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(Information)

COURT OF JUSTICE

COURT OF JUSTICE

JUDGMENT OF THE COURT

(Fifth Chamber)

of 2 February 2006

in Case C-143/05: Commission of the European Communities v Kingdom of Belgium [1]

(Failure of a Member State to fulfil obligations — Directive 2002/84/EC — Failure to transpose within the prescribed period)

(2006/C 96/01)

(Language of the case: Dutch)

In Case C-143/05: Commission of the European Communities (Agents: K. Simonsson and W.Wils) v Kingdom of Belgium (Agent: M. Wimmer) — action under Article 226 EC for failure to fulfil obligations, brought on 29 March 2005 — the Court (Fifth Chamber), composed of J. Makarczyk, President of the Chamber, R. Schintgen and J. Klučka (Rapporteur), Judges; C. Stix-Hackl, Advocate General; R. Grass, Registrar, gave a judgment on 2 February 2006, in which it:

1. *Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2002/84/EC of the European Parliament and of the Council of 5 November 2002 amending the Directives on maritime safety and the prevention of pollution from ships, the Kingdom of Belgium has failed to fulfil its obligations under that directive;*

2. *Orders the Kingdom of Belgium to pay the costs.*

[1] OJ C 143 of 11.06.2005.

Appeal brought on 28 November 2005 by Ricosmos B.V. against the judgment delivered by the Court of First Instance of the European Communities (First Chamber) on 13 September 2005 in Case T-53/02 Ricosmos v Commission of the European Communities

(Case C-420/05 P)

(2006/C 96/02)

(Language of the case: Dutch)

An appeal was brought before the Court of Justice of the European Communities on 28 November 2005 by Ricosmos B.V., represented by J.J.M. Hertoghs and J.H. Peek, of the law firm Hertoghs Advocaten-Belastingkundigen, Parkstraat 8, (4818 SK) Breda, Netherlands, against the judgment of the Court of First Instance of the European Communities (First Chamber) of 13 September 2005 in Case T-53/02 *Ricosmos B.V.* v *Commission of the European Communities*.

The appellant claims that the Court should:

— declare the present appeal to be admissible and well founded;

— set aside the judgment delivered by the Court of First Instance on 13 September 2005;

— grant the application made at first instance for the annulment of Commission Decision REM 09/00 of 16 November 2001 stating that remission of import duties in favour of the present appellant was not justified;

— alternatively, remit the case to the Court of First Instance for further consideration;

— order the Commission to pay the costs of the present proceedings and of those at first instance.

Pleas in law and main arguments

In support of its appeal against the aforementioned judgment, the appellant makes the following submissions:

1. The appellant takes the view that the Court of First Instance proceeded on the basis of an incorrect, or at any rate unduly restricted, interpretation of, in particular, Articles 905 to 909 of the regulation implementing the Community Customs Code [1] with regard to the procedure for the repayment and/or remission of customs duties. The principle of legal certainty requires that the legal situation of Ricosmos should have been foreseeable in this particular case. Ricosmos takes the view that, because of suspensions of the proceedings of which it was not informed, that was not the case here. The Court of First Instance also proceeded incorrectly on the basis of an overly restricted view of the rights of the defence, reflected in its excessively circumscribed interpretation of the right to timeous and full access to the case files (both that of the national customs authorities and that of the Commission):

2. The appellant considers that the decision of the Court of First Instance is also at variance with Community law. It takes the view that the principle of legal certainty also implies that the criteria for determining that there was no obvious negligence must be clear and readily identifiable. It is precisely because of the considerable flexibility of the term 'obvious negligence' that those criteria ought in principle to be construed restrictively and individually. The negligence must be evident and essential and must also be in a clear causal relationship with the special situation which has been established. In this case, the Court of First Instance wrongly attached in this regard no, or not enough, weight to the complexity of the legislation and to the significant professional experience of the appellant, and also misconstrued a number of obligations on the appellant, or at any rate appraised them in an overly formalistic manner;

3. The appellant is also of the view that the Commission infringed the principle of proportionality and that the Court of First Instance also attached no, or at any rate insufficient, weight to new facts which suggested that the customs duties charged ought to have been cancelled;

4. In conclusion, the appellant expresses the view that the establishment by the Court of First Instance of the facts underlying the dispute was in part erroneous or in any event incomplete.

[1] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

References for a preliminary ruling from the Finanzgericht Hamburg by orders of that court of 10 and 12 January 2006 in Viamex Agrar Handels GmbH (Case C-37/06) and ZVK Zuchtvieh-Kontor GmbH (Case C-58/06) v Hauptzollamt Hamburg-Jonas

(Cases C-37/06 and C-58/06)

(2006/C 96/03)

(Language of the cases: German)

Reference has been made to the Court of Justice of the European Communities by orders of the Finanzgericht Hamburg (Hamburg Finance Court) of 10 and 12 January 2006, received at the Court Registry on 23 January 2006 and 3 February 2006, for a preliminary ruling in the proceedings between Viamex Agrar Handels GmbH (Case C-37/06) and ZVK Zuchtvieh-Kontor GmbH (Case C-58/06) v Hauptzollamt Hamburg-Jonas on the following questions:

1. Is Article 1 of Regulation (EC) No 615/98 [1] valid inasmuch as it links the grant of an export refund to compliance with Directive 91/628/EEC [2] on the protection of animals during transport?

2. If the first question should be answered in the affirmative: Is Article 5(3) of Regulation (EC) No 615/98, according to which export refunds are not to be paid for animals for which the competent authority considers, in the light of all elements at its disposal concerning compliance with Article 1 of Regulation (EC) No 615/98, that the Directive on the protection of animals during transport was not complied with, compatible with the principle of proportionality?

[1] OJ L 82, p. 19.

[2] OJ L 340, p. 17.

Action brought on 27 January 2006 by the Commission of the European Communities against the Kingdom of the Netherlands

(Case C-50/06)

(2006/C 96/04)

(Language of the case: Dutch)

An action against the Kingdom of the Netherlands was brought before the Court of Justice of the European Communities on 27 January 2006 by the Commission of the European Communities, represented by Maria Condou-Durande and Rudi Troosters, acting as Agents, with an address for service in Luxembourg.

The Commission of the European Communities claims that the Court should:

1. declare that, by not applying to citizens of the European Union Council Directive 64/221/EEC ([1]) of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, but rather applying to them general legislation on aliens which makes it possible to establish a systematic and automatic connection between a criminal conviction and an expulsion measure, the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 64/221/EEC;

2. order the Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

Article 8(e) of the Netherlands Vreemdelingenwet (Law on Aliens) 2000 provides that an alien will be lawfully resident in the Netherlands as a Community national only on condition that that national is resident on the basis of a rule, including a rule *pursuant to* the EC Treaty.

Most of the provisions of the Vreemdelingenwet 2000 are otherwise applicable in full to '*aliens*' in general, that term being construed, in accordance with Article 1(m) of the Law, as also covering nationals of a Member State of the EU. As such, no reference is made in the Vreemdelingenwet to Directive 64/221/EEC and the principles contained in that directive are not incorporated in the text of the Law. *A fortiori*, the obligations resulting from Directive 64/221/EEC have not been transposed in a clear and unambiguous manner in that legislation.

([1]) OJ, English Special Edition 1963-1964, p. 117.

Reference for a preliminary ruling from the Verwaltungsgericht Köln by order of that court of 26 January 2006 in Arcor AG & Co. KG v Federal Republic of Germany, interested party: Deutsche Telekom AG

(Case C-55/06)

(2006/C 96/05)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Verwaltungsgericht Köln (Administrative Court, Cologne) (Germany) of 26 January 2006, received at the Court Registry on 2 February 2006, for a preliminary ruling in the proceedings between Arcor AG & Co. KG and Federal Republic of Germany, interested party: Deutsche Telekom AG, on the following questions:

1. Is Article 1(4) of Regulation (EC) No 2887/2000 ([1]) to be understood as meaning that the conditions for cost-orientation under Article 3(3) of that regulation lay down minimum requirements in the sense that national law of the Member States may not deviate from that standard to the prejudice of beneficiaries?

2. Are imputed interest and cost-accounting depreciation also encompassed by the cost-orientation requirement under Article 3(3) of Regulation (EC) No 2887/2000?

3. If Question 2 is to be answered in the affirmative:

   (a) Is the calculation basis for that interest and depreciation the replacement value of the assets after the depreciation made prior to the time of valuation, or is the calculation basis exclusively the current replacement value, expressed in terms of current daily prices at the time of valuation?

   (b) In any event, do the costs used as the calculation basis for imputed interest and cost-accounting depreciation, in particular those which are not directly associated with service (overheads), have to be proven by comprehensible documents detailing the costs of the notified operator?

(c) If Question 3(b) is to be answered either entirely or partially in the negative:

May the costs alternatively be proven by a valuation made on the basis of an analytical cost model?

Which methodological and other substantive requirements do those alternative methods of valuation have to satisfy?

(d) Is the national regulatory authority entitled, when assessing cost-orientation in the context of its authority under Article 4(1) to (3) of Regulation (EC) No 2887/2000, to a so-called scope for evaluation which is subject only to limited judicial control?

(e) If Question 3(d) is to be answered in the affirmative:

Is that scope also applicable, in particular, to methods of cost calculation and questions of determining the appropriate amount of imputed interest (for borrowed and/or own capital) and appropriate depreciation periods?

Where do the boundaries of that scope lie?

(f) Do the cost-orientation requirements at least serve to protect the rights of competitors as beneficiaries, with the consequence that those competitors can make use of legal protection against rates for access which are not set on the basis of cost-orientation?

(g) Does the notified operator bear the burden of unprovability (burden of proof) if, in the supervisory procedure under Article 4 of Regulation (EC) No 2887/2000 or in the subsequent judicial proceedings, costs are totally or partially unverifiable?

(h) If Questions 3(f) and 3(g) are to be answered in the affirmative:

Is the burden of proof for the cost-orientation also on the notified operator if a beneficiary competitor brings an action against rates approved by a regulatory authority under national law on the ground that, since they were not set on the basis of cost-orientation, the approved rates for access are too high?

(1) OJ 2000 L 336, p. 4.

Appeal brought on 3 February 2006 by Luigi Marcuccio against the judgment delivered on 24 November 2005 by the Fifth Chamber of the Court of First Instance of the European Communities in Case T-236/02 Luigi Marcuccio v Commission of the European Communities

(Case C-59/06 P)

(2006/C 96/06)

(Language of the case: Italian)

An appeal against the judgment of the Court of First Instance (Fifth Chamber) of 24 November 2005 in Case T-236/02 Luigi Marcuccio v Commission of the European Communities was brought before the Court of Justice of the European Communities on 3 February 2006 by Luigi Marcuccio, represented by L. Garofolo, avvocato.

Parties

Appellant: Luigi Marcuccio (represented by: L. Garofolo)

The other party to the proceedings before the Court of First Instance: Commission

The appellant claims that the Court should:

— set aside the judgment under appeal and grant the other forms of order sought by the appellant.

Pleas in law and main arguments

The appellant claims that the judgment of the Court of First Instance is flawed by reason of:

1. distortion and misrepresentation of the facts and the statements made by the appellant in his written submissions which, in turn, led to substantial inaccuracy in the findings of fact made by the Court of First Instance;

2. failure to give a ruling on a number of fundamental issues in the case;

3. procedural errors of a serious nature such as to damage irreparably the interests of the appellant;

4. total failure to state grounds concerning a number of vital issues in the case by reason, inter alia, of a failure to make inquiries and the fact that the reasons supposedly put forward by way of justification were confused, inconsistent, inadequate, unreasonable, tautologous, arbitrary, self-evident and illogical as regards both primary and secondary grounds;

5. misinterpretation and misapplication of the second paragraph of Article 26 of the Staff Regulations of Officials of the European Communities;

6. misinterpretation and misapplication of the concept of the right to a fair hearing and unconsidered and illogical failure properly to apply the relevant case-law;

7. misinterpretation and misapplication of the concept of statement of reasons and unconsidered and illogical failure properly to apply the relevant case-law;

8. misinterpretation and misapplication of the concept that a statement of reasons should be consistent;

9. misinterpretation and misapplication of the concept that a preparatory measure cannot be challenged;

10. misinterpretation and misapplication of the concept of an opinion;

11. misinterpretation and misapplication of the concept that a decision that has been issued cannot be amended.

