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*(Notices)*

# NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## COURT OF JUSTICE

(2010/C 80/01)

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

OJ C 63, 13.3.2010

**Past publications**

OJ C 51, 27.2.2010

OJ C 37, 13.2.2010

OJ C 24, 30.1.2010

OJ C 11, 16.1.2010

OJ C 312, 19.12.2009

OJ C 297, 5.12.2009

These texts are available on:

EUR-Lex: http://eur-lex.europa.eu

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**Taking of the oath by a new Member of the Court of Justice**

(2010/C 80/02)

Following his appointment as Advocate General at the Court of Justice of the European Communities for the period from 30 November 2009 to 6 October 2015 by decision of the Representatives of the Governments of the Member States of 30 November 2009, [1] Mr Cruz Villalón took the oath before the Court on 14 December 2009.

[1] OJ L 14 of 20.1.2010, p.12.

V

*(Announcements)*

# COURT PROCEEDINGS

# COURT OF JUSTICE

## Judgment of the Court (Third Chamber) of 11 February 2010 (Reference for a preliminary ruling from the Finanzgericht Düsseldorf — Germany) — Hoesch Metals and Alloys GmbH v Hauptzollamt Aachen

**(Case C-373/08)** [1]

***(Community Customs Code — Article 24 — Non-preferential origin of goods — Origin-conferring processing or working — Silicon blocks originating in China — Separation, crushing and purification of the blocks and the sieving, sorting by size and packaging of the grains in India — Dumping — Validity of Regulation (EC) No 398/2004)***

(2010/C 80/03)

*Language of the case: German*

### Referring court

Finanzgericht Düsseldorf

### Parties to the main proceedings

*Applicant:* Hoesch Metals and Alloys GmbH

*Defendant:* Hauptzollamt Aachen

### Re:

Reference for a preliminary ruling — Finanzgericht Düsseldorf (Germany) — Interpretation of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) — Validity of Council Regulation (EC) No 398/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China (OJ 2004 L 66, p. 15) — Meaning of 'substantial processing or working' conferring origin on a product — Cleaning and crushing of silicon metal blocks originating in China and sorting, separating and packaging of the silicon grains thus obtained

### Operative part of the judgment

1. *The separation, crushing and purification of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing, as carried out in the main proceedings, do not constitute origin-conferring processing or working for the purposes of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.*

2. *The examination of the second question raised by the referring court has not revealed any factors of such a kind as to affect the validity of Council Regulation (EC) No 398/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China.*

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[1] OJ C 272, 25.10.2008.

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## Judgment of the Court (Third Chamber) of 11 February 2010 (reference for a preliminary ruling from the Vestre Landsret — Denmark) — Ingeniørforeningen i Danmark, acting on behalf of Bertram Holst v Dansk Arbejdsgiverforening, acting on behalf of Babcock & Wilcox Vølund ApS

**(Case C-405/08)** [1]

***(Social policy — Informing and consulting employees — Directive 2002/14/EC — Transposition of Directive 2002/14/EC by way of legislation and also by way of collective agreement — Effects of the collective agreement with regard to an employee who is not a member of the union which is a party to that agreement — Article 7 — Protection of employees' representatives — Requirement of more extensive protection against dismissal — No requirement)***

(2010/C 80/04)

*Language of the case: Danish*

### Referring court

Vestre Landsret

**Parties to the main proceedings**

*Applicant:* Ingeniørforeningen i Danmark, acting on behalf of Bertram Holst

*Defendant:* Dansk Arbejdsgiverforening, acting on behalf of Babcock & Wilcox Vølund ApS

**Re:**

Reference for a preliminary ruling — Vestre Landsret — Interpretation of Article 7 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community — Joint declaration of the European Parliament, the Council and the Commission on employee representation (OJ 2002 L 80, p. 29) — Implementation of the directive through a collective agreement — Effects of the collective agreement for an employee who is not a member of the union which concluded that agreement — Implementing legislation not providing for a higher standard of protection against dismissal than currently provided for, in respect of groups of employees not covered by the collective agreement

**Operative part of the judgment**

1. *Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community must be interpreted as not precluding its transposition by way of a collective agreement which results in a group of employees being covered by the agreement in question, even though the employees in that group are not members of the union which is a party to that agreement and their field of activity is not represented by that union, provided that the collective agreement is such as to guarantee to the employees coming within its scope effective protection of the rights conferred on them by Directive 2002/14.*

2. *Article 7 of Directive 2002/14 must be interpreted as not requiring that more extensive protection against dismissal be granted to employees' representatives. However, any measure adopted to transpose that directive, whether provided for by legislation or by collective agreement, must comply with the minimum protection threshold laid down in that Article 7.*

(1) OJ C 301, 22.11.2008.

