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Information and Notices

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I

(Information)

COMMISSION

Ecu (1)

24 July 1989

(89/C 188/01)

Currency amount for one ecu:

Belgian and Luxembourg franc con.	43,4398	Spanish peseta	130,170
Belgian and Luxembourg franc fin.	43,5241	Portuguese escudo	173,586
German mark	2,07447	United States dollar	1,08810
Dutch guilder	2,34018	Swiss franc	1,78939
Pound sterling	0,671047	Swedish krona	7,07049
Danish krone	8,06121	Norwegian krone	7,60584
French franc	7,03567	Canadian dollar	1,29343
Italian lira	1496,69	Austrian schilling	14,6056
Irish pound	0,775720	Finnish markka	4,66034
Greek drachma	179,298	Japanese yen	154,968
		Australian dollar	1,45449
		New Zealand dollar	1,88907

The Commission has installed a telex with an automatic answering device which gives the conversion rates in a number of currencies. This service is available every day from 3.30 p.m. until 1 p.m. the following day.

Users of the service should do as follows:

— call telex number Brussels 23789;

— give their own telex code;

— type the code 'cccc' which puts the automatic system into operation resulting in the transmission of the conversion rates of the ecu;

— the transmission should not be interrupted until the end of the message, which is marked by the code 'ffff'.

Note: The Commission also has an automatic telex answering service (No 21791) providing daily data on calculation of monetary compensatory amounts for the purposes of the common agricultural policy.

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(1) Council Regulation (EEC) No 3180/78 of 18 December 1978 (OJ No L 379, 30. 12. 1978, p. 1), as amended by Regulation (EEC) No 2626/84 (OJ No L 247, 16. 9. 1984, p. 1).

Council Decision 80/1184/EEC of 18 December 1980 (Convention of Lomé) (OJ No L 349, 23. 12. 1980, p. 34).

Commission Decision No 3334/80/ECSC of 19 December 1980 (OJ No L 349, 23. 12. 1980, p. 27).

Financial Regulation of 16 December 1980 concerning the general budget of the European Communities (OJ No L 345, 20. 12. 1980, p. 23).

Council Regulation (EEC) No 3308/80 of 16 December 1980 (OJ No L 345, 20. 12. 1980, p. 1).

Decision of the Council of Governors of the European Investment Bank of 13 May 1981 (OJ No L 311, 30. 10. 1981, p. 1).

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) concerning a request for the application of Article 85 (3) of the EEC Treaty (Case No IV/32.452 — Fluke — Philips)

(89/C 188/02)

1. **Summary.** On 29 September 1987, Philips International BV, also acting on behalf of John Fluke Manufacturing Company Inc. ('Fluke') of Everett, Washington, USA, submitted a notification to the Commission in accordance with Article 4 of Regulation No 17 regarding the agreements of indefinite duration concluded between Philips Export BV ('Philips') and Fluke for the distribution of testing and measurement ('T + M') products which are used in monitoring the performance of electrical and electronic equipment. Both Philips companies cited above belong to the group of companies of which NV Philips' Gloeilampenfabrieken of Eindhoven, the Netherlands, is the holding company, and all relevant affiliated Philips companies are party to the agreements. Under the respective agreements, Fluke will be the exclusive distributor of certain Philips T + M products in the USA, Canada, Mexico and certain other countries, while Philips will be the exclusive distributor of certain Fluke T + M products in all remaining countries, including the Member States of the European Communities. Only the latter agreement requires exemption under the competition rules of the EEC Treaty.

2. **The market.** The T + M market, worth approximately US $ 6,5 billion worldwide in 1985 (all figures are estimates for 1985) is expanding rapidly and is characterized by a large diversity of products and fast technological changes. It is dominated by US manufacturers, which supply approximately 70 % of the Community market. There are half a dozen important US manufacturers aside from Fluke, half a dozen European manufacturers of relatively minor importance aside from Philips, and several Japanese manufacturers. Two US manufacturers (Hewlett Packard and Tektronix) account for about one-third of the West European market, while nearly 50 % of the market is covered by relatively small European producers who sell only regionally or by very specialized (also non-European) firms who offer narrow product ranges. Philips and Fluke taken together account for the major part of the remaining 15 % of the market; Fluke's market share has remained at a relatively low level (less than 5 %) in Europe over the past five years. Worldwide, the combined market shares of the two companies amount to approximately 5 %.

3. **The parties.** The Philips group produces a wide range of products. Sales of T + M products account for less than 1 % of the total sales of the Philips group. Fluke, on the contrary, operates solely on the T + M market (total world turnover: $ 200 million, of which $ 48 million in Europe).