Action brought on 6 February 2006 by the Commission of the European Communities against the Hellenic Republic

(Case C-67/06)

(2006/C 96/07)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 6 February 2006 by the Commission of the European Communities, represented by Minas Konstantinidis and Amparo Alcover San Pedro, of its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

— declare that, by not adopting, and in any event by not notifying to the Commission, the laws, regulations and administrative provisions necessary to comply with Directive 2002/49/EC [1] of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise, the Hellenic Republic has failed to fulfil its obligations under that directive;

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of the directive into domestic law expired on 18 July 2004.

[1] OJ No L 189, 18.7.2002, p. 12.

Reference for a preliminary ruling from the Finanzgericht Köln by order of that court of 19 January 2006 in Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern

(Case C-73/06)

(2006/C 96/08)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Finanzgericht Köln of 19 January 2006, received at the Court Registry on 8 February 2006, for a preliminary ruling in the proceedings between Planzer Luxembourg Sàrl and Bundeszentralamt für Steuern on the following questions:

1. Does an undertaking's certificate according to the specimen form in Annex B to the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country [1] have binding effect or create an irrefutable assumption that the undertaking is established in the State issuing the certificate?

2. If the first question should be answered in the negative:

   Should the term 'business' in Article 1(1) of the Thirteenth Directive be construed as meaning the place where the company has its registered office

   or should it mean the place where management decisions are taken

   or is the crucial factor the place where decisions vital to normal everyday operations are taken?

[1] OJ L 331, p. 11

Action brought on 14 February 2006 by the Commission of the European Communities against the Republic of Austria

(Case C-91/06)

(2006/C 96/09)

(Language of the case: German)

An action against the Republic of Austria was brought before the Court of Justice of the European Communities on 14 February 2006 by the Commission of the European Communities, represented by B. Schima and F. Simonetti, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

1. declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ([1]) or by failing to communicate those provisions to the Commission, the Republic of Austria has failed to fulfil its obligations under Article 13(1) of that directive;

2. order the Republic of Austria to pay the costs.

Pleas in law and main arguments

The period prescribed for transposing Directive 2001/42 into national law expired on 21 July 2004.

([1]) OJ L 197, 21.7.2001, p. 30.

Reference for a preliminary ruling from the Finanzgericht Hamburg by order of that court of 23 January 2006 in Viamex Agrar Handels GmbH v Hauptzollamt Hamburg-Jonas

(Case C-96/06)

(2006/C 96/10)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Finanzgericht Hamburg (Germany) of 23 January 2006, received at the Court Registry on 17 February 2006, for a preliminary ruling in the proceedings between Viamex Agrar Handels GmbH and Hauptzollamt Hamburg-Jonas on the following questions:

1. Does Article 5(3) of Regulation No 615/98 ([1]) constitute an exclusion, with the consequence that the burden of proof in respect of the requirements of Article 5(3) of Regulation No 615/98 is on the Principal Customs Office?

2. If the first question is answered in the affirmative: In order to conclude under Article 5(3) of Regulation No 615/98 that the directive has not been complied with, is it necessary to have proof that there has been an infringement of Directive 91/628/EEC ([2]) in the particular case, or does the competent authority discharge its burden of proof if it relies on and provides evidence of circumstances which in an overall view indicate a material probability that the directive on the protection of animals during transport has not been complied with (also) in relation to the export consignment in question?

3. Irrespective of the answers to questions 1 and 2: May the competent authority refuse to pay (all of) the export refund to the exporter under Article 5(3) of Regulation No 615/98 where there are no indications that the (potential) infringement of Directive 91/628/EEC has in fact been deleterious to the wellbeing of the animals during transport in relation to the export consignment in question?

([1]) OJ L 82 of 19.3.1998, p. 19.
([2]) OJ L 240 of 11.12.1991, p. 17.

Reference for a preliminary ruling from the Oberlandesgerichts Stuttgart by order of that court of 7 February 2006 in Raiffeisenbank Mutlangen eG v Roland Schabel, other parties: 1. President of the Landgericht Unkel (Regional Court, Unkel), 2. District Auditor Stiglmair

(Case C-99/06)

(2006/C 96/11)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Oberlandesgerichts Stuttgart of 7 February 2006, received at the Court Registry on 21 February 2006, for a preliminary ruling in the proceedings between Raiffeisenbank Mutlangen eG and Roland Schabel, other parties: 1. President of the Landgericht Unkel (Regional Court, Unkel), 2. District Auditor Stiglmair on the following question:

Is Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985 ([1]), to be interpreted as meaning that the charges of a notary employed as a civil servant for the drawing up of a notarially attested act recording a transaction covered by that directive constitute taxes for the purposes of that directive where, first, under the relevant national legislation, also notaries who are civil servants may be authorised to practise and are themselves owed the charges in question, and, second, although the notaries who are employed as civil servants have to remit to the Treasury, out of the fees for the recording of transactions in matters of company law covered by that directive, only a fixed reimbursement for expenses in the amount of 15 % of those fees, they must, in respect of other activities, remit to the Treasury charges exceeding a (fixed) reimbursement for expenses, which the State uses to fund its activities.

([1]) OJ L 156, p. 23.

Action brought on 21 February 2006 by the Commission of the European Communities against the Republic of Austria

(Case C-102/06)

(2006/C 96/12)

(Language of the case: German)

An action against the Republic of Austria was brought before the Court of Justice of the European Communities on 21 February 2006 by the Commission of the European Communities, represented by C. O'Reilly and W. Bogensberger, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ([1]) or, in any event, by failing to communicate those provisions to the Commission, the Republic of Austria has failed to fulfil its obligations under that directive;

2. order the Republic of Austria to pay the costs.

Pleas in law and main arguments

The period prescribed for transposing Directive 2003/9 into national law expired on 6 February 2005.

([1]) OJ L 31, 06.02.2003, p. 18

Action brought on 22 February 2006 by the Commission of the European Communities against the Kingdom of Sweden

(Case C-104/06)

(2006/C 96/13)

(Language of the case: Swedish)

An action against the Kingdom of Sweden was brought before the Court of Justice of the European Communities on 22 February 2006 by the Commission of the European Communities, represented by L. Ström van Lier and R. Lyal, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

1. declare that, by adopting and maintaining in force tax legislation according to which deferred taxation on capital gains which arise on the sale of owner-occupied property when the taxable person acquires a replacement property is permitted only if the property sold and the property acquired are both within Swedish territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 18, 39, 43 and 56(1) EC and Articles 28, 31 and 40 EEA.

2. order the Kingdom of Sweden to pay the costs.

Pleas in law and main arguments

Swedish income tax law contains provisions on deferred taxation on the sale of private immovable property and the rights thereto. A taxpayer may defer taxation if he/she accounts for capital gains on the basis of a sale which includes a permanent dwelling in Sweden and has acquired or intends to acquire a replacement property in Sweden and has moved or intends to move into the replacement property. However, no deferral of taxation is permitted if the properties sold and newly acquired are situated outside Swedish territory. The above conditions constitute a clear obstacle to the exercise of the fundamental freedoms enshrined in the EC Treaty and the EEA Agreement.

The Swedish rules are not appropriate to ensure the coherence of the Swedish tax system since, with regard to a single taxpayer, there is no direct link between the fiscal advantage (the deferred taxation) and the compensation for that advantage through a tax levy within the framework of the same taxation. In all the circumstances, the Swedish rules are disproportionate to the aim they seek to achieve.

Action brought on 27 February 2006 by the Commission of the European Communities against the Slovak Republic

(Case C-114/06)

(2006/C 96/14)

(Language of the case: Slovak)

An action against the Slovak Republic was brought before the Court of Justice of the European Communities on 27 February 2006 by the Commission of the European Communities, represented by G. Zavvos and Tomáš Kukal, acting as Agents, with an address for service in Luxembourg.

The Commission claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system ([1]), or alternatively by failing to notify those measures to the Commission, the Slovak Republic has failed to fulfil its obligations under that directive;

2. order the Slovak Republic to pay the costs.

Pleas in law and main arguments

The period for adopting measures to transpose the directive expired on 1 May 2004.

([1]) OJ L 235 of 17. 9. 1996, p. 6.

Action brought on 2 March 2006 by the Commission of the European Communities against the Hellenic Republic

(Case C-123/06)

(2006/C 96/15)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 2 March 2006 by the Commission of the European Communities, represented by Dominique Maidani and Georgios Zavvos, Legal Advisers in its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

— declare that, by not adopting, and in any event by not notifying to the Commission, the necessary laws, regulations and administrative provisions in order to comply with Directive 2001/24/EC ([1]) of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, the Hellenic Republic has failed to fulfil its obligations under that directive;

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

In the case in point, Article 34 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 5 May 2004 at the latest and are immediately to inform the Commission thereof.

([1]) OJ No L 125, 5.5.2001, p. 15.

Action brought on 2 March 2006 by the Commission of the European Communities against the Hellenic Republic

(Case C-124/06)

(2006/C 96/16)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 2 March 2006 by the Commission of the European Communities, represented by Gerald Braun, of its Legal Service, and Georgios Zavvos, Legal Adviser in its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

— declare that, by not adopting, and in any event by not notifying to the Commission, the necessary laws, regulations and administrative provisions in order to comply with Directive 2003/51/EC ([1]) of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, the Hellenic Republic has failed to fulfil its obligations under that directive;

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

In the case in point, Article 5 of Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1 January 2005 at the latest and are immediately to inform the Commission thereof.

([1]) OJ No L 178, 17.7.2003, p. 16.

COURT OF FIRST INSTANCE

Judgment of the Court of First Instance of 22 February 2006 — *Le Levant* 001 and Others v Commission

(Case T-34/02) ([1])

(State aid — Concept of interested party — Formal notice to submit comments — Decision to open the procedure provided for in Article 88(2) EC — Tax deduction measure for certain overseas investments — Development aid for shipbuilding — Assessment in the light of Article 87(1) EC — Obligation to state reasons)

(2006/C 96/17)

Language of the case: French

Parties

Applicants: EURL *Le Levant* 001 (Paris, France) and the other applicants listed in the Annex to the judgment (represented by: P. Kirch and N Chahid-Nouraï, lawyers)

Defendant: Commission of the European Communities (represented by G. Rozet, acting as Agent)

Re:

Application for annulment of Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon (OJ 2001 L 327, p. 37).

Operative part of the judgment

The Court

1. *Annuls Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the form of development assistance for the cruise vessel Le Levant, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon;*

2. *Orders the Commission to bear its own costs and to pay the costs incurred by the applicants, including those relating to the interim proceedings.*

([1]) OJ 109, 4.5.2002.

Judgment of the Court of First Instance of 23 February 2006 — Cementbouw Handel & Industrie BV v Commission

(Case T-282/02) ([1])

(Competition — Control of concentration of undertakings — Articles 2, 3 and 8 of Regulation (EEC) No 4064/89 — Concept of concentration — Creation of a dominant position — Authorisation subject to compliance with certain commitments — Principle of proportionality)

(2006/C 96/18)

Language of the case: English

Parties

Applicant: Cementbouw Handel & Industrie BV (Le Cruquius, Netherlands) (represented by: W. Knibbeler, O. Brouwer and P. Kreijger, lawyers)

Defendant: Commission of the European Communities (represented by: initially, A. Nijenhuis, K. Wiedner and W. Mölls, and subsequently A. Nijenhuis, E. Gippini Fournier and A. Whelan, acting as Agents)

Application for

annulment of Commission Decision 2003/756/EC of 26 June 2002, relating to a procedure pursuant to Council Regulation (EEC) No 4064/89, declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK)) (OJ 2003 L 282, p. 1, corrigendum published in OJ 2003 L 285, p. 52)

Operative part of the judgment

The Court:

1. *Dismisses the application;*

2. *Orders the applicant to pay the costs.*

([1]) OJ C 274 of 9.11.2002.