**Judgment of the Court (Seventh Chamber) of 11 February 2010 — European Commission v Kingdom of Spain**

**(Case C-523/08)** (1)

***(Failure of a Member State to fulfil obligations — Directive 2005/71/EC — Specific procedure for admitting third-country nationals for the purposes of scientific research — Failure to transpose within the prescribed period)***

(2010/C 80/05)

*Language of the case: Spanish*

**Parties**

*Applicant:* European Commission (represented by: M. Condou-Durande and M.-A. Rabanal Suárez, acting as Agents)

*Defendant:* Kingdom of Spain (represented by: B. Plaza Cruz, acting as Agent)

**Re:**

Failure of a Member State to fulfil obligations — Failure to adopt within the prescribed period the provisions necessary to comply with Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289, p. 15)

**Operative part of the judgment**

*The Court:*

1. *Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, the Kingdom of Spain has failed to fulfil its obligations under that directive;*

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

(1) OJ C 19, 24.01.2009.

**Judgment of the Court (Third Chamber) of 11 February 2010 (reference for a preliminary ruling from the Oberster Gerichtshof — Austria) — Fokus Invest AG v Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG)**

**(Case C-541/08)** [1]

***(Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons — Article 25 of Annex I to the Agreement — Articles 63 TFEU and 64(1) TFEU — Free movement of capital — Company established under the law of a Member State, the shares of which are held by a company established under Swiss law — Purchase by the company of immovable property situated in that Member State)***

(2010/C 80/06)

*Language of the case: German*

**Referring court**

Oberster Gerichtshof

**Parties to the main proceedings**

*Applicant:* Fokus Invest AG

*Defendant:* Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG)

**Re:**

Reference for a preliminary ruling — Oberster Gerichtshof (Austria) — Interpretation of Article 57(1) of the EC Treaty and of Article 25 of Annex I to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, signed at Luxembourg on 21 June 1999 (OJ 2002, L 114, p. 6) — Applicability to legal persons of the principle of equal treatment — National legislation establishing a system of prior authorisation in the case of acquisition of immovable property by a foreign national — Acquisition of immovable property by a domestic company all the shares in which are held by Swiss Companies

**Operative part of the judgment**

1. *Article 25 of Annex I to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, signed at Luxembourg on 21 June 1999, must be interpreted as meaning that the requirement of equal treatment with nationals in relation to the acquisition of immovable property applies only in relation to natural persons.*

2. *Article 64(1) TFEU must be interpreted as meaning that the provisions of the Law of the province of Vienna on the purchase of immovable property by foreign nationals (Wiener Ausländergrunderwerbsgesetz) of 3 March 1998, which require foreign nationals, within the meaning of that law, when acquiring immovable property situated in the province of Vienna, to obtain authorisation in respect of that acquisition or else to produce a confirmation that the conditions laid down in that law for exemption from that requirement are satisfied, constitute a restriction on the free movement of capital which is permitted with regard to the Swiss Confederation as a third country.*

[1] OJ C 55, 07.03.2009.

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**Judgment of the Court (Second Chamber) of 4 February 2010 (reference for a preliminary ruling from the Verwaltungsgericht Berlin (Germany)) — Hava Genc v Land Berlin**

**(Case C-14/09)** [1]

***(EEC-Turkey Association Agreement — Decision No 1/80 of the Association Council — Article 6(1) — Concept of 'worker' — Exercise of minor employment — Condition governing loss of acquired rights)***

(2010/C 80/07)

*Language of the case: German*

**Referring court**

Verwaltungsgericht Berlin

**Parties to the main proceedings**

*Applicant:* Hava Genc

*Defendant:* Land Berlin

**Re:**

Reference for a preliminary ruling — Verwaltungsgericht Berlin (Germany) — Interpretation of Article 6(1) of Decision No 1/80 of the EEC/Turkey Association Council — Right to remain of a Turkish national whose entry into the territory of the host Member State was based on a ground which no longer exists and whose professional activity, amounting to 5.5 hours per week, is merely minor — Minimum characteristics of a working relationship required for it to be considered 'regular employment' within the meaning of Decision No 1/80