4. **The products.** Philips' core T + M products include oscilloscopes, logic analysers, electric counters and multimeters, while Fluke's core products are calibrators, digital test systems and digital multimeters. Aside from these core products, the agreement also covers data acquisition/logging equipment and generators; Fluke's data acquisition equipment must be tied to a computer and provides for numerical data, whereas Philips' data logging equipment provides for direct graphic printouts on paper; the parties' respective generators perform on different frequencies.

The product ranges of the two parties are thus largely complementary, except with respect to multimeters. Although the parties' respective market shares in the Community for all T + M equipment are relatively small (see point 2), their combined market shares for the three different kinds of multimeters (system multimeters, bench multimeters, and high-end handheld multimeters) are higher, on average 20 %. However, the combined sales of these overlap products represent only approximately 1 % of the total Community market for T + M products.

5. **The exclusive distribution agreements.** Philips wishing to increase its presence in the USA and other major non-European countries where its market shares are negligible, and Fluke wishing to do likewise in, *inter alia*, the Community, where despite having set up subsidiaries and other forms of distribution over the last 20 years it has attained only a minor market share, the two parties decided to enter into mutual exclusive distribution agreements to improve the marketing and distribution of each party's products in the territory of the other. There is a non-competition obligation which prevents the parties from selling competing products of third parties, but each will in principle continue selling its own T + M products in its own territory, e.g. Philips will sell Fluke and Philips T + M products side-by-side in the Community, to the exclusion of other competing products. With respect to sales of all products, each party will remain solely responsible for determining its policies on prices, customer support and servicing.

6. **Regulation (EEC) No 1983/83.** Although the parties' respective product ranges are largely complementary (see above under point 4), they are direct competitors with respect to certain types of multimeters. The agreement pertaining to sales in the Community is therefore not entirely covered by the block exemption Regulation for exclusive distribution agreements (2), by

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) Commission Regulation (EEC) No 1983/83, OJ No L 173, 30. 6. 1983, p. 1.

virtue of Article 3 (a) thereof. However, the parties have submitted that the requirements of Article 85 (3) are fulfilled in this case and that individual exemption is therefore warranted, whereby the following considerations must be taken into account:

(a) given Philips' need to expand its presence in, *inter alia*, the USA, where its market share at present is negligible, and Fluke's relatively minor position in the Community despite its presence there during many years, it seems reasonable that the parties have turned to each other to rationalize and improve the marketing and distribution of their respective products which, aside from a small overlap, are complementary; each party will continue to sell its own products next to those of its partner;

(b) except for the problem of the overlap, the exclusive distribution agreement as such does not contain any provisions which would stand in the way of automatic exemption under the Regulation;

(c) the overlap constitutes only a small part of the parties' respective product ranges: the combined sales of system, bench and high-end handheld multimeters by both parties account for only approximately 1 % of the total T+M market in the Community. The parties argue that it would not be economically feasible and certainly not rational for Fluke to set up separate distribution channels for only those products, which generally need expert technical handling and servicing;

(d) competition in the T+M sector in general, and thus also in the market for multimeters, is very active and according to the parties there are no technical or commercial barriers to entry;

(e) parallel exports of Fluke products from the USA have always existed and are not barred by this agreement: customers in the Community are still free to place orders directly in the USA and a small percentage of the total Fluke business in the Community takes place via direct shipments from the USA, either from multinational customers with headquarters or subsidiaries there, or from US based export houses. Although the Community list price is higher than the US list price, this difference is mainly accounted for by costs for handling, shipment and various selling expenses such as guarantees, installation, advertising, technical support and servicing; a profit margin is also included. The costs are, according to the parties, normal for high technology products and would have to be borne in any event, even if a customer went directly to Fluke. The parties underline that Fluke's end-user prices in the Community have remained the same since 1986.

7. **Preliminary conclusion.** The above elements seem to indicate that the advantages which the agreement will bring about in terms of rationalizing distribution and thus improving the sale of the products concerned outweigh the disadvantages resulting from the fact that there is a small overlap in the parties' respective product ranges. Normally, the Commission considers that an undertaking will not be likely actively to promote a competitor's products and thereby jeopardize the sale of his own products; this reasoning is the basis for Article 3 (a) of Regulation (EEC) No 1983/83. However, in this case, where the parties sell mainly complementary products, their behaviour may be expected to be different from the normal situation envisaged by Article 3 (a): each party is interested in increasing its market share in the other's territory. Thus, Philips must invest adequate efforts in selling Fluke products in *inter alia*, the Community in order to ensure that Fluke will make the same efforts in promoting Philips products in *inter alia*, the USA, these efforts necessarily relate to the entire product range, including the overlap products. The parties note that customer preferences and loyalty are quite strong in this sector and that demand for overlap products should be sufficient for each party to continue its own production.