Judgment of the Court of First Instance of 23 February 2006 — Il Ponte Finanziaria v OHIM

(Case T-194/03) ([1])

(Community trade mark — Opposition proceedings — Application for Community figurative mark composed of the word 'Bainbridge' — Earlier national, figurative three-dimensional and word marks including the word 'Bridge' — Proof of use — Use in a different form — 'Defensive' trade marks — Family of trade marks)

(2006/C 96/19)

Language of the case: Italian

Parties:

Applicant: Il Ponte Finanziaria (Scandicci, Italy) (represented by: P.L. Roncaglia, A. Torrigiani Malaspina and M. Boletto, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: M. Buffolo and O. Montalto, agents)

Other party to the proceedings before the Board of Appeal of OHIM intervening before the Court of First Instance: Marine Enterprise Projects — Società Unipersonale di Alberto Fiorenzi Srl (Numana, Italy) (represented by: D. Marchi, lawyer)

Action

brought against the decision of the Fourth Board of Appeal of OHIM of 17 March 2003 (Case R 1015/2001-4) relating to opposition proceedings between Il Ponte Finanziaria SpA and Marine Enterprise Projects — Società Unipersonale di Alberto Fiorenzi Srl

Operative part of the judgment

The Court:

1. *dismisses the action;*

2. *orders the applicant to pay the costs.*

([1]) OJ 2003 C 184.

Judgment of the Court of First Instance of 21 February 2006 — V v Commission

(Joined Cases T-200/03 and T-313/03) ([1])

(Officials — Dismissal for incompetence — Article 51 of the Staff Regulations — Manifest error of assessment — Misuse of power — Duty to have regard for the welfare of officials — Rights of the defence — Proportionality — Equality of treatment — Statement of reasons — Staff report — Admissibility — Legal interest in bringing proceedings)

(2006/C 96/20)

Language of the case: French

Parties

Applicant: V (Overijse, Belgium) (represented by: C. Mourato, lawyer)

Defendant: Commission of the European Communities (represented by: J. Currall, Agent)

Application for

Firstly, annulment of the appointing authority's decision to dismiss the applicant for incompetence and, secondly, annulment of the applicant's staff report for the 1999/2001 period

Operative part of the judgment

The Court:

1. *Dismisses actions T-200/03 and T-313/03;*

2. *Orders each party to bear the costs it incurred during these proceedings and during the interlocutory proceedings.*

([1]) OJ C 200, 23.8.2003.

Judgment of the Court of First Instance of 22 February 2006 — Nestlé v OHIM

(Case T-74/04) ([1])

(Community trade mark — Opposition procedure — Application for Community figurative trade mark including the word element 'QUICKY' — Earlier Community, national and international figurative trade marks including the word element 'QUICK' — Earlier national and international word marks 'QUICK' — Earlier national word marks 'QUICKIES' — Likelihood of confusion — Refusal to register — Article 8(1)(b) of Regulation (EC) No 40/94)

(2006/C 96/21)

Language of the case: French

Parties:

Applicant: Société des produits Nestlé SA (Vevey, Switzerland) (represented by: J. Evrard and P. Péters, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: A. Folliard-Monguiral, Agent)

Other party or parties to the proceedings before the Board of Appeal of OHIM intervening before the Court of First Instance: Quick restaurants SA (Brussels, Belgium) (represented by: É. De Gryse and D. Moreau, lawyers)

Action

brought against the decision of the Second Board of Appeal of OHIM of 17 December 2003 (Case R 922/2001-2) regarding opposition proceedings between Société des Produits Nestlé SA and Quick restaurants SA

Operative part of the judgment

The Court:

1. *dismisses the action;*

2. *orders the applicant to pay the costs in their entirety.*

([1]) OJ C 94, 17.4.2004.

Judgment of the Court of First Instance of 22 February 2006 — Adam v Commission

(Case T-342/04) ([1])

(Officials — Remuneration — Expatriation allowance — Article 4(1)(a) of Annex VII to the Staff Regulations — Definition of 'services carried out for another State')

(2006/C 96/22)

Language of the case: French

Parties

Applicant: Herta Adam (Brussels, Belgium) (represented by: S. Orlandi, A. Coolen, J.-N. Louis and É. Marchal, lawyers)

Defendant: Commission of the European Communities (represented by: J. Currall and L. Lozano Palacios, Agents)

Application for

Annulment of the Commission's decision of 2 September 2003 refusing the applicant the benefit of the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations of officials of the European Communities

Operative part of the judgment

The Court:

1. *Dismisses the application;*

2. *Orders each party to bear its own costs.*

([1]) OJ C 262, 23.10.2004.

Judgment of the Court of First Instance of 22 February 2006 — Standertskjöld-Nordenstam and Heyraud v Commission

(Joined Cases T-437/04 and T-441/04) ([1])

(Officials — 'Second round' promotion — 2003 promotion procedure — Failure to include on the list of the officials selected for promotion to Grade A3 — Breach of Article 45 of the Staff Regulations and of the principle of equal treatment)

(2006/C 96/23)

Language of the case: French

Parties

Applicants: Holger Standertskjöld-Nordenstam (Waterloo, Belgium) (represented by: T. Demaseure, lawyer) and Jean-Claude Heyraud (Brussels, Belgium) (represented by S. Orlandi, A. Coolen, J.-N. Louis and É. Marchal, lawyers)

Defendant: Commission of the European Communities (represented by: J. Currall and B. Berscheid, Agents)

Application for

Annulment of the Commission's decision not to include the applicants' names on the list of the officials selected for promotion to Grade A3 in the 'second round' of the 2003 promotion procedure

Operative part of the judgment

The Court:

1. *joins Cases T-437/04 and T-441/04 for the purposes of the judgment;*

2. *annuls the decisions of the Commission not to include the applicants' names on the list of the officials selected for promotion to Grade A3 in the 'second round' of the 2003 promotion procedure;*

3. *orders the Commission to pay the costs.*

([1]) OJ C 6, 8.1.2005.

Judgment of the Court of First Instance of 23 February 2006 — Karatzoglou v EAR

(Case T-471/04) [1]

(Member of the temporary staff — Termination of contract — Article 47(2)(a) of the Conditions of Employment of Other Servants of the European Communities — Observance of the provisions of the contract — Legitimate expectations)

(2006/C 96/24)

Language of the case: English

Parties

Applicant: Georgios Karatzoglou (Ioannina, Greece), represented by S. Pappas, lawyer)

Defendant: European Agency for Reconstruction (EAR) (represented by J.-N. Louis, S. Orlandi, X. Martin and C. Manolopoulos, lawyers)

Application

for annulment of the decision of the EAR of 26 February 2004 to terminate the applicant's contract of employment

Operative part of the judgment

The Court:

1. *Annuls the decision of the European Agency for Reconstruction (EAR) of 26 February 2004 terminating the applicant's contract of employment;*

2. *Orders the EAR to pay the costs.*

[1] OJ C 57, 5.3.2005.

Order of the Court of First Instance of 16 February 2006 — Centro Europa 7 v Commission

(Case T-338/04) [1]

(Article 86(3) EC — Rejection of complaint — Action for annulment — Plea of inadmissibility)

(2006/C 96/25)

Language of the case: Italian

Parties:

Applicant: Centro Europa 7 Srl (Rome, Italy) (represented by: V. Ripa di Meana and R. Mastroianni, lawyers)

Defendant: Commission of the European Communities (represented by: P. Oliver and F. Amato, Agents)

Intervener in support of the defendant: Mediaset SpA (Milan, Italy) (represented by: M. Bay, lawyer)

Application for

Annulment of the Commission's letter of 4 June 2004 [D (2004) 471] in so far as it rejects the applicant's complaint that the Italian Republic had infringed the combined provisions of Articles 86 EC and 82 EC.

Operative part of the Order

1. *The action is dismissed as inadmissible.*

2. *In addition to bearing its own costs, the applicant is ordered to pay the costs incurred by the Commission and the intervener.*

[1] OJ C 262 of 23.10.2004.

Order of the President of the Court of First Instance of 17 February 2006 — Nijs v Court of Auditors

(Case T-171/05 RII)

(Proceedings for interim relief — Officials — New action — Article 109 of the Rules of Procedure — New facts)

(2006/C 96/26)

Language of the case: French

Parties:

Applicant: Bart Nijs (Bereldange, Luxembourg) (represented by: F. Rollinger, lawyer)

Defendant: Court of Auditors of the European Communities (represented by: T. Kennedy, J.-M. Stenier and G. Corstens, Agents)

Application for

Suspension of operation of the Court of Auditors' decision of 2 December 2004 to promote an official other than the applicant to the post of principal translator at grade LA5 in the Dutch Section of the Translation Service of the General Secretariat of the Court of Auditors

Operative part of the order

1. *The application for interim measures is dismissed.*

2. *The costs are reserved.*

Action brought on 14 December 2005 — Daishowa Seiki v OHIM

(Case T-438/05)

(2006/C 96/27)

Language in which the application was lodged: German

Parties

Applicant: Daishowa Seiki Co. Ltd (Osaka, Japan) (represented by: T. Krüger, 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: Tengelmann Warenhandelsgesellschaft KG (Mülheim, Germany)

Form of order sought

— Annul Decision R928/2004-1 of the First Board of Appeal for the Office for Harmonisation in the Internal Market (Trade Marks and Designs), made on 7 September 2005;

— order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) to pay the costs of this action and of the objection proceedings R928/2004-1.

Pleas in law and main arguments

Applicant for a Community trade mark: Daishowa Seiki Co. Ltd

Community trade mark concerned: figurative mark 'BIG PLUS' for goods in Class 7 (Metal machine tools, parts and tool holders) Application no. 1 073 964

Proprietor of the mark or sign cited in the opposition proceedings: Tengelmann Warenhandelsgesellschaft KG

Mark or sign cited in opposition: The national figurative mark 'Plus' for goods, inter alia in Classes 6 and 8

Decision of the Opposition Division: Rejection of the opposition

Decision of the Board of Appeal: Setting aside of the decision of the Opposition Division

Pleas in law: Infringement of Article 8(1)(b) of EC Regulation No. 40/94, as there is no risk of confusion between the opposing trade marks, (i) due to the lack of similarity of the goods and trade marks, and (ii) because the distinctive character of the opposing trademark is limited to the graphical design.

Action brought on 25 January 2006 — Trioplast Wittenheim v Commission

(Case T-26/06)

(2006/C 96/28)

Language of the case: Swedish

Parties

Applicant: Trioplast Wittenheim AS (Wittenheim, France) (represented by: Tommy Pettersson, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— partially, annul Article 1(g) of the decision regarding the period during which the applicant is held responsible for the violation;

— partially, annul Article 2(f) of the decision regarding the fine imposed on the applicant; in the alternative reduce the fine;

— order the Commission to pay the applicant's costs.

Pleas in law and main arguments

The applicant appeals against the Commission's decision in Case COMP/F/38.354 — Industrial sacks (C(2005) 4634 final; hereinafter 'the contested decision') by which a fine of EUR 17.85 million is imposed on the applicant for participating in anticompetitive conduct in the market for industrial sacks in Belgium, Germany, Spain, France, Luxembourg and the Netherlands contrary to Article 81 EC.

The applicant does not dispute its participation in anticompetitive conduct up to 23 March 1999, but ceased its infringement in March 1999 when the applicant's new owner, Trioplast Industrier, became aware of the anticompetitive conduct. According to the applicant, the Commission has thus wrongly assessed the duration of the company's infringement.

Furthermore, the applicant argues, with regard to the gravity of the infringement, that, in comparison with the other companies involved, the Commission has imposed a basic amount which is too high by reference to the applicant's market share.

In addition, in support of its claim, the applicant submits that the Commission's method of calculation for determination of the fine was incorrect and that another method should have been used, by which account should have been taken of the fact that the applicant's infringement consists of three distinct periods of time, since the applicant was owned by three different owners (St. Gobain, FLS and Trioplast Industrier) over the time during which the infringement occurred. According to the applicant, the Commission's method gives the result that FLS and Trioplast Industrier's overall joint and several liability exceeds the total fine imposed on the applicant and that in practice FLS and Trioplast Industrier are held jointly and severally liable also to pay for the period when neither company owned the applicant.

Furthermore, the applicant takes the view that the Commission should have taken account of the fact that there are attenuating circumstances with regard to the applicant's infringement since the applicant was throughout a minor and passive participant in the infringement. Moreover, according to the applicant, the Commission did not take account of the 10 % rule in Regulation No 1/2003, [1] and the Commission should have granted the applicant leniency to a greater degree than was the case in the contested decision.

Finally, the applicant claims that the Commission has failed to apply the principles of legal certainty and proportionality.