**Operative part of the judgment**

1. *A person in a situation such as that of the applicant in the main proceedings is a worker within the meaning of Article 6(1) of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, provided that the employment in question is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.*

2. *A Turkish worker, within the meaning of Article 6(1) of Decision No 1/80, may rely on the right to free movement which he derives from the Agreement establishing an Association between the European Economic Community and Turkey, even if the purpose for which he entered the host Member State no longer exists. Where such a worker satisfies the conditions set out in Article 6(1) of that decision, his right of residence in the host Member State cannot be made subject to additional conditions as to the existence of interests capable of justifying residence or as to the nature of the employment.*

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([1]) OJ C 102, 1.5.2009.

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**Judgment of the Court (Seventh Chamber) of 4 February 2010 — European Commission v Kingdom of Spain**

**(Case C-18/09)** ([1])

***(Failure of a Member State to fulfil obligations — Freedom to provide services — Regulation (EEC) No 4055/86 — Article 1 — Maritime transport — Ports of general interest — Harbour dues — Exemptions and subsidies)***

(2010/C 80/08)

*Language of the case: Spanish*

**Parties**

*Applicant:* European Commission (represented by: K. Simonsson and L. Lozano Palacios, acting as Agents)

*Defendant:* Kingdom of Spain (represented by: B. Plaza Cruz, acting as Agent)

**Re:**

Failure of a Member State to fulfil obligations Infringement of Article 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1) — Ports of general interest — Subsidies and exemptions from harbour dues

**Operative part of the judgment**

*The Court:*

1. *Declares that, by maintaining in force Article 24(5) and Article 27(1), (2) and (4) of Law 48/2003 of 26 November 2003 on the economic rules and supply of services for ports of general interest, which establishes a system of rebates and exemptions for harbour dues, the Kingdom of Spain has failed to fulfil its obligations under Article 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries;*

2. *orders the Kingdom of Spain to pay the costs.*

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([1]) OJ C 69, 21.3.2009.

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**Judgment of the Court (First Chamber) of 11 February 2010 (reference for a preliminary ruling from the Conseil d'État, France) — Graphic Procédé v Ministère du budget, des comptes publics et de la fonction publique**

**(Case C-88/09)** ([1])

***(Taxation — Sixth VAT Directive — Reprographics activities — Concepts of 'supply of goods' and 'supply of services' — Distinguishing criteria)***

(2010/C 80/09)

*Language of the case: French*

**Referring court**

Conseil d'État

**Parties to the main proceedings**

*Applicant:* Graphic Procédé

*Defendant:* Ministère du budget, des comptes publics et de la fonction publique

**Re:**

Reference for a preliminary ruling — Conseil d'État — Interpretation of Articles 2(1), 5(1) and 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) — Reprographics — Criteria to take into account in order to distinguish a supply of services from a provision of services for the purposes of the Sixth Directive

**Operative part of the judgment**

*Article 5(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that reprographics activities have the characteristics of a supply of goods to the extent that they are limited to mere reproduction of documents on materials, where the right to dispose of them has been transferred from the reprographer to the customer who ordered the copies of the original. Such activities must be classified however as a 'supply of services', within the meaning of Article 6(1) of Sixth Directive 77/388, where it is clear that they involve additional services liable, having regard to the importance of those services for the recipient, the time necessary to perform them, the processing required by the original documents and the proportion of the total cost that those services represent, to be predominant in relation to the supply of goods, such that they constitute an aim in themselves for the recipient thereof.*

(1) OJ C 113, 16.5.2009.

## Judgment of the Court (Sixth Chamber) of 4 February 2010 — European Commission v Kingdom of Sweden

**(Case C-185/09)** (1)

***(Failure of a Member State to fulfil obligations — Directive 2006/24/EC — Electronic communications — Retention of data generated or processed in connection with the provision of electronic communications services — Failure to transpose within the prescribed period)***

(2010/C 80/10)

*Language of the case: Swedish*

**Parties**

*Applicant:* European Commission (represented by: L. Balta and U. Jonsson, Agents)

*Defendant:* Kingdom of Sweden (represented by: A. Falk and A. Engman, Agents)

**Re:**

Failure of Member State to fulfil obligations — Failure to adopt, within the prescribed period, the provisions necessary to comply Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)

**Operative part of the judgment**

*The Court:*

1. *declares that, by failing to adopt, within the prescribed period, the provisions necessary to comply Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, the Kingdom of Sweden has failed to fulfil its obligations under that directive;*

2. *orders the Kingdom of Sweden to pay the costs.*

(1) OJ C 180, 01.08.2009.