The Commission's intention. On the basis of the foregoing facts and arguments, the Commission intends either to take a decision granting an exemption pursuant to Article 85 (3) of the Treaty or to have its Directorate-General for Competition send a favourable provisional letter as described in the notice on procedures concerning notifications [1]. Before doing so, it invites interested third parties to send their observations within one month from the publication of this notice to the following address, quoting the reference IV/32.452 — Fluke — Philips:

Commission of the European Communities,
Directorate-General for Competition (IV),
Directorate for Restrictive Practices, Abuse of Dominant Positions and Other Distortions — I,
200, rue de la Loi,
B-1049 Brussels.

[1] OJ No C 295, 2. 11. 1983, p. 6.

Commission communication within the framework of the provisions of Council Regulation (EEC) No 4257/88 of 19 December 1988, applying to general tariff preferences for 1989 with regard to certain industrial products originating in developing countries

(89/C 188/03)

Within the framework of the provisions of Council Regulation (EEC) No 4257/88 (OJ No L 375 of 31. 12. 1988) of 19 December 1988 the Commission informs that the following quotas have been used up after obligatory returns have been made:

Order No	Description	Country of origin	Quota amount (in ECU)	Date of exhaustion
10.0980	Other pumps and compressors	Brazil	8 600 000	3. 7. 1989
10.1320	Entertainment articles	Hong Kong	2 000 000	27. 6. 1989

Communication of Decisions for granting financial assistance from EAGGF

(89/C 188/04)

Decision of 5 July 1989 Member State concerned: *Greece*

Base: Regulation (EEC) No 4253/88 (coordination of interventions of the structural funds) (1)

Decision for granting financial assistance from EAGGF, Guidance Section, for an operational programme regarding grubbing-up of apricot trees and replacement by other crops in certain areas of Peloponesos (Greece).

Decision of 5 July 1989 Member State concerned: *Greece*

Base: Regulation (EEC) No 4253/88 (coordination of interventions of the structural funds) (1)

Decision for granting financial assistance from EAGGF, Guidance Section, for an operational programme to combat phylloxera which has affected the vineyards of Crete (Greece).

(1) OJ No L 374, 31. 12. 1988, p. 1.

Decision to renew a term of office

(89/C 188/05)

By Decision of 17 July 1989, the Commission renewed the office of Mr. Clive John Purkiss as Director of the European Foundation for the improvement of Living and Working Conditions for a period of five years as from 15 May 1990.

COURT OF JUSTICE

JUDGMENT OF THE COURT

(Second Chamber)

of 27 June 1989

in Joined Cases 48, 106 and 107/88: (references for a preliminary ruling made by the Raad van Beroep, Utrecht, and the Raad van Beroep, Groningen): J. E. G. Achterberg-te Riele and Others v. Sociale Verzekeringsbank (1)

(Equal treatment for men and women — Social security — Scope* ratione personae *of Directive 79/7)

(89/C 188/06)

(Language of the case: Dutch)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Joined Cases 48, 106 and 107/88: references to the Court under Article 177 of the EEC Treaty by:

1. the Raad van Beroep, Utrecht (Netherlands), for a preliminary ruling in the proceedings pending before that court between J. E. G. Achterberg-te Riele, residing in Utrecht, and the Sociale Verzekeringsbank ((Social Insurance Bank)) Amsterdam, (Case 48/88);

2. the Raad van Beroep, Groningen (Netherlands), for a preliminary ruling in the proceedings pending before that court between M. A. Bernsen-Gustin, residing in Borger-Compascuum, and the Sociale Verzekeringsbank, Amsterdam, (Case 106/88); and

3. the Raad van Beroep, Groningen, for a preliminary ruling in the proceedings pending before that court between K. Egbers-Reuvers, residing in Zwartenmeer, and the Sociale Verzekeringsbank, Amsterdam, (Case 107/88), on the interpretation of certain provisions of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, — the Court (Second Chamber), composed of T. F. O'Higgins, President of the Chamber, G. F. Mancini und F. A. Schockweiler, Judges; Advocate-General: M. Darmon; H. A. Rühl, Principal Administrator, for the Registrar, gave a judgment on 27 June 1989, the operative part of which is as follows:

   1. *Article 2 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as not applying to persons who have not had an occupation and are not seeking work or to persons who have had an occupation which was not interrupted by one of the risks referred to in Article 3 (I) (a) of the Directive and are not seeking work;*

   2. *The reply given above is not affected if the person concerned stopped working and was no longer available on the labour market before the last date for transposing the Directive;*

   3. *A person who is not referred to by Article 2 of Directive 79/7/EEC may not rely on Article 4 thereof.*

(1) OJ No C 72, 18. 3. 1988, and OJ No C 132, 21. 5. 1988.