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[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

Action brought on 27 January 2006 — Justerini & Brooks Limited v OHIM

(Case T-32/06)

(2006/C 96/29)

Language in which the application was lodged: English

Parties

Applicant(s): Justerini & Brooks Limited (London, United Kingdom) [represented by: B. Cordery, Solicitor]

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

Other party to the proceedings before the Board of Appeal: Elia Canelo Gutierrez (Talavera de la Reina, Spain)

Form of order sought

— annul the decision of the Second Board of Appeal of the OHIM of 23 November 2005 (Case R 36/2005-2) relating to Opposition Proceedings No. B 605 461, notification of which was received on 30 November 2005;

— order the OHIM to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: Figurative mark 'J&B' for goods and services in classes 14, 18, 21, 25, 33 and 43 (Community trade mark application No 2 696 383)

Proprietor of the mark or sign cited in the opposition proceedings: Elia Canelo Gutierrez

Mark or sign cited: International figurative trade mark 'JOB' for goods in class 33 (registration No 275 247)

Decision of the Opposition Division: Rejects opposition

Decision of the Board of Appeal: Annuls the contested decision and remits the case to the Opposition Division for further prosecution

Pleas in law: Violation of Articles 8(1)(b), 8(2)(iii) and 73 of Council Regulation (EC) No 40/94 and of procedural requirements, as contained in various rules of the Commission Regulation (EC) No 2868/95.

Action brought on 26 January 2006 — Bundesverband deutsche Banken e.V. Berlin v Commission of the European Communities

(Case T-36/06)

(2006/C 96/30)

Language of the case: German

Parties

Applicant: Bundesverband deutsche Banken e.V. Berlin (Germany) (represented by: H.-J. Niemeyer and K.-S. Scholz, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— annul the defendant's decision of 6 September 2005 [C(2005)3232 Final] in Case N 248/04 — Landesbank Hessen-Thüringen;

— order the defendant to pay costs.

Pleas in law and main arguments

The applicant challenges Commission Decision C(2005)3232 Final of 6 September 2005, in which the Commission determined that the notified transfer of the special Hessian Investment Fund as silent partnership participation to Landesbank Hessen-Thüringen ('Helaba') does not constitute state aid.

In support of its application, the applicant advances four pleas.

First, the applicant contends that the Commission has breached the duty to state reasons under Article 253 EC.

Second, the applicant supports its claim in contending that the defendant, by confirming the appropriateness of the agreed remuneration for the transfer to Helaba, has breached the principle of a private investor in a market economy and, thereby, Article 87(1) EC.

The applicant further claims that the Commission wrongly deducted the refinancing costs because of the lack of liquidity of the transfer to Helaba. The applicant contends that, for this reason, the Commission has breached the principle of a private investor in a market economy and, thereby, Article 87(1) EC.

Finally, the applicant submits that the right to a fair hearing has been infringed, on the ground that the Commission failed to open a formal investigation procedure under Article 88(2) EC and Article 6 of Regulation (EC) No 659/1999 in respect of the transfer to Helaba ([1]).

([1]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

Action brought on 7 February 2006 — MEGGLE Aktiengesellschaft v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case T-37/06)

(2006/C 96/31)

Language of the case: German

Parties

Applicant: MEGGLE Aktiengesellschaft (Wasserburg a. Inn, Germany) (represented by: T. Rabb, lawyer)

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

Other party to the proceedings before the Board of Appeal: Clover Corporation Limited (North Sydney, Australia)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 November 2005 and the opposition decision of the Opposition Division of the Office with competence for trade marks of 30 September 2004;

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for Community trade mark: Clover Corporation Limited

Community trade mark sought: Figurative mark 'HiQ with cloverleaf' for goods in Classes 5, 29 and 30 (No 2 171 114)

Proprietor of mark or sign cited in the opposition proceedings: The applicant

Mark or sign cited in opposition: the German figurative mark 'Cloverleaf' for goods in Classes 1, 3, 5, 29, 30, 31, 32 and 33 (No 980 458) and the German figurative mark 'Cloverleaf' for goods in Classes 1, 3, 5, 29, 30, 31, 32, 33 (No 39 652 600)

Decision of the Opposition Division: Rejection of the opposition

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Article 8(1)(b) of Regulation (EC) No 40/94 ([1]) has been incorrectly applied, on the ground that there exists a likelihood of confusion between the opposing marks. The marks show a high degree of similarity and the earlier mark has particular distinctive character. Article 74(1) of Regulation No 40/94 has been breached, on the ground that the defendant Office is in breach of its duty to examine the facts before it.

([1]) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

Action brought on 9 February 2006 — Trioplast Industrier v Commission

(Case T-40/06)

(2006/C 96/32)

Language of the case: Swedish

Parties

Applicant: Trioplast Industrier AB (Smålandsstenar, Sweden) (represented by: Tommy Pettersson, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— partially annul Article 1(g) of the decision in relation to the period during which the applicant is held liable for the infringement;

— partially annul Article 2(f) of the decision in relation to the fine imposed which the applicant is jointly liable to pay; in the alternative, reduce the fine;

— order the Commission to pay the costs.

Pleas in law and main arguments

The pleas in law and main arguments relied on by the applicant are identical to those relied on in Case T-26/06 *Trioplast Wittenheim* v *Commission*.

Action brought on 6 February 2006 — Republic of Poland v Commission of the European Communities

(Case T-41/06)

(2006/C 96/33)

Language of the case: Polish

Parties

Applicant: Republic of Poland (represented by: Paweł Szałamacha, Government Agent)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— declare invalid the decision of 18 October 2005 in Case COMP/M.3894 establishing that the merger of Unicredito Italiano SpA and Bayerische Hypo- und Vereinsbank AG is compatible with the common market;

— order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant seeks a declaration that the decision of the European Commission of 18 October 2005 in case COMP/M.3894 recognising the merger of the banks Unicredito Italiano SpA (UCI) and Bayerische Hypo- und Vereinsbank AG (HVB) as being compatible with the common market is invalid. Each of those banks has holdings in banking institutions in Poland and, according to the assertions made by the applicant, the effect of the proposed concentration will be the assumption of control by UCI over HBV's holding within the Polish banking market.

In support of its action, the applicant raises the following heads of complaint:

— breach of Article 2(1) of the Regulation on concentrations ([1]) by reason of what the applicant considers to be the inappropriate appraisal of the proposed concentration, in that the Commission failed to take account of the history of the banking sector in Poland, the large amount of foreign investment and the reasons why the Polish Government introduced limitations on investments in the event of the privatisation of State banks. The applicant further submits that the Commission breached Article 2(1) of the Regulation inasmuch as, when concluding its appraisal of the compatibility of the proposed concentration with the common market, it failed to take account of the existence and effects of Article 3(9) of the privatisation agreement, ([2]) which, in the view of the applicant, amounts to a legal barrier to market entry within the terms of Article 2(1)(b) of the Regulation on concentrations. The applicant also contends that the Commission adopted an inappropriate evaluation of concentrations on the Polish banking market and also erred in its appraisal of the effect which the proposed concentration would have on competition within the market for investment funds and a number of specific markets within the Polish banking sector;

— breach of Article 6(1) of the Regulation on concentrations, inasmuch as the proposed concentration ought, according to the applicant, to have given rise to serious doubts on the Commission's part as to its compatibility with the common market and should have led to the initiation of proceedings or the second phase of the investigation as to whether the proposed operation comes within the scope of the Regulation on concentrations;

— breach of Article 11 of the Regulation on concentrations, breach of Article 5 of the implementing regulation ([3]) and infringement of the principle of fair and proper administration; the applicant takes the view that the notification of the concentration, as indicated by the parties, was incomplete inasmuch as it did not contain any information on the matter of the conditions of the privatisation agreement, in particular Article 3 thereof, and as such should not at all have been taken into consideration by the Commission;

— breach of the duty to cooperate resulting from Article 10 of the Treaty establishing the European Community by reason of the failure, before the decision was adopted, to take into consideration the legitimate interests of the Republic of Poland, the protection of which is provided for in Article 21(4) of the Regulation on concentrations; in the view of the applicant, the Commission was under an obligation, prior to the adoption of the decision recognising the concentration as being compatible with the common market, to take action for the purpose of obtaining full information on any legitimate interests of the Member States, *a fortiori* as it was possible for the Commission, when monitoring the Polish banking market over the period prior to the Republic of Poland's accession to the European Union, to familiarise itself with the structure of that market, and the Commission must have been aware of the existence of a legitimate public interest on the part of the Polish Government in guaranteeing the application and implementation of the strategies of de-monopolisation and privatisation;

— breach of Article 253 EC and of the obligation to provide specific reasons for a decision, a failure which, in the view of the applicant, renders more difficult the reconstruction and monitoring of the correctness of the process by which the law is applied by the Commission.

([1]) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

([2]) Agreement on the sale of shares in Bank Polska Kasa Opieki Spółka Akcyjna – Grupa Pekao S.A. entered into on 23 June 1999 between the State Treasury of the Republic of Poland and Unicredito Italiano SpA and Allianz AG.

([3]) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1).

Action brought on 21 February 2006 — Fardem Packaging v Commission

(Case T-51/06)

(2006/C 96/34)

Language of the case: Dutch

Parties

Applicant: Fardem Packaging B.V. (Edam, Netherlands) (represented by: F.J. Leeflang, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— set aside in whole or in part the decision addressed to Fardem;

— reduce the fine imposed on Fardem;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The applicant is challenging the Commission decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags), in which the applicant was held to be jointly and severally liable in respect of its participation in a cartel and ordered to pay a fine.

In support of its action the applicant alleges breach of Article 81 EC, Article 253 EC, and Article 23(2) of Regulation No 1/2003, as well as infringement of the principle of care, the principle that reasons must be given, and the principle of equal treatment.

The applicant first submits that the Commission has misunderstood the applicant's defence with regard to its conduct both before and after 1997. While the applicant does not deny that it took part in the cartel, it points out that, prior to 1997, it was entirely dependent on its then parent company. After 1997, however, it was independent and its intentions altered gradually but fundamentally.

The applicant goes on to submit that the Commission proceeds on the basis of an erroneous appraisal of the facts with regard to the applicant's participation in the 'Valveplast', 'Benelux' and 'Teppema' groups, as also with regard to its participation in the 'Belgium' and 'Block Bags' groups. The applicant claims that the Commission accepted a number of conclusions which were negligent and inaccurate in regard to several forms of conduct. The applicant also points out that the Commission failed to take any account of the fact that the 'Belgium' and 'Block Bags' groups were terminated prior to 1997.

Furthermore, the applicant alleges that the Commission erred in its appraisal of the facts relating to the determination of geographical markets. The applicant points out in this regard that it has no turnover in Spain and only a minimal turnover in France.

The applicant also criticises the Commission on the ground that it did not apply the leniency notice to the applicant and that it failed to treat certain facts indicated by the applicant as amounting to mitigating circumstances.

With regard to the determination of the basic amount of the fine, the applicant disputes that the individual market shares were determined on the basis of turnover achieved instead of tonnage, the application of differentiated treatment in categories on the basis of market share and the expression of that differentiation in categories, as well as the application of the basic amount of the fine to each category as determined.

The applicant concludes that the Commission was wrong to decide that the applicant and Kendrion N.V. constituted an economic unit, on which ground Kendrion was unjustly fined as a result of a breach committed by the applicant.

Action brought on 21 February 2006 — Harry's Morato v OHIM

(Case T-52/06)

(2006/C 96/35)

Language of the case: Italian

Parties

Applicant: Harry's Morato SpA (Altavilla Vicentina, Italy) (represented by: Niccoló Ferretti, Giovanni Casucci, Fabio Trevisan, lawyers)

Defendant: Office for Harmonisation in the Internal Market (OHIM)

Other party to the proceedings before the Board of Appeal: Ferrero OhG mbH

Form of order sought

The applicant claims that the Court should:

— amend decision R 600/2005-1 of the First Board of Appeal of 16 December 2005;

— call on the OHIM to immediately register the trade mark 'Morato' further to the application for registration No 1 849 439 and subsequent restriction, in the absence of any real subjective impediment and in any case in view of the fact that it does not conflict with the trade mark 'MORATO', and order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant

Community trade mark concerned: Figurative mark 'Morato' (application for registration No 1 849 439), for goods in Class 30.

Proprietor of the mark or sign cited in the opposition proceedings: FERRERO OHG mbH.

Mark or sign cited in opposition: German word mark 'MORETTO' (No 39 707 273), for goods in Class 30.

Decision of the Opposition Division: Opposition allowed and refusal of the application for registration.

Decision of the Board of Appeal: Dismissal of the appeal.

Pleas in law: Lapse of the trade mark 'MORETTO' on grounds of lack of use, and the incorrect application of Article 8(1)(b) of Regulation (EC) No 40/94 (risk of confusion).

