicant in Case T-168/01 to pay the costs of the Commission arising from that case and from the present appeal.

**Pleas in law and main arguments**

The Commission agrees with the conclusions of the Court of First Instance concerning the reasoning of the contested decision; the existence of an agreement between undertakings; the alleged misuse of powers and the alleged infringement of the principle of subsidiary and of Article 43 EC.

Concerning the part of the judgment dealing with existence of an anticompetitive 'effect' the Commission contests the reasoning followed by the Court of First Instance. It maintains that the Court's analysis confirming the existence of the restrictive 'effects' constitutes in reality an analysis of the restrictive 'object' of the agreement having due regard to the legal and economic context, and should have led the Court to confirm the Decision's finding that the agreement had an anticompetitive object. Concerning the other findings about 'effects', the Commission has serious objections in particular regarding: the definition of the relevant market; the dismissal of the Commission's findings under Article 81(1)(d) with the legally erroneous argument that the different prices were charged on different geographic markets; and a number of other findings made in the in the judgment where the Court substitutes its own

assessment of the factual and economic evidence for that of the Commission, an exercise that is not permissible in judicial review. However, given that the Commission shares the ultimate conclusions reached by the Court, i.e. that the agreement in question produced anticompetitive effects, it does not intend at this stage to raise grounds of appeal against this part of the judgment.

The present appeal raises two series of pleas. The first series relates to the findings concerning Article 81(1), and in particular the errors of law and distortions in the interpretation and application of the notion of 'object' in the provision, as well as the many distortions, errors of law, and inadequacies or contradictions in the reasoning in relation with 'legal and economic context' of the agreement. The second series of pleas relates to the findings under Article 81(3): first and foremost those relating to the first condition contemplated in this provision, but also the lack of examination of several other conditions.

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**Appeal brought on 20 December 2006 by the Commission of the European Communities against the judgment of the Court of First Instance (First Chamber) delivered on 27 September 2006 in Case T-153/04 Ferriere Nord SpA v Commission of European Communities**

**(Case C-516/06 P)**

(2007/C 42/23)

*Language of the case: Italian*

#### **Parties**

*Appellant:* Commission of the European Communities (represented by: V. Di Bucci and F. Amato, Agents)

*Other party to the proceedings:* Ferriere Nord SpA

#### **Form of order sought**

- The Court is asked to set aside the judgment appealed against in so far as it declares admissible the action for annulment brought by Ferriere Nord against the Commission's letter of 5 February 2004 and its fax of 13 April 2004;
- declare inadmissible and accordingly dismiss the action for annulment brought by Ferriere Nord against the contested acts;
- order Ferriere Nord to pay the costs of the proceedings, together with the costs of the proceedings at first instance.

#### **Pleas in law and main arguments**

In so far as it declares admissible the action brought at first instance, the judgment of the Court of First Instance of 27 September 2006 in Case T-153/04 *Commission of the Euro-*

*pean Communities v Ferriere Nord SpA* infringes the first paragraph of Article 230 EC, read in conjunction with Article 249 EC, concerning the interpretation of the concept of an act against which proceedings can be brought, fails to state reasons or states incorrect reasons and is vitiated by a lack of jurisdiction on the part of the Court of First Instance.

The Court of First Instance did not demonstrate that the contested acts produced binding legal effects likely to affect the interests of the applicant at first instance, thereby bringing about a significant change in its legal position. The Court of First Instance also based its finding of admissibility on the assumption, also unsubstantiated, that a presumption of lawfulness attached to the acts contested at first instance. Lastly, the Court of First Instance exceeded the powers conferred on it by the Treaty.

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**Action brought on 20 December 2006 — Commission of the European Communities v Republic of Austria**

**(Case C-517/06)**

(2007/C 42/24)

*Language of the case: German*

#### **Parties**

*Applicant:* Commission of the European Communities (represented by: G. Braun and E. Montaguti)

*Defendants:* Republic of Austria

#### **Form of order sought**

The Court is asked to:

- declare that, by failing to adopt, in the Steiermark and Salzburg Länder, the laws, regulations and administrative provisions necessary to comply with Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information <sup>(1)</sup> or, in any event, by failing to communicate them to the Commission, the Republic of Austria has failed to fulfil its obligations under that directive;
- order the Republic of Austria to pay the costs.

#### **Pleas in law and main arguments**

The period prescribed for transposition of the directive expired on 1 July 2005.

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<sup>(1)</sup> OJ 2003 L 345, p. 90.