JUDGMENT OF THE COURT

(Sixth Chamber)

of 27 June 1989

in Case 50/88: (reference for a preliminary ruling made by the Finanzgericht, München [Finance Court, Munich]: H. Kühne v. Finanzamt München III [Tax Office, Munich III] (1)

(VAT — Taxation of private use of a business car purchased second-hand in circumstances where the residual proportion of the VAT was not deductible)

(89/C 188/07)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Case 50/88: reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht München for a preliminary ruling in the proceedings pending before that court between H. Kühne, Munich, and Finanzamt München, Munich III — on the interpretation of Article 6 (2) (a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (*Official Journal of the European Communities* No L 145, 1977, p. 1) — the Court (Sixth Chamber), composed of T. Koopmans, President of the Chamber, T. F. O'Higgins, G. F. Mancini, C. N. Kakouris and F. A. Schockweiler, Judges; F. G. Jacobs, Advocate-General; J.-G. Giraud, Registrar, gave a judgment on 27 June 1989, the operative part of which is as follows:

1. *Article 6 (2) (a) of the Sixth Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment*

(1) OJ No C 74, 22. 3. 1988.

must be interpreted as precluding the taxation of the depreciation of business goods by reason of their private use where the value added tax on such goods was not deductible because they were purchased from a non-taxable person;

2. *The reply given above is the same where, although the taxable person was not able to deduct the value added tax in respect of the supply of the goods to him, he was none the less able to deduct the value added tax on the goods or services which he sought and obtained from other taxable persons for the maintenance or use of the goods;*
3. *The second sentence of Article 6 (2) of the Sixth Directive does not allow Member States to tax the private use of business goods where the value added tax on such goods was not wholly or partly deductible;*
4. *Article 6 (2) of the Sixth Directive may be relied on by a taxable person before the courts of a Member State inasmuch as that provision precludes taxation of the private use of business goods where the value added tax on those goods was not wholly or partly deductible.*

JUDGMENT OF THE COURT

(Second Chamber)

of 27 June 1989

in Case 88/88 (reference for a preliminary ruling made by the Bundesverwaltungsgericht): REWE — Handelsgesellschaft Nord mbH v. Überwachungsstelle für Milcherzeugnisse und Handelsklassen (1)

(Water content of frozen poultry — Conditions under which checks are conducted)

(89/C 188/08)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Case 88/88: reference to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht [Federal Administrative Court] for a preliminary ruling in the proceedings pending before that court between REWE — Handelsgesellschaft Nord mbH and Überwachungsstelle für Milcherzeugnisse und Handelsklassen [Supervisory Bureau for Dairy Products and Goods Classification] — on the interpretation of the second indent of the second subparagraph of Article 3 (2) of Council Regulation (EEC) No 2967/76 of 23 November 1976 laying down common standards for the water content of frozen and deep-frozen chickens, hens and cocks (*Official Journal of the European Communities* No L 339, 1976, p. 1) — the Court (Second Chamber), composed of T. F. O'Higgins, President of the Chamber, G. F. Mancini and F. Schockweiler, Judges; F. G. Jacobs, Advocate-General; B. Pastor, Administrator, for the Registrar, gave a judgment on 27 June 1989, the operative part of which is as follows:

The second indent of the second subparagraph of Article 3 (2) of Regulation (EEC) No 2967/76 does not prohibit national rules under which any batch of goods from which a sample has been taken must be withheld from the market until the inspection procedure has been completed. Nevertheless, such a suspension of marketing may not exceed the time needed for an effective inspection.

(1) OJ No C 100, 15. 4. 1988.