Action brought on 22 February 2006 — Kendrion v Commission

(Case T-54/06)

(2006/C 96/36)

Language of the case: Dutch

Parties

Applicant: Kendrion N.V. (Zeist, Netherlands) (represented by: P. Glazener and C.C. Meijer, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— set aside in whole or in part the decision addressed to the applicant, *inter alios*;

— set aside or reduce the fine imposed on the applicant;

— order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant is challenging the Commission Decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case No COMP/F/38.354 — Industrial bags), in which the applicant was held to be guilty of infringing the rules on competition and ordered to pay a fine.

In support of its action the applicant alleges breach of Article 81 EC, Article 253 EC and Article 15(2) of Regulation No 1/2003, on the ground that the operative part of the decision is inconsistent with its grounds. The applicant submits that, while it is not accused in the grounds of the contested decision of individual participation in the breach, it is accused in the operative part of breaching Article 81 EC.

The applicant goes on to submit that there has been a breach of Article 81 EC, Article 253 EC and Article 23(2) of Regulation No 1/2003 by reason of the fact that the Commission wrongly assumed that the applicant and Fardem Packaging B.V. formed a single economic unit, with the result that the applicant was unjustly fined as a result of a breach by Fardem Packaging.

The applicant submits that the Commission also breached Article 81 EC, Article 253 EC and Article 23(2) of Regulation No 1/2003 and infringed general principles of law, including the duty of care, the prohibition of arbitrary action, and the principles of equality and proportionality.

The applicant goes on to submit that the Commission held the applicant liable for a breach committed by Fardem Packaging, contrary to other Commission decisions in which the parent company was not held liable. Furthermore, the applicant, in its capacity as parent company, incurred a fine in excess of that for which the subsidiary, which committed the breach, was held jointly and severally liable. The applicant claims further that it was treated in a manner different to the other parent companies held jointly and severally liable for breaches committed by their subsidiaries. The fine imposed on the applicant also amounts, it argues, to an infringement of the principle of proportionality and the duty of care.

The applicant concludes by alleging a breach of the guidelines for the calculation of fines, in particular as Article 5(b) of those guidelines was not applied. The applicant submits that the Commission failed to take proper account of the specific characteristics of the undertaking.

Action brought on 22 February 2006 — RKW v Commission

(Case T-55/06)

(2006/C 96/37)

Language of the case: German

Parties

Applicant: RKW AG Rheinische Kunststoffwerke (Worms, Germany) (represented by: H.-J. Hellmann, lawyer)

Defendant: Commission of the European Communities

Forms of order sought

The applicant claims that the Court should:

— annul the defendant's decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case C(2005) 4635 final, COMP/F/38.354 — Industrial bags), served on the applicant on 14 December 2005, in so far as it concerns the latter;

in the alternative, reduce the fine imposed on the applicant;

— order the defendant to bear the costs of the proceedings.

Pleas in law and main arguments

The applicant challenges Commission Decision C(2005) 4634 final of 30 November 2005 in Case COMP/F/38.354 — Industrial bags. In the contested decision a fine was imposed on the applicant for infringement of Article 81 EC since, according to the Commission, it participated in a complex of agreements and concerted practices in the industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands.

In support of its action the applicant submits that the contested decision infringes the duty of administrative authorities to comply strictly with the law. The defendant's method of levying fines does not fall within the scope of the enabling provision, namely Article 15(2) of Regulation No 17/1962 ([1]), or Article 23 of Regulation No 1/2003 ([2]). In that regard, the applicant also claims that the principles of equal treatment and proportionality have been infringed.

In addition, the applicant complains that Article 15(2) of Regulation No 17 and the guidelines on fixing fines have been misapplied. In particular, the submission and evaluation of the evidence in relation to the applicant was irregular. Furthermore, in view of previous administrative practice the applicant was disproportionately fined. As regards the amount of the initial sum for the gravity of the infringement, the applicant alleges that it was treated unequally, in several respects, in relation to the other parties to which the contested decision was also addressed. In addition, the applicant claims that the Commission erred in law with regard to the assessment of the duration of the infringement and did not take mitigating circumstances into account. Finally, the applicant submits that Article 15(2) of Regulation No 17 has also been infringed as the fine was wrongly fixed in the light of the application of the Notice on the non-imposition or reduction of fines.

([1]) Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

([2]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

Action brought on 17 February 2006 — France v Commission

(Case T-56/06)

(2006/C 96/38)

Language of the case: French

Parties

Applicant: French Republic (Paris, France) (represented by: G. de Bergues and S. Ramet, Agents)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— primarily, annul the contested decision in its entirety;

— in the alternative, annul Article 5 of that decision;

— order the Commission to pay the costs.

Pleas in law and main arguments

By decision of 30 June 1997, adopted following a proposal from the Commission and in accordance with the procedure laid down in Directive 92/81/EEC ([1]), the Council authorised Member States to apply or to continue to apply the existing reduced rates of excise duty or exemptions from excise duty to certain mineral oils when used for specific purposes. By four subsequent decisions, the Council extended this authorisation, the final authorisation period expiring on 31 December 2006. France is authorised to apply these reduced rates or exemptions to heavy fuel oil used as fuel for the production of alumina in the Gardanne region.

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 ([2]). On 7 December 2005, in consequence of this procedure, the Commission adopted the disputed decision ([3]) 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 ([4]), 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.

([1]) Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils

([2]) Published in OJ 2002 C 30

([3]) Decision C (2005) 4436 final, State aid Nos C 78-79-80/2001

([4]) 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.

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 ([1]).

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) ([2]). 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.

([1]) 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

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

Action brought on 16 February 2006 — Italian Republic v Commission

(Case T-60/06)

(2006/C 96/41)

Language of the case: Italian

Parties

Applicant): Italian Republic (represented by: Giacomo Aiello, Avvocato dello Stato)

Defendant): Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— annul Commission Decision C (2005) 4436 final of 7 December 2005 and order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant brings the present action against Commission Decision C (2005) 4436 final of 7 December 2005 concerning the exemption from the tax on mineral oils used as fuel for the production of alumina in the region of Gardanne, the region of Shannon and in Sardinia, implemented by France, Ireland and Italy respectively.

With regard to the applicant, that decision stated that:

— The exemptions in question were not intended to apply generally and without distinction to all those to whom it was addressed, but were designed to support certain undertakings on account of the special structure of the alumina market.

— The aid in question was new and unlawful since notification of it was not given in due time and it was to be regarded as partially existing until 29 May 1998.

— Up to 31 October 2003 that aid was incompatible with State aid rules on the protection of the environment.

In support of its claims, the applicant submits that:

— The tax exemption provided for by Italian legislation was not selective but was directed at all businesses using mineral oil for the production of aluminium oxide. The fact that there is only one plant in Italy at which such oil is used in the production cycle is simply a matter of fact which is not capable of altering the fact, which is not disputed, that the provision is of general scope.

— The aid in question should have been regarded as existing aid in accordance with the provisions of Article 1(b)(ii) of Regulation (EC) No 659/1999 since the Italian State was duly authorised by the Council to keep the exemption that is the subject of the dispute in force.

— The exemption in question was closely linked with the attainment of environmental protection objectives, as may be inferred from the legislation implemented by the Italian Government and from the agreements concluded by Eurallumina with the region of Sardinia and the Ministero dell'Ambiente (Environment Ministry).

— The exemption should have been regarded as necessary for the economic development of the region of Sardinia.

— In the opinion of the Italian Government, once Directive 2003/96/EC entered into force, there was no longer any obligation to give notification of the tax benefit in question as Article 18 in conjunction with Annex II of that directive expressly provided that the disputed tax should remain in force and unaffected until 31 December 2006. Moreover, the content of those provisions is analogous to that of Article 1(2) of Council Decision 2001/224/EC.

Finally, the applicant pleads infringement of the principle of the protection of legitimate expectations and the presumption of the legality of Community provisions.

Action brought on 23 February 2006 — FLS Plast v Commission

(Case T-64/06)

(2006/C 96/42)

Language of the case: English

Parties

Applicant: FLS Plast A/S (Copenhagen, Denmark) [represented by: K. Lasok, QC, and M. Thill-Tayara, lawyer]

Defendant: Commission of the European Communities

Form of order sought

— Annul Articles 1(h) and 2(f) of the Contested Decision of the Commission, no. C(2005)4634, of 30 November 2005, in case COMP/F/38.354 — Industrial bags in its entirety, insofar as they apply to the applicant;

— alternatively, amend Article 2(f) of the Contested Decision and substantially reduce the amount of the fine imposed jointly and severally on FLP Plast in exercise of the Court's unlimited jurisdiction, annul in part Article 1(1) insofar as it relates to the applicants and annul in part, or alternatively, reduce as appropriate the fine imposed by Article 2 on the applicants;

— order the Commission to pay FLS Plast's legal and other costs and expenses in relation to this matter.

Pleas in law and main arguments

By the Contested Decision the Commission found that the applicant had infringed Article 81 EC by participating in a complex of agreements and concerted practices in the plastic industrial bags sector, affecting Belgium, France, Germany, Luxembourg, the Netherlands and Spain, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invitations to tender and the exchange of individualised information. The applicant's infringement related to the conduct of another company, Trioplast Wittenheim SA ('TW'), which was found to have participated in the cartel in question. The applicant had owned shares of TW and, for most of the period for which the applicant was found liable, TW was its wholly owned subsidiary. A fine was imposed on TW, and the applicant was made jointly and severally liable for part of that fine.

Without contesting the existence and duration of the cartel or the participation of its former subsidiary, the applicant contends that the Commission erred in law in determining the amount of the fine it imposed on it. The applicant points out that the part of the fine on TW for which the applicant was made liable is manifestly disproportionate to the period during which it held shares in TW.

The applicant further submits that the Contested Decision violates the principles of non-discrimination and proportionality, to the extent that it held both the applicant and its own parent company liable for TW's conduct, even though it decided not to address the Contested Decision to intermediate holding companies and did not, in fact, address it to such companies other than the applicant.

The applicant also submits that it was not aware of TW's unlawful conduct, did not exercise influence over its management and was not part of the undertaking (TW) involved in the infringements referred to in the Contested Decision and that, therefore, the Contested Decision is unlawful and should be annulled.

In the alternative, the applicant requests the Court to reduce the amount of the fine, in exercise of its unlimited jurisdiction. In this context, it puts forward that the fine imposed on TW was too high since past practice and the gravity of the infringement do not justify the level of the basic amount of the fine; that the Commission erred in determining the duration of the infringement for TW; and that the Commission failed to assess whether the fines imposed on TW and the applicant complied with the 10 % ceiling rule.

With regard to the fine imposed on itself, the applicant also contends that it is disproportionately high, taking into account the lack of deterrent effect, the duration and the intensity of the infringement. Further, the applicant argues that the Commission erred in failing to reduce its liability in accordance with the Leniency Notice, more particularly by failing to pass the 30 % reduction granted to TW on to the applicant's own liability and refusing to grant the applicant a reduction. Finally, the applicant invokes the violation of the principle *non bis in idem* and the principle according to which penalties should relate to the specific circumstances of each applicant; in this context, it points out that although it was the parent company of TW for only 35 % of the period of the latter's involvement in the cartel, it was made liable to pay 85.7 % of TW's fine.

Action brought on 24 February 2006 — FLSmidth v Commission

(Case T-65/06)

(2006/C 96/43)

Language of the case: English

Parties

Applicant: FLSmidth & Co. A/S (Valby, Denmark) [represented by: J.-E. Svensson, lawyer]

Defendant: Commission of the European Communities

Form of order sought

— Primarily, annul the Decision of the Commission, no. C(2005)4634, of 30 November 2005, relating to a proceeding under Article 81 EC, in case COMP/F/38.354 — Industrial bags, in so far as it concerns the applicant;

— secondarily, set the amount of the fine of which the applicant is held jointly and severally liable in Article 2 of the above Decision at 0 EUR in so far as it concerns the applicant;

— order the Commission to pay the costs.

Pleas in law and main arguments

By the Contested Decision the Commission found that the applicant had infringed Article 81 EC by participating in a complex of agreements and concerted practices in the plastic industrial bags sector, affecting Belgium, France, Germany, Luxembourg, the Netherlands and Spain, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invitations to tender and the exchange of individualised information.