## Judgment of the Court (Seventh Chamber) of 4 February 2010 — European Commission v United Kingdom of Great Britain and Northern Ireland

**(Case C-186/09)** (1)

***(Failure of a Member State to fulfil obligations — Directive 2004/113/EC — Equal treatment for men and women — Access to and supply of goods and services — Failure to transpose within the prescribed period as regards Gibraltar)***

(2010/C 80/11)

*Language of the case: English*

**Parties**

*Applicant:* European Commission (represented by: M. van Beek and P. Van den Wyngaert, Agents)

*Defendant:* United Kingdom of Great Britain and Northern Ireland (represented by: H. Walker, Agent)

**Re:**

Failure of Member State to fulfil obligations — Failure to take, in the prescribed period, the provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37)

**Operative part of the judgment**

*The Court:*

1. *Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;*

2. *Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.*

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([1]) OJ C 180, 1.8.2009.

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## Judgment of the Court (Fifth Chamber) of 4 February 2010 — European Commission v United Kingdom of Great Britain and Northern Ireland

**(Case C-259/09)** ([1])

***(Management of waste from extractive industries — Failure to transpose or to communicate national transposition measures)***

(2010/C 80/12)

*Language of the case: English*

**Parties**

*Applicant:* European Commission (represented by: A. Marghelis and P. Van den Wyngaert, Agents)

*Defendant:* United Kingdom of Great Britain and Northern Ireland (represented by: S. Ossowski, Agent)

**Re:**

Failure of a Member State to fulfil obligations — Failure to adopt, within the prescribed period, the measures necessary to comply with Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC (OJ 2006 L 102, p. 15)

**Operative part of the judgment**

*The Court:*

1. *Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;*

2. *Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.*

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([1]) OJ C 220, 12.9.2009

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## Appeal brought on 3 December 2009 by Thomson Sales Europe against the judgment of the Court of First Instance (First Chamber) delivered on 29 September 2009 in Joined Cases T-225/07 and T-364/07 Thomson Sales Europe v Commission

**(Case C-498/09 P)**

(2010/C 80/13)

*Language of the case: French*

**Parties**

*Appellant:* Thomson Sales Europe (represented by: F. Goguel and F. Foucault, avocats)

*Other party to the proceedings:* European Commission

**Form of order sought**

— Set aside the judgment of the Court of 29 September 2009;

— annul Decision REM No 03/05 of the European Commission of 7 May 2007;

— order the Commission to pay the costs.

**Pleas in law and main arguments**

The appellant relies, in essence, on three pleas in support of its appeal.

By its first ground of appeal, the appellant submits that the Court failed to have regard to the rules on jurisdiction set out in Article 225 EC, in so far as it delivered a decision on the merits of the appellant's application for annulment of the Commission's letter of 20 July 2007 not confirming entitlement to a waiver of post-clearance recovery of import duties on colour television receivers manufactured in Thailand, even though it had previously held that the aforementioned application was inadmissible on the ground that the letter in question was not capable of producing legal effects.

By its second ground of appeal, the appellant submits that the Court infringed the rights of the defence and made a manifest error in the legal characterisation of the facts inasmuch as it refused the appellant's request to make all the evidence relied on available to the parties and, moreover, held that Thomson had displayed obvious negligence since, as an experienced operator, it should have asked the Commission for specific information about the possibility of continuing to declare colour televisions manufactured in Thailand as being of Thai origin after beginning to be supplied with tubes originating in Korea and Malaysia.

By its third ground of appeal, which is in two parts, Thomson claims that the Court infringed Article 239 of the Customs Code [1] with regard to the possibility of full or part repayment of import or export duties paid, or of remission of a certain amount of customs debt. The appellant submits, first, that the Court erred in law in so far as it dismissed its application after considering only the condition relating to the absence of deception or of negligence, without first investigating the condition relating to the existence of a special situation.

Second, the Court made an error in the legal characterisation of the facts, and thus an error of law, in considering that the conditions for remission under Article 239 of the Customs Code had not been fulfilled. According to the appellant, it does indeed satisfy the requirements of that provision, since the circumstances of the case are such as to amount to a special situation in so far as the Commission changed its practice in respect of the interpretation of the relevant provisions without giving operators sufficient warning.