JUDGMENT OF THE COURT

(Third Chamber)

of 27 June 1989

in Case 113/88: (reference for a preliminary ruling made by the Finanzgericht Baden-Württemberg): Karl Leukhardt v. Hauptzollamt Reutlingen (1)

(Additional levy on milk)

(89/C 188/09)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Case 113/88: reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Baden-Württemberg for a preliminary ruling in the proceedings pending before that court between Karl Leukhardt and Hauptzollamt [Principal Customs Office] Reutlingen — on the interpretation and validity of Articles 3 (3) and 2 (1) and (2) of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation EEC No 804/68 in the milk and milk products sector (*Official Journal of the European Communities* No L 90, 1984, p. 13) — the Court (Third Chamber), composed of F. Grévisse, President of the Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges; F. G. Jacobs, Advocate-General; S. Hackspiel, acting as Administrator, for the Registrar, gave a judgment on 27 June 1987, the operative part of which is as follows:

1. *Article 3 (3) of Council Regulation (EEC) No 857/84 of 31 March 1984 must be interpreted as meaning that a producer whose milk production was appreciably affected by an exceptional event throughout the 1981 to 1983 period may not opt to have taken into account the quantity of milk or milk equivalent which he delivered in a year prior to 1981;*

2. *Examination of Article 3 (3) of Council Regulation (EEC) No 857/84 of 31 March 1984 has disclosed no factor of such a kind as to affect the validity of that provision;*

3. *Articles 2 (1) and (2) and 3 (3) of Council Regulation (EEC) No 857/84 of 31 March 1984 must be interpreted*

(1) OJ No C 120, 7. 5. 1988.

as meaning that a producer whose milk production was appreciably affected by an exceptional event in the reference year chosen by the relevant Member State may not require that his delivery reference quantity be calculated, at his option, either according to the method laid down in Article 2 (2) of Regulation (EEC) No 857/84 taking another calendar reference year as the basis, or according to the method laid down in Article 2 (1) of that regulation, taking as the basis the quantity of milk or milk equivalent delivered in the 1981 calendar year, plus 1 %.

JUDGMENT OF THE COURT

(First Chamber)

of 28 June 1989

in Case 164/88: (reference for a preliminary ruling made by the Tribunal de Grande Instance, Paris): Ministère Public v. J.-P. M. Rispal and Others (1)

(Common Customs Tariff — Magic cubes)

(89/C 188/10)

(Language of the case: French)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Case 164/88: reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance [Regional Court], Paris, (31st Criminal Chamber), for a preliminary ruling in the proceedings pending before that court between Ministère Public and J.-P. M Rispal, G. M. R. Vairon, J. N. A. Cresson, R. Bizot, Sodetair SA, a company incorporated under French law, whose registered office is in Paris, Frêt et Transit Aérien SA, a company incorporated under French law, whose registered office is at Orly, and Frecom, a company incorporated under French law, whose registered office is in Paris — on the tariff classification of goods known as 'magic cubes' or 'magicubes' — the Court (First Chamber), composed of R. Joliet, President of the Chamber, Sir Gordon Slynn and G. C. Rodriguez Iglesias, Judges; W. Van Gerven, Advocate-General; D. Louterman, Principal Administrator, for the Registrar, gave a judgment on 28 June 1989, the operative part of which is as follows:

In March, April and May 1981 heading No 97.03 of the Common Customs Tariff was to be interpreted as including goods known as 'magic cubes'.

(1) OJ No C 176, 5. 7. 1988.

JUDGMENT OF THE COURT

(Sixth Chamber)

of 29 June 1989

in Joined Cases 250/86 and 11/87: RAR, Refinarias de Açucar Reunidas SA v. Council and Commission of the European Communities (1)

(Application for a declaration that a measure is void — Admissibility — Aid for raw sugar refineries)

(89/C 188/11)

(Language of the case: Portuguese)

In Joined Cases 250/86 and 11/87: RAR, Refinarias de Açucar Reunidas SA, whose registered office is in Oporto, represented and assisted by Nuno Ruiz, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Guy Harles, 4 avenue Marie-Thérèse, against the Council of the European Communities (Agents: Antonio Sacchettini, Antonio Lucidi and I. Lopes Cardoso), supported by the Commission of the European Communities (Agents: Luis Antunes and Peter Oliver) (in Case 250/86) and against the Commission of the European Communities (Agents: Luis Antunes and Peter Oliver) (in Case 11/87) — application for a declaration under the second paragraph of Article 173 of the EEC Treaty that Article 3 of Council Regulation (EEC) No 2225/86 of 15 July 1986 laying down measures for the marketing of sugar produced in the French overseas departments and for the equalization of the price conditions with preferential raw sugar (*Official Journal of the European Communities* No L 194, 1986, p. 7) and Articles 2 (1) (b) and 6 (b) of Commission Regulation (EEC) No 3214/86 of 22 October 1986 adopting measures for the supply of raw sugar from beet harvested in the Community to Portuguese refineries during the 1986/87 marketing year (*Official Journal of the European Communities* No L 299, 1986, p. 24) are void, — the Court (Sixth Chamber), composed of T. Koopmans, President of the Chamber, G. F. Mancini, C. N. Kakouris, F. A. Schockweiler and M. Díez de Velasco, Judges; J. Mischo, Advocate-General, H. A. Rühl, Principal Administrator, acting as Registrar, gave a judgment on 29 June 1989, the operative part of which is as follows:

1. *The applications are dismissed as inadmissible;*

2. *The applicant is ordered to pay the costs of the Council and the Commission.*

(1) OJ No C 280, 6. 11. 1986, and OJ No C 40, 18. 2. 1987.