The applicant's infringement related to the conduct of another company, Trioplast Wittenheim SA ('TW'), which was found to have participated in the cartel in question. Another company, FLS Plast, of which the applicant was the holding company, had owned shares of TW and, for most of the period for which the applicant was found liable, TW was FLS Plast's wholly owned subsidiary. A fine was imposed on TW, and the applicant and FLS Plast were made jointly and severally liable for part of that fine.

In support of its application, the applicant first of all contends that the Commission did not correctly apply the test for liability of the parent company, as it did not adduce evidence to the effect that there existed circumstances, in respect of the applicant, which could support a presumption of parental influence on TW. The applicant also contends that, in any case, the Commission did not apply the correct legal test since a stricter set of criteria is applicable in a situation such as the one in the present case, where, according to the Commission, TW started participating in the cartel long before its acquisition by the applicant's daughter company, and continued to do so after its disposal. In any event, the applicant considers that it has established that TW decided independently its own conduct on the market and did not carry out instructions given to it by the applicant.

The applicant also submits that attribution of liability to it is discriminatory, disproportionate and arbitrary since none of the other groups comprised by the Decision had liability attributed to the operating subsidiary, a parent company and the parent's parent company, as was the case with TW and the applicant. Furthermore, even though TW had previously belonged to another group, the Commission did not attribute any liability for TW's participation in the cartel, on any member of that other group. Finally, the liability attributed to the applicant is disproportionate since the applicant was made liable for 85.7 % of the fine imposed on TW even though it had a shareholding in it for only 8 years out of a total of 20 in which the latter was supposedly involved in the cartel.

The applicant also invokes the latter arguments in support of its secondary claim, to have the fine imposed on it reduced. It further argues that the fine imposed on it is excessive, since the Commission failed to set a separate basic amount of the fine for the applicant, taking into account its lack of responsibility. It also contends that the Commission erred in law by not taking into account certain attenuating circumstances in its favour.

Finally, the applicant contends that the Commission committed further errors in law by attributing liability to TW for the period 1982 to 1988; imposing on the latter a fine which is disproportionate, excessive and exceeds the 10 % of turnover ceiling; and by not letting the applicant, as a secondary liable party, benefit from the leniency granted to the principally liable party, TW or, at least, granting an independent reduction of fines to the applicant under the leniency notice.

Action brought on 23 February 2006 — JM Gesellschaft für industrielle Beteiligungen v Commission

(Case T-66/06)

(2006/C 96/44)

Language of the case: German

Parties

Applicant: JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA (Worms, Germany) (represented by: H.-J. Hellmann, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— annul the defendant's decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case C(2005) 4635 final, COMP/F/38.354 — Industrial bags), served on the applicant on 14 December 2005, in so far as it concerns the latter;

in the alternative, reduce the fine imposed jointly and severally on the applicant;

— order the defendant to bear the costs of the proceedings.

Pleas in law and main arguments

The applicant challenges Commission Decision C(2005) 4634 final of 30 November 2005 in Case COMP/F/38.354 — Industrial bags. In the contested decision a fine was imposed jointly and severally on RKW AG Rheinische Kunststoffwerke (RKW) and the applicant for infringement of Article 81 EC. According to the Commission, they participated in a complex of agreements and concerted practices in the industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands.

In support of its action the applicant submits that the contested decision infringes the duty of administrative authorities to comply strictly with the law. The defendant held the applicant jointly and severally liable with RKW without a legal basis or enabling act permitting it to do so.

In addition, the applicant complains that it was also held liable for RKW's infringement. The conditions developed by the Court of Justice for such liability were not satisfied. Further, the applicant claims that, in holding it liable for RKW's infringement, the duty of administrative authorities to comply strictly with the law has been infringed since the defendant's method of levying fines does not fall within the scope of the enabling provision, namely Article 15(2) of Regulation No 17 ([1]). In that regard, the applicant also claims that the principles of equal treatment and proportionality have been infringed.

In addition, the applicant complains that Article 15(2) of Regulation No 17 and the guidelines on fixing fines have been misapplied. In particular, the submission and evaluation of the evidence in relation to RKW was irregular. Furthermore, in view of previous administrative practice RKW was disproportionately fined. As regards the amount of the initial sum for the gravity of the infringement, the applicant alleges that RKW was treated unequally, in several respects, in relation to the other parties to which the contested decision was also addressed. In addition, the applicant claims that the Commission erred in law with regard to the assessment of the duration of the infringement and did not take mitigating circumstances into account in respect of RKW. Finally, the applicant submits that Article 15(2) of Regulation No 17 has also been infringed as the fine was wrongly fixed in relation to RKW in the light of the application of the Notice on the non-imposition or reduction of fines.

([1]) Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

Action brought on 20 February 2006 — Elini N.V. v OHIM

(Case T -67/06)

(2006/C 96/45)

Language in which the application was lodged: Dutch

Parties

Applicant: Elini N.V. (Antwerp, Belgium) (represented by: F. Cornette and S. Tilsley, lawyers)

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

Other party to the proceedings before the Board of Appeal of OHIM: Rolex. S.A (Geneva, Switzerland)

Form of order sought

The applicant claims that the Court should:

— review and annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 12 December 2005 (Case R-725/2004-4);

— order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Elini N.V.

Community trade mark concerned: the figurative mark 'Elini' for goods in class 14 (jewellery; watches; watch straps, watch glasses, watch chains and precious stones)

Proprietor of the mark or sign cited in the opposition proceedings: Rolex S.A.

Mark or sign cited in opposition: the figurative mark 'Cellini' for goods in class 14 (registration number 1 456 102)

Decision of the Opposition Division: rejection of the opposition

Decision of the Board of Appeal: annulment of the decision of the Opposition Division and rejection of the application for a Community trade mark

Pleas in law: breach of Article 8(1)(b) of Regulation No 40/94.

Action brought on 23 February 2006 — Stempher and Koninklijke Verpakkingsindustrie Stempher v Commission

(Case T-68/06)

(2006/C 96/46)

Language of the case: Dutch

Parties

Applicants: Stempher B.V. (Rijssen, Netherlands) and Koninklijke Verpakkingsindustrie Stempher C.V. (represented by: J.K. de Pree, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicants claim that the Court should:

— annul Articles 1(2), 2, 3 and 4 of the Commission decision of 30 November 2005, as amended by the Commission decision of 7 December 2005, relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags — C(2005) 4634 final), or at least in so far as those provisions find that Stempher breached Article 81 EC, in so far as a fine is imposed on Stempher in that regard, in so far as Stempher is enjoined to bring that breach to an end and to refrain from repeating any act or conduct described in Article 1, and any act or conduct having an identical or similar object or effect, and to the extent to which that decision is addressed to Stempher;

— order the Commission to pay its own costs and those of the applicants.

Pleas in law and main arguments

The applicants are challenging the Commission decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags).

In support of their action, the applicants submit that the decision is at variance with Article 81 EC and with Articles 7 and 23 of Regulation No 1/2003 [1] by reason of the fact that there was inadequate evidence to justify a finding that the applicants had acted in breach of Article 81 EC.

The applicants submit further that the decision is contrary to Article 25 of Regulation No 1/2003 and to Regulation No 2988/74 [2], which was previously in force, on the ground that the authority to pursue the alleged breach has become time-barred.

In the alternative, the applicants submit that Article 2 of the contested decision is at variance with Article 23(3) of Regulation No 1/2003 and the guidelines relating to fines [3]. The severity of the breach of which the applicants were accused was incorrectly appraised and was wrongly classified as being very serious. Furthermore, the applicants allege, inaccurate matters and information were taken into account in setting the fine. This, they submit, resulted in a disproportionately heavy fine.

The applicants submit in conclusion that the contested decision was adopted in disregard of essential procedural requirements and contrary to the principle that reasons must be given, inasmuch as no careful investigation was carried out and there was no proper description of the breach in which the applicants are alleged to have participated or of the market on which that breach allegedly took place. Nor, according to the applicants, is there any description of the factors which formed the basis for the appraisal of the gravity of the breach of which they stand accused.

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[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) (OJ 2003 L 1, p. 1).

[2] Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

[3] Information from the Commission - Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

Action brought on 23 February 2006 — Aughinish Alumina v Commission

(Case T-69/06)

(2006/C 96/47)

Language of the case: English

Parties

Applicant: Aughinish Alumina Ltd (Askeaton, Ireland) [represented by: J. Handoll and C. Waterson, Solicitors]

Defendant: Commission of the European Communities

Form of order sought

— Annul Commission Decision of 7 December 2005, registered under document number C (2005) 4436 def. concerning the exemption from excise duty on mineral oils used as fuel for alumina production in, among others, the Shannon region, implemented by Ireland, insofar as it relates to the applicant (C 78/2001 (ex NN/2001) — Ireland);

— order the Commission to pay the costs incurred by the applicant in the current proceedings.

Pleas in law and main arguments

By the contested Decision the Commission found that the exemption from excise duty granted by, among other Member States, Ireland in respect of heavy fuel oils used in the production of alumina until 31 December 2003, constitute State aid within the meaning of Article 87(1) EC. Whilst concluding that aid granted between 17 July 1990 and 2 February 2002, to the extent that it was incompatible with the common market, should not be recovered and that aid granted between 3 February 2002 and 31 December 2003 is compatible with the common market, within the meaning of Article 87(3) EC, insofar as the beneficiaries pay at least a rate of EUR 13.01 per 1 000 kg of heavy fuel oils, the Commission also decided that the same aid was incompatible with the common market insofar as the beneficiaries did not pay that rate and instructed, among others, Ireland, to take all necessary measures to recover from the beneficiaries the incompatible aid.

The applicant, an Irish company who was a beneficiary of the alleged aid, requests the annulment of the contested Decision. In support of its application it alleges, first of all, that the Commission wrongly failed to treat the aid in question as existing aid falling under Article 88(1) EC. In this respect, the applicant advances three alternative submissions: The aid was the subject of a binding commitment given before the accession of Ireland; the aid was notified in January 1983 and it was not until 2000 that the Commission even considered initiating proceedings and; even if the aid was to be regarded as unlawful aid, the Commission wrongly concluded that it could only partially be deemed to be existing aid pursuant to Article 15 of Regulation 659/99 ([1]).

The applicant also contends that the contested Decision violates the principle of legal certainty as it undermines authorisations granted by the Council under Article 93 EC and the Commission failed to use the procedures available to it under Article 8 of Directive 92/81 ([2]) to resolve State aid or other concerns, or indeed to seek the annulment of the relevant Council Decisions.

Further, according to the applicant the Commission failed to take account of the fundamental requirements of Articles 3 and 157 EC, to strengthen the competitiveness of Community industry and to ensure the existence of necessary conditions for it.

The applicant also invokes the principles of protection of legitimate expectations and legal certainty. In this respect the applicant points again to the fact that the Commission took no negative action for a period of 17 years after the aid's notification and failed to challenge the Council's Decisions extending the exemption until December 2006.

The applicant argues further that the procedure under Article 88(2) EC lasted 43 months, according to the applicant an excessively long time violating the principles of good administration and legal certainty.

Finally, the applicant considers that the Commission failed properly to analyse the relevant markets and their competitive structure, as it was required to do in view of the fact that it had itself accepted earlier that there was no distortion of competition and taking into account the fact that the Council had authorised the exemptions until 31 December 2006.

([1]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 , 27/03/1999 p. 1

([2]) Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, OJ L 316 , 31/10/1992 p.12

Action brought on 28 February 2006 — Audi Aktiengesellschaft v OHIM

(Case T-70/06)

(2006/C 96/48)

Language in which the application was lodged: German

Parties

Applicant: Audi Aktiengesellschaft (Ingolstadt, Germany) (represented by O. Gillert, F. Schiwek, lawyers)

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

Form of order sought

— Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 16 December 2005 (Case R 237/2005-2);

— order the defendant to pay the costs of this action.

Pleas in law and main arguments

Community trade mark concerned: Word Mark 'Vorsprung durch Technik' for goods and services in Classes 9, 12, 14, 16, 18, 25, 28, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 45 — Application no. 3 016 292

Decision of the Examiner: Partial rejection of the application

Decision of the Board of Appeal: Partial rejection of the appeal

Pleas in law: Infringement of Article 7(1)(b) of EC Regulation 40/94, as the mark applied for is sufficiently distinct and the contested decision does not contain any findings regarding the relevant public.

Action brought on 23 February 2006 — Groupe Gascogne v Commission

(Case T-72/06)

(2006/C 96/49)

Language of the case: French

Parties

Applicant: Groupe Gascogne (Saint-Paul-lès-Dax, France) (represented by: C. Lazarus, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— primarily, set aside Articles 1(k), 2(i) and 4(12) of the decision in so far as they are addressed to Groupe Gascogne and imposed a fine on it, and amend Article 2(i) of the decision in so far as it imposes on Sachsa, contrary to Article 15(2) of Regulation No 17/62 and Article 23(2) of Regulation (EC) No 1/2003, a fine in excess of 10 % of its turnover;

— in the alternative, set aside Article 2(i) of the decision;

— in the further alternative, amend Article 2(i) of the decision and reduce the amount of the fine imposed jointly and severally on Sachsa and Groupe Gascogne;

— order the Commission to pay all of the costs of the proceedings.

Pleas in law and main arguments

By the present action, the applicant seeks the partial annulment of Commission Decision C(2005) 4634 final of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags) by which the Commission decided that the undertakings to which that decision was addressed, which included the applicant, breached Article 81 EC by engaging in agreements or concerted practices in the industrial bags sector in Belgium, the Netherlands, Luxembourg, Germany, France and Spain. In the part of its decision which relates to the applicant, the Commission adjudged it to be jointly and severally liable with Sachsa Verpackung GmbH for the breach by reason of its status as parent company of Sachsa Verpackung. In the alternative, the applicant seeks annulment solely of Article 2(i), which imposes a fine on it, and, in the further alternative, the amendment of that article so as to bring about a reduction in the fine imposed.

In support of its claims, the applicant puts forward three pleas in law.

By the first plea, which is put forward as the principal plea, the applicant submits that the Commission breached the provisions of Article 81(1) EC by incorrectly attributing to it joint and several liability for the practices engaged in by Sachsa and by holding it jointly and severally liable for payment of the fine imposed on Sachsa.

By its second plea, put forward by way of alternative submission, the applicant submits that the Commission erred in law by misconstruing the notion of 'undertaking' within the meaning of Article 81 EC and, as a result, imposing on it a fine calculated on the basis of the consolidated turnover of Groupe Gascogne, whereas, according to the applicant, it ought to have based itself on the aggregate corporate turnover of Groupe Gascogne and Sachsa, having failed to set out reasons as to why the other subsidiaries of Groupe Gascogne ought to be included within 'the undertaking' liable in respect of the practices of Sachsa adjudged anti-competitive in the contested decision.

By its third plea, put forward as a further alternative, the applicant contends that the Commission infringed the principle of proportionality by imposing an allegedly excessive fine on Sachsa and Groupe Gascogne jointly and severally, in particular by failing to ensure that there was a reasonable relation between the penalty imposed and the actual turnover achieved by Groupe Gascogne within the plastic bags sector.

Action brought on 27 February 2006 — Bayer CropScience a.o. v Commission

(Case T-75/06)

(2006/C 96/50)

Language of the case: English

Parties

Applicants: Bayer CropScience AG (Monheim am Rhein, Germany), Makhteshim-Agan Holding BV (Amsterdam, Netherlands), Teko AE (Athens, Greece) and Aragonesas Agro SA (Madrid, Spain) [represented by: C. Mereu and K. Van Maldegem, lawyers]

Defendant: Commission of the European Communities

Form of order sought

— Order the annulment of Commission Decision 2005/864/EC [1], of 2 December 2005, concerning the non-inclusion of endosulfan in Annex I to Directive 91/414/EEC and the withdrawal of authorisations for plant protection products containing this substance; and

— order the defendant to pay all costs and expenses in these proceedings.

Pleas in law and main arguments

Council Directive 91/414 [2] concerning the placing of plant protection products on the market (known as the 'plant protection products directive' or 'PPPD') provides that Member States shall not authorise a product unless it is inscribed in Annex I of the Directive. The applicants, who are producers of endosulfan, request the annulment of the contested Decision, which refused to include endosulfan in that Annex.

In support of their application they first invoke a number of alleged procedural irregularities, namely: that the assessment of the contested Decision is based on criteria other than those specified in Directive 91/414, is incomplete and makes only selective use of the data submitted by the applicants; that new guidelines and criteria established by the Commission were applied retroactively after the applicant's notification and submission of data; and that the Commission refused to advise and consult with the applicants in relation to changing evaluation criteria and policy.

The applicants further allege that from a substantive law viewpoint the contested Decision violates Article 95(3) EC and Article 5(1) of Directive 91/414. They consider that the Commission failed to comply with its duty, under these provisions, to assess active substances and include them in Annex I in light of current scientific and technical knowledge and subject only to the requirements listed in article 5.

They further invoke the violation of a number of general principles of Community law, namely: the principle of proportionality, the principle of legitimate expectations and legal certainty, the duty to perform a diligent and impartial assessment, the right of due process (right of defence and right to a fair hearing), the principle of excellence and independence of scientific advice, the principle of equal treatment, the principle that more general provisions must give way to a *lex specialis* and finally the principle of estoppel.

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[1] OJ L 317, 3/12/2005 p. 25
[2] OJ L 230 , 19/08/1991 p.1

Action brought on 1 March 2006 — Italian Republic v Commission

(Case T-77/06)

(2006/C 96/51)

Language of the case: Italian

Parties

Applicant: Italian Republic (represented by: Paolo Gentili, Avvocato dello Stato)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— annul the European Commission's Memorandum No 14 012 of 19 December 2005 concerning the POR Sicilia Programme (claim for payment No 2005 3489) containing a request to 'comply with the conditions set out in Commissioner Barnier's letter of 29 July 2003 as to the eligibility of the payments on account made in the context of aid schemes';

— annul the European Commission's Memorandum No 14 134 of 21 December 2005 concerning the POR Sicilia Programme (claim for payment SYSFIN 2005 3554) containing a request to 'comply with the conditions set out in Commissioner Barnier's letter of 29 July 2003 as to the eligibility of the payments on account made in the context of aid schemes';

— annul the European Commission's Memorandum No 765 of 25 January 2006 concerning the programme entitled 'PON Ricerca scientifica, sviluppo tecnologico e alta formazione' (Scientific Research, Technological Development and Higher Education) (claim for payment No 20 053 784) containing a request to 'comply with the conditions set out in Commissioner Barnier's letter of 29 July 2003 as to the eligibility of the payments on account made in the context of aid schemes';

— annul the European Commission's Memorandum No 1 459 of 13 February 2006 concerning the POR Sicilia Programme (claim for payment SYSFIN 2006 0029) containing a request to 'comply with the conditions set out in Commissioner Barnier's letter of 29 July 2003 as to the eligibility of the payments on account made in the context of aid schemes';

— order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The pleas in law and main arguments are those invoked in Case T-345/04 *Italian Republic* v *Commission* ([1]).

([1]) OJ C 262, 23.10.2004, p. 55.

Action brought on 23 February 2006 — Sachsa Verpackung v Commission

(Case T-79/06)

(2006/C 96/52)

Language of the case: French

Parties

Applicant: Sachsa Verpackung GmbH (Wieda, Germany) (represented by: F. Puel and L. François-Martin, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— set aside Articles 1(k), 2(i) and 4(21) of the decision;

— in the alternative, amend Article 2(i) of the decision and reduce the amount of the fine;

— order the European Commission to pay all of the costs of the proceedings.

Pleas in law and main arguments

By the present action the applicant seeks the partial annulment of Commission Decision C(2005) 4634 final of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/F/38.354 — Industrial bags), by which the Commission found that the undertakings to which the decision was addressed, which included the applicant, had breached Article 81 of the EC Treaty by participating in agreements or concerted practices within the industrial-bags sector in Belgium, the Netherlands, Luxembourg, Germany, France and Spain. In the part of its decision relating to the applicant, the Commission found that the applicant had taken part in the single and continuous breach and ordered it to pay a fine.

In support of its first submission, which it presents as its main submission, the applicant sets out three pleas in law.

In the first of these, it alleges that the Commission committed a manifest error of appraisal with regard to the extent of the applicant's involvement in the cartel when it formed the view that the applicant had played an active role in setting general quotas, allocating customers and fixing prices.

The second plea in law alleges a lack of reasons inasmuch as the Commission failed to set out adequate grounds in law to substantiate its claim that the applicant had participated in a 'Germany' subgroup within the cartel.

By its third plea in law, the applicant submits that the Commission breached Article 23(2) of Regulation (EC) No 1/2003 ([1]) and Article 15 of Regulation No 17/62 ([2]) by taking the view, erroneously in the applicant's opinion, that it was not an independent undertaking and by deciding, also incorrectly, that Groupe Gascogne, its parent company, was to be held jointly and severally liable for the payment of the fine. The applicant further argues that the Commission erred in its determination of the portion of the fine attributable to the applicant for the period of its participation in the breach, which consequently exceeded the threshold of 10 % of its turnover.

In support of the alternative form of order which it seeks, the applicant submits that the Commission failed correctly to assess the amount of the fine imposed and that it infringed the principle of proportionality by misconstruing the seriousness and duration of the breach, and by failing to take account of mitigating circumstances and of the applicant's cooperation under the leniency notice ([3]).

([1]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

([2]) Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

([3]) Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Action brought on 13 December 2005 — Gesner v OHIM

(Case F-119/05)

(2006/C 96/53)

(Language of the case: Spanish)

Parties

Applicant: Charlotte Gesner (Kildedalsvej, Denmark) (represented by: J. Vazquez Vazquez and C. Amo Quiñones, lawyers)

Defendant: Office for Harmonisation in the Internal Market

Form of order sought

The applicant claims that the Court should:

— order that the decision adopted by the Office for Harmonisation in the Internal Market (OHIM) of 2 September 2005 be annulled, to the extent that it dismisses the applicant's complaint of 10 May 2005 against its decision of 21 April 2005 refusing to appoint an invalidity committee.

— order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, a temporary agent of OHIM until 15 April 2005, has suffered from a slipped disc and various conditions of her spinal column since 2003. Despite having surgery and undergoing medical treatment and physiotherapy, the applicant's acute back pain did not stop and the fact that she spent long periods sitting caused her condition to deteriorate, with the result that she was on sick leave for several months.

On 11 March 2005 the applicant requested OHIM to appoint an invalidity committee in order to establish her incapacity to perform her duties and grant her an invalidity allowance.

OHIM refused her application on two grounds. First, Article 59 of the Staff Regulations should be interpreted as meaning that the decision to convene an invalidity committee is a matter for the appointing authority. Second, since the applicant has been on sick leave for only 294 days in the last three years she has not completed the period prescribed in Article 59(4) of the Staff Regulations.

In her application, the applicant puts forward four main pleas. First, she argues that the appointing authority cannot arrogate to itself the power to convene an invalidity committee. If that were the case the appointing authority could determine in a pre-emptive, subjective and arbitrary manner whether the agent or official was sufficiently incapacitated for him to be summoned before that committee.

In her second plea, the applicant states that the reasoning of the contested decision is incorrect. The application of the time-limits provided for in Article 59(4) of the Staff Regulations hinders access to an invalidity allowance by officials or agents who have not fulfilled that criterion, but who may be incapacitated as a result of accidents or illnesses which manifest themselves more quickly.

In her third plea the applicant claims that the provisions applicable to the appointment of an invalidity committee need not be limited to Article 59 of the Staff Regulations, but include provisions which fall within the legal framework governing access to invalidity allowances, namely Articles 31 to 33 of the Conditions of Employment for Other Servants of the European Communities, Article 9 of the Staff Regulations, and Annex VIII thereto.

In her final plea, the applicant argues that the contested decision infringes the principles of non-discrimination and equal treatment. OHIM prevents its staff from convening an invalidity committee although that possibility appears to be available to all other Community personnel. Moreover, as regards agents of OHIM having contracts of less than three years, it would be difficult for them to gain access to an invalidity allowance however incapacitated they were, because they could never satisfy the criterion laid down in Article 59(4) of the Staff Regulations.

Action brought on 13 January 2006 — Nicola Scafarto v Commission

(Case F-6/06)

(2006/C 96/54)

(Language of the case: Italian)

Parties

Applicant: Nicola Scafarto (Luxembourg, Luxembourg) (represented by: A. D'Antuono and G. Somma, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— declare inapplicable, within the meaning of Article 241 EC, Article 12 of Annex XIII to the Staff Regulations;

— annul the decision by which the appointing authority (AIPN) implicitly dismissed the applicant's complaint against Decision No 000617 of 17 March 2005;

— annul only the part of that decision in which the AIPN placed the applicant in Grade A*6, first step, instead of A*8, first step;

— order the defendant to replace the contested part of that decision with a part placing the applicant, with retroactive effect, in Grade A*8, first step;

— order the defendant to pay the applicant all the amounts which he did not receive owing to the unlawfulness of the contested decisions, including interest;

— order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, who was included on the reserve list for Competition EUR/A/155/2000 for Grades A6 and A7, was subsequently recruited by the Commission at Grade A*6 after the new Staff Regulations had come into force.