JUDGMENT OF THE COURT

(Sixth Chamber)

of 29 June 1989

in Case 22/88: (Reference for a preliminary ruling made by the College van Beroep voor het Bedrijfsleven, the Netherlands): Industrie- en Handelsonderneming Vreugdenhil BV and Gijs van de Kolk — Douane Expediteur BV v. Minister van Landbouw en Visserij (1)

(Rules applicable to returned goods — Applications to products from intervention)

(89/C 188/12)

(Language of the case: Dutch)

(Provisional translation; the definitive translation will be published in Reports of Cases before the Court)

In Case 22/88: reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven [Court of last instance in matters of trade and industry], the Netherlands, for a preliminary ruling in the proceedings pending before that court between Industrie- en Handelsonderneming Vreugdenhil BV, a limited liability company under Netherlands law, whose registered office is at Voorthuizen (the Netherlands) and Gijs van de Kolk — Douane Expediteur BV, a limited liability company under Netherlands law, whose registered office is at Harderwijk (the Netherlands), on the one hand, and the Minister van Landbouw en Visserij [Netherlands Minister for Agriculture and Fisheries], on the other hand — on the validity of Article 13a of Commission Regulation (EEC) No 1687/76 of 30 June 1976 laying down common detailed rules for verifying the use and/or destination of products from intervention (*Official Journal of the European Communities* No L 190, 1976, p. 1), as inserted in that regulation by Commission Regulation (EEC) No 45/84 of 6 January 1984 amending Regulation (EEC) No 1687/76 (*Official Journal of European Communities* No L 7, 1984, p. 5) — the Court (Sixth Chamber), composed of T. Koopmans, President of the Chamber, G. F. Mancini, C. N. Kakouris, F. A. Schockweiler and M. Díez de Velasco, Judges; W. van Gerven, Advocate-General; H. A. Rühl, Principal Administrator, acting as Registrar, gave a judgment on 29 June 1989, the operative part of which is as follows:

Article 13a of Commission Regulation (EEC) No 1687/76 of 30 June 1976 laying down common detailed rules for verifying the use and/or destination of products from intervention, as inserted in that Regulation by Commission Regulation (EEC) No 45/84 of 6 January 1984 amending Regulation (EEC) No 1687/76, is invalid.

(1) OJ No C 51, 23. 2. 1988.

Action brought on 26 June 1989 by the Association pour le Développement à Charleroi, d'Actions Collectives de Formation pour l'Université Ouverte (Funoc) against the Commission of the European Communities

(Case 200/89)

(89/C 188/13)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 26 June 1989 by the Association pour le Développement à Charleroi, d'Actions Collectives de Formation pour l'Université Ouverte (Funoc), represented by G. Vandersanden of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume.

The applicant claims that the Court should:

1. Declare this application admissible and well founded;

2. Declare void the Commission Decision of 21 April 1989 ordering the applicant to reimburse Bfrs 6 570 334 and withholding payment of the balance (Bfrs 6 600 000) in the context of project No 84 3246 B 5 of the European Social Fund;

3. Order the defendant to pay Bfrs 10 730 173 in compensation for material damage and Bfrs 5 000 000 in compensation for non-material damage;

4. Order the defendant to pay all the costs.

Contentions and main arguments adduced in support:

Ultra vires: although under Article 6 (1) of Commission Regulation (EEC) No 2950/83 the Commission can withdraw European Social Fund assistance, a head of division is purporting to take such a decision. It is scarcely conceivable that a decision of such importance could be delegated to the level of head of division.

Breach of the rules relating to the European Social Fund: the Commission did not first give the Member State concerned an opportunity to comment (Article 6 (1), cited above).

Manifest error of appraisal and error of law: the applicant correctly implemented the innovative project which it had undertaken to carry out.

In the alternative: breach of the principle of proportionality.

Application for damages

The applicant suffered material damage consisting of:

(a) losses as a result of giving notice of dismissal to contract staff;

(b) legal interest on the balance of the European Social Fund assistance the payment of which is late;

(c) the increase in operating and equipment expenses;

(d) the increase in expenses owing to hiring equipment which was to have been purchased.

The non-material damage results from the harm done to the reputation of the applicant association.

II

(Preparatory Acts)

COMMISSION

Re-examined proposal for a Council Decision to adopt a first plan to support and facilitate access to large-scale scientific facilities of European interest

(COM(89) 90 final — SYN 93)

(Submitted by the Commission pursuant to Article 149 (2) (d) of the EEC Treaty on 23 February 1989)

(89/C 188/14)

PART I

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular to Article 130q (2),

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the terms of Article 130 k of the Treaty provide that implementation of the framework programme be carried out by means of specific programmes developed within each of the action lines;

Whereas Council Decision 87/516/Euratom/EEC of 28 September 1987 (1) adopting the multiannual framework programme 1987 to 1991 includes the use of major installations amongst the activities it provides for;

Whereas one of the objectives of the Community R&D efforts for 1987 to 1991 *is to promote better use of human resources in the Community as a whole and to improve the utilization of large-scale scientific and technical installations through the addition of a European dimension;*

Whereas the present plan whilst being consistent with the pursuit of scientific excellence will help to improve the Community's competitiveness in the field of research and at the same time strengthen economic and social cohesion in the Community;

Whereas the Commission will ensure that the research carried out under this plan falls solely within the scope of the EEC Treaty, even in cases where the facility or installation used may not be wholly or partially covered by that Treaty;

Having regard to the opinion of the Scientific and Technical Research Committee (CREST) on the Commission proposal,

HAS ADOPTED THIS DECISION:

Article 1

An experimental Community plan to support and facilitate access to scientific and technical facilities and installations situated in the Community hereinafter referred to as the 'plan' — as defined in the Annex — is hereby adopted for a four-year period commencing on 1 January 1989.

Article 2

1. The plan consists of temporary financial support measures designed to facilitate access to and thereby develop the exploitation of large-scale scientific facilities situated in the European Community.

2. To achieve this objective, the Community will provide financial support for operations chosen on the basis of their scientific and technical quality. Such operations, which will be selected in conformity with the procedure laid down in Article 3 of the present Decision, must be based on joint proposals from the institutions or bodies responsible for the facilities and from the scientists or research workers wishing to acquire access to them.

3. Community financial support for the operations will be used to contribute as necessary to:

(1) OJ No L 302, 24. 10. 1987.

— the operating costs of the facilities and, if necessary, the cost of adaptations and/or special features to meet the objectives set out in paragraph 1,

— incidental expenditure arising from the operations,

— expenditure incurred by the scientists or research workers including expenditure on mobility and travel.

4. The scientists or research workers acquiring access to a facility as a result of Community financial support under this plan shall be nationals of a Member State of the European Community. Financial support under this plan shall only be granted to provide access to a scientific facility for scientists or research workers not normally enjoying access to the facility in questions.

5. The Commission shall notify the Council and the Parliament, within a maximum period of three months from their selection, of the list of beneficiaries (scientific installations and researchers) of the plan.

6. The precise objectives of the plan, together with its detailed modalities for implementation, are set out in Annex I.

Article 3

1. The Commission shall be responsible for implementing the plan.

2. The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

3. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

Article 4

The funds estimated as necessary for the execution of the plan amount to ECU 30 million including expenditure on a staff of three.

Article 5

The Commission shall address a report to the Council and to the European Parliament after 30 months on the basis of an evaluation of the results so far achieved. This report shall be accompanied by suggestions for changes which may be necessary in the light of these results.

After completion of the plan, the Commission shall send to the Council and the European Parliament a report on the performance and results of the plan.

The abovementioned reports should be prepared in relation to the precise objectives set out in Annex I to this Decision and in conformity with the provisions of Article 2 (2) of the framework programme.

Article 6

This Decision is addressed to the Member States.

ANNEX

OBJECTIVES AND IMPLEMENTATION PROCEDURES

The plan takes the form of a number of temporary financial support measures, aimed at encouraging access to large-scale scientific and technical installations within the Community. It is of potential benefit to all researchers in the physical biological sciences who are nationals of one of the Community Member States.

1. Objectives

The precise objectives of the plan take the following form:

— to encourage access by researchers who are nationals of Community Member States to major scientific and technical installations within the Community to which they would not normally enjoy access,

— to increase training opportunities available to European researchers so as to enable them to make better use of major scientific and technical installations,

— to develop the use of large-scale scientific and technical facilities within the Community, where necessary by adaptation and/or the addition of special features.

2. **Potential beneficiaries**

Community financial support may be made available to:

— any organization within the Community which possesses major scientific and technical equipment or an installation of interest to the physical and biological sciences,

— any researcher or engineer who is a national of one of the Community Member States and is currently working in a public or private sector laboratory in one of the Member States. All fields of the physical and biological sciences are eligible.