By his application he claims primarily that the decision determining his grade infringes Article 31 of the Staff Regulations.

He goes on to submit that, in any event, that decision is unlawful, in so far as its legal basis, Article 12 of Annex XIII to the Staff Regulations, is unlawful on the ground that it infringes the following principles: legal certainty, the protection of legitimate expectations, non-discrimination, equal treatment, reasonableness and proper administration. Finally and in the alternative, the applicant adds that even if the protection of legitimate expectations is not always absolute, any exception thereto and/or derogation therefrom must be duly justified, a condition which was not fulfilled in this case.

Action brought on 23 January 2006 — B v Commission

(Case F-7/06)

(2006/C 96/55)

(Language of the case: French)

Parties

Applicant: B (Brussels, Belgium) (represented by: S. Rodrigues and A. Jaume, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Appointing Authority of 10 October 2005 dismissing the applicant's complaint taken in conjunction with the decision of the Appointing Authority of 26 April 2005 refusing to grant the applicant an expatriation allowance;

— order the defendant to pay the applicant an expatriation allowance, as from the date of taking up her post;

— order the defendant to pay interest for late payment, as from the decision to be taken;

— order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, an official of the Commission, challenges the decision which definitively establishes her rights by which the defendant refused her an expatriation allowance.

In support of her action, she pleads infringement of Article 4(1)(a) of Annex VII to the Staff Regulations. She also raises a plea of unlawfulness to the effect that application of the criterion of nationality, set out in the first indent of that provision, to officials who have both the nationality of the Member State where they are employed and that of another Member State, infringes the principles of non-discrimination and equal treatment.

Next, the applicant claims that, in any event, she fulfils the condition of residence under the second indent of the provision in question.

In the alternative, the applicant pleads infringement of Article 4(1)(b) of Annex VII to the Staff Regulations, in so far as the contested decision does not take account of the fact that the applicant satisfies both the criterion of nationality and the criterion of residence cited in that provision.

In the further alternative, the applicant pleads infringement of Article 4(3) of Annex VII to the Staff Regulations, in so far as that provision cannot be interpreted as requiring an official with dual nationality to renounce that of the Member State where he is employed in order to be entitled to an expatriation allowance.

Action brought on 5 January 2006 — Daniel André v Commission of the European Communities

(Case F-10/06)

(2006/C 96/56)

(Language of the case: French)

Parties

Applicant(s): Daniel André (Brussels, Belgium) (represented by: M. Jourdan, avocat)

Defendant: Commission of the European Communities

Form of order sought

— Annul the Commission decision of 6 October 2005 refusing to pay the applicant, in respect of a service rendered for and at the request of the Court of Justice on 12 and 13 January 2005, the flat-rate allowance laid down by Article 7 of the Agreement on working conditions and financial terms for contract conference interpreters recruited by the institutions of the European Union;

— Order the defendant to pay compensation for the loss suffered by the applicant as a result of the contested decision, namely to pay the sum of EUR 241.99 corresponding to the allowance which should have been paid, together with interest thereon from the date of request;

— Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, a contract conference interpreter, renders periodic services to various Interpretation services within the Community institutions. His services are supplied under contracts fixing the days and the place in which the interpretation is required. Those contracts are governed, as regards the financial aspects, by the Agreement on working conditions and financial terms for contract conference interpreters recruited by the institutions of the European Union.

In the present case, the applicant challenges the Commission decision refusing to pay him the flat-rate travel allowance laid down by Article 7 of that agreement and set out in detail in the 'rules for implementing' certain provisions of that agreement annexed thereto.

In his application, the applicant challenges the defendant's interpretation of those provisions according to which the business trip must cause a loss of earnings in order for the allowance in question to be paid. Furthermore, the Commission was wrong to find that, as the applicant had already worked for a Community institution on 10 and 11 January 2005, 12 January 2005 was not the first day of his contract.

The applicant claims that the text of the agreement does not, even impliedly, contain the additional conditions required by the defendant, which would wrongfully alter the scope of the agreement.

Lastly, the applicant submits that the fact of there being a succession of contracts with one or more Community institutions does not enable it to deny him the benefit of the allowance in question.

Action brought on 9 February 2006 — Zuleta de Reales Ansaldo v Court of Justice

(Case F-13/06)

(2006/C 96/57)

(Language of the case: French)

Parties

Applicant: Leticia Zuleta de Reales Ansaldo (Luxembourg, Luxembourg) (represented by: G. Vandersanden, lawyer)

Defendant: Court of Justice of the European Communities

Form of order sought

The applicant claims that the Court should:

— Annul the decision of the appointing authority of the Court of Justice of 4 May 2005 appointing the applicant and grading her at grade A*7, step 2;

— Reinstate the applicant at the grade (A*10, step 2) in which she should as a matter of course have been graded in accordance with the provisions in the notice of competition CJ/LA/25 in which she was a successful candidate;

— Wholly restore the applicant's rightful career prospects with retrospective effect from the date on which she was graded at the grade and step thus adjusted, including interest for late payment;

— Consequently, restore the applicant's right to the salary corresponding to grade A*10, step 2 as from her appointment and restore her pension rights and the benefits and allowances to which she is entitled as well as ensuring that, for promotion purposes, regard is had to the date of her appointment;

— Order the Court of Justice to pay the costs.

Pleas in law and main arguments

The applicant took part in competition CJ/LA/25 aimed at constituting a reserve list of Spanish-language lawyer-linguists for grades LA7/LA6.

After passing the competition, the applicant was informed that she had been appointed as a probationary official at grade A*7, step 2 in the Translation Directorate of the Court of Justice as from 16 May 2005.

In her action the applicant challenges her classification at a lower grade pursuant to the entry into force of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities. ([1])

In support of her action, the applicant submits two pleas in law. The first consists of a plea of illegality against Article 12(3) and Article 13(2) of Annex XIII to the Staff Regulations. The second is based on the infringement of the principle of good administration, the duty to have regard for the welfare and interests of officials, the principle of transparency, the principle of good faith, the principle of equal treatment and the principle of non-discrimination.

([1]) OJ L 124, of 27.04.2004, p. 1

Action brought on 15 February 2006 — Chevalier Carmana and Others v Court of Justice of the European Communities

(Case F-14/06)

(2006/C 96/58)

(Language of the case: French)

Parties

Applicants: Giovanna Chevalier Carmana (Paris, France), Alice Coda (Paris, France), Jacqueline Doucet (Paris, France), Françoise Kluss (Ollioules, France) (represented by: G. Vandersanden and L. Levi, lawyers)

Defendant: Court of Justice of the European Communities

Form of order sought

The applicants claim that the Court should:

— declare the action admissible and well founded, including the objection of illegality contained in it;

— consequently, annul the applicants' pension statements for March 2005, so as to result in the application of a weighting for the capital of their country of residence or, at least, of a weighting such as to reflect adequately the differences in the cost of living in the places where the applicants are deemed to incur their expenditure and therefore to give effect to the principle of equivalence;

— order the defendant to pay the costs.

Pleas in law and main arguments

The pleas and main arguments relied on by the applicants are identical to those relied on in Case F-128/05 Adolf and Others v Commission ([1]).

([1]) OJ C 60 of 11.3.2006, p. 56.

Action brought on 15 February 2006 — Abba and Others v European Parliament

(Case F-15/06)

(2006/C 96/59)

(Language of the case: French)

Parties

Applicants: Abba and Others (represented by: G. Vandersanden and L. Levi, lawyers)

Defendant: European Parliament

Form of order sought

The applicants claim that the Court should:

— declare the action admissible and well founded, including the objection of illegality contained in it;

— consequently, annul the applicants' pension statements for March 2005, so as to result in the application of a weighting for the capital of their country of residence or, at least, of a weighting such as to reflect adequately the differences in the cost of living in the places where the applicants are deemed to incur their expenditure and therefore to give effect to the principle of equivalence;

— order the defendant to pay the costs.

Pleas in law and main arguments

The pleas and main arguments relied on by the applicants are identical to those relied on in Case F-128/05 Adolf and Others v Commission ([1]).

([1]) OJ C 60 of 11.3.2006, p. 56.

Action brought on 15 February 2006 — Augenault and Others v Council

(Case F-16/06)

(2006/C 96/60)

(Language of the case: French)

Parties

Applicants: Françoise Augenault and Others (represented by: G. Vandersanden and L. Levi, lawyers)

Defendant: Council of the European Union

Form of order sought

The applicants claim that the Court should:

— declare the action admissible and well founded, including the objection of illegality contained in it;

— consequently, annul the applicants' pension statements for March 2005, so as to result in the application of a weighting for the capital of their country of residence or, at least, of a weighting such as to reflect adequately the differences in the cost of living in the places where the applicants are deemed to incur their expenditure and therefore to give effect to the principle of equivalence;

— order the defendant to pay the costs.

Pleas in law and main arguments

The pleas and main arguments relied on by the applicants are identical to those relied on in Case F-128/05 Adolf and Others v Commission ([1]).

([1]) OJ C 60 of 11.3.2006, p. 56.

Action brought on 21 February 2006 — Marc Vereecken v Commission of the European Communities

(Case F-17/06)

(2006/C 96/61)

(Language of the case: French)

Parties

Applicant(s): Marc Vereecken (Brussels, Belgium) (represented by: S. Rodrigues and A. Jaume)

Defendant: Commission of the European Communities

Form of order sought

— Annul the decisions of the Appointing Authority (AA) dismissing the applicant's complaint, together with the decision of the AA of 19 October 2004 and the pay slips for the months of February 2005 et seq. in so far as they change the applicant's grade to A*8, and the decision awarding merit points, priority points and compensation points for leave on personal grounds (CCP) adopted by the AA;

— Inform the AA of the consequences of annulling the contested decisions, and in particular: (i) the promotion of the applicant to grade A*10 (ex A6) with retroactive effect from 2001, or at least from 1 October 2004, when the applicant was re-employed; (ii) at least the promotion of the applicant to grade A*9 with effect from 1 October 2004; (iii) the award to the applicant of the points to which he is entitled with effect from his promotion, including merit points, priority points and transitional points for the CDRs 2003, 2004 and 2005;

— Order the defendant to pay compensation for the pecuniary loss suffered by the applicant as a result of the fact that he was not promoted to grade A*10 with effect from the 2001 promotion round or at least from 1 October 2004, including the consequences for his pension;

— Order the defendant to pay compensation for the non-pecuniary loss sustained by the applicant by reason of the failure to establish Staff Reports for 1997-1999 and the excessively late establishment of the Staff Reports for 1999-2001 and of the Career Development Reports (CDR) for 2003 and 2004;

— Order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

The applicant, an Official of the Commission under the former grade A7 was reemployed on 1 October 2004 under grade A*8 following a CCP of three years.

In his application he sets out four pleas in law, the first of which alleges the wrongful failure to establish or the late establishment of his Staff Reports for 1997-1999 and 1999-2001 and of his CDRs for 2003 and 2004.

By his second plea, the applicant submits that his classification under grade A*8 following his CCP was contrary to Article 6 of the Staff Regulations. That decision also infringes the principle of equivalence between the old and new career structures and the principle of equal treatment and the protection of legitimate expectations.

By his third plea, the applicant alleges that he was the victim of discrimination as compared with Officials in active employment in so far as, because he was on CCP, he did not benefit from the transitional measures which were applied to those Officials in relation to promotion.

Lastly, by his fourth plea, the applicant challenges the failure to take account of his seniority attained before and during his CCP, in particular as regards the award of compensation points, merit points and priority points. He thus considers that he was worse off than Officials on secondment.

III

(Notices)

(2006/C 96/62)

Last publication of the Court of Justice in the *Official Journal of the European Union*

OJ C 86, 8.4.2006

Past publications

OJ C 74, 25.3.2006

OJ C 60, 11.3.2006

OJ C 48, 25.2.2006

OJ C 36, 11.2.2006

OJ C 22, 28.1.2006

OJ C 10, 14.1.2006

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