3. **Procedural arrangements**

3.1. *Call for proposals and selection procedure*

(a) The Commission will publish a call for preliminary proposals from organizations or groups of organizations within the Community having one or more major scientific and technical installations with experimental and/or test facilities which could be made available to scientists or research workers who have hitherto been unable to use them.

The Commission will also ensure that scientists and research workers who could potentially benefit under the plan from access to the facilities in question are informed of the possibilities likely to become available.

The preliminary proposals received from those responsible for the large-scale facilities should be accompanied by a written statement of interest expressed by potential new users.

All information related to the call for proposals and selection procedures will be published simultaneously in all Community languages, with the aim of ensuring conditions of equal participitation in all the countries of the European Community.

(b) The Commission will draw up a draft preselection list of preliminary proposals to be retained. The committee referred to in Article 3 will be informed of the proposals received and will give an opinion on the draft preselection list according to the procedure set out in Article 3 (3). The Commission will then establish a preselection list of facilities which will be published in the *Official Journal of the European Communities.*

(c) On the basis of the preselection list, the Commission will ask for joint proposals from the installations and potential users concerned. The Commission may, if necessary, assist in the organization of meetings between those responsible for the installations and potential users (financing of joint meetings, etc.).

(d) The Commission will submit the list of joint proposals received to the committee, which shall, in accordance with the procedure set out in Article 3 (3), give an opinion on the operations with a view to financial support from the plan. The Commission will then proceed to the final selection of the operations to benefit from Community support.

3.2. *Choice of installations to receive Community support*

Criteria of selection

The assessment of the value of Community support will be based upon an evaluation of the proposal put forward, on the basis of the following criteria:

(a) Quality of the facility:

— specific characteristics,

— originality or uniqueness,

— up-to-dateness,

— range of experiments or tests possible,

— backup and technical support available;

(b) Interest shown by potential users:

— priority will be given to researchers from Member States other than that in which the major installation is situated.

(c) Cost/benefit ratio of Community support:

— the number and quality of opportunities made available at the facility in return for Community support;

(d) Value to the Community:

— importance of the facility in respect of the Community's overall scientific and technical potential,

— value of the experimental opportunities made available in terms of achieving the Community's scientific and technical objectives (potential links with sectoral R&D objectives),

— value of the facility in terms of strengthening the scientific and technical potential of certain countries or regions of the Community.

3.3. *Mechanisms for giving Community support to selected installations*

The Commission will conclude an agreement with the recipient organization or institution which will set out:

— the level of Community funding,

— the uses to which it may be put, including a quantification of the opportunities for access to visiting scientists,

— the obligations imposed upon the recipient organization.

The obligations imposed on the recipient organization include, *inter alia:*

— enabling the use of the equipment and installations forming the subject of the agreement at no extra charge by researchers not belonging to the recipient organization or institution, this being for a fixed period of time over the year,

— ensuring access by visiting scientists to the scientific and technical back-up services on site.

The contracts will also specify:

— the payment from Community funds to visiting scientists and research workers of all eligible expenditure covered by the plan,

— the methods by which the results arising from research carried out under the agreement are to be protected, disseminated and exploited.

Finally, the Commission will, in cooperation with the installations concerned, take all appropriate measures to ensure the best possible implementation of the operations selected (programming, availability of machine time, etc.).

3.4. *Implementation report*

At the end of each year of Community support, the beneficiary organization or institute will make a report to the Commission upon the use to which the funds awarded to them were put, and the results arising from the use which outside researchers made of the facilities made available to them in the context of the agreement signed with the Commission.

PART II

Comment of the Commission on the amendment of Parliament which is not accepted by the Commission

1. During its meeting of 15 February 1989, the European Parliament, in its second reading of the common position on the plan to support and facilitate access to large-scale scientific facilities of European interest, adopted the attached amendment.

2. The Commission can not accept this amendment because of the following reasons:

The amendment refers to the annual budgetary procedures and has been tabled repeatedly. The Commission believes that this amendment is not necessary as Article 130, of the EEC Treaty already covers this issue.

ANNEX

Amendment of Parliament which is not accepted by the Commission

Amendment No 7

Article 4

The funds estimated as necessary for the execution of the plan amount to ECU 30 000 including expenditure on a staff of three.

Each year, as part of the annual budgetary procedure, the Commission shall propose to the Budgetary Authority that these funds be allocated to the title covering the programme in accordance with the real needs for the financial year in question and the financial estimates contained in the Interinstitutional Agreement.

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