Thomson submits, moreover, that it had no doubt that its operations were being conducted properly, as it was convinced that a single anti-dumping duty, fixed in practice by agreement with the Commission, applied to the whole of its production. It could not, therefore, be regarded as having been negligent.

[1] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

## Reference for a preliminary ruling from the Arbeitsgericht Wuppertal (Germany) lodged on 14 December 2009 — Dieter May v AOK Rheinland/Hamburg — Die Gesundheitskasse

**(Case C-519/09)**

(2010/C 80/14)

*Language of the case: German*

### Referring court

Arbeitsgericht Wuppertal

### Parties to the main proceedings

*Claimant:* Dieter May

*Defendant:* AOK Rheinland/Hamburg — Die Gesundheitskasse

### Question referred

Does the concept of worker within the meaning of Article 7(1) and (2) of Directive 2003/88/EC (corresponding to Article 7 of Directive 93/104/EC) … [1] also cover an employee subject to staff regulations (Dienstordnungsangestellter) in a public-law body whose autonomous regulations issued on the basis of authorisation under federal legislation (Paragraph 351 of the Reichsversicherungsordnung (National Social Insurance Code)) refer, in respect of the holiday entitlement of such an employee, to the provisions applicable to public servants (here Paragraph 101 of the Landesbeamtengesetz NW (Law on public servants of the *Land* North Rhine-Westphalia) in conjunction with the Verordnung über den Erholungsurlaub der Beamtinnen und Beamten und Richterinnen und Richter im Lande Nordrhein-Westfalen (Regulations on the holiday leave of public servants and judges in the *Land* North Rhine-Westphalia))?

[1] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003, L 299, p. 9).

## Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 22 December 2009 — Deutsche Telekom AG v Bundesrepublik Deutschland

**(Case C-543/09)**

(2010/C 80/15)

*Language of the case: German*

### Referring court

Bundesverwaltungsgericht

**Parties to the main proceedings**

*Appellant:* Deutsche Telekom AG

*Respondent:* Bundesrepublik Deutschland

*Intervening parties:* Go Yellow GmbH, Telix AG

**Questions referred**

1. Must Article 25(2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ([1]) be interpreted as meaning that Member States may require undertakings which assign telephone numbers to subscribers to make available data relating to subscribers to whom the undertaking in question has not itself assigned telephone numbers for the purpose of the provision of publicly available directory enquiry services and directories, in so far as that undertaking has such data in its possession?

2. If the answer to the previous question is in the affirmative:

   Must Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ([2]) be interpreted as meaning that the imposition of the abovementioned obligation by the national legislature is conditional upon the consent of, or at least the lack of any objection by, the other telephone service provider or its subscribers to the transmission of the data?

([1]) OJ 2002 L 108, p. 51.
([2]) OJ 2002 L 201, P. 37.

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**Reference for a preliminary ruling from the Varhoven Administrativen Sad (Bulgaria) lodged on 23 December 2009 — Aurubis Balgaria v Nachalnik na Mitnitsa — Sofia**

**(Case C-546/09)**

(2010/C 80/16)

*Language of the case: Bulgarian*

**Referring court**

Varhoven Administrativen Sad

**Parties to the main proceedings**

*Applicant:* Aurubis Balgaria

*Defendant:* Nachalnik na Mitnitsa — Sofia

**Questions referred**

1. Are national courts to interpret Article 232(1)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ([1]) as meaning that customs authorities may charge interest on arrears in respect of the amount of additional customs debts only in relation to the period following entry in the accounts, communication to the debtor and expiry of the period laid down by the customs authority pursuant to Article 222(1)(a) of the regulation for payment of the additional customs debts?

2. Is Article 214(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code to be interpreted, in the absence of corresponding provisions in Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, ([2]) as meaning that national authorities may not charge compensatory interest in respect of the period between the time of the original customs declaration and the time of the subsequent entry in the accounts?

3. Are the provisions of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and of Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 to be interpreted as meaning that, where there are no national legal provisions which provide expressly, in the event of subsequent entry in the accounts, for an increase in the customs duty or another national penalty equal to the amount that would have been charged as interest on arrears in respect of the period between the time at which the customs debt was incurred and the time at which the subsequent entry in the accounts was made, Community law does not permit national courts to effect such an increase or impose such a penalty?

([1]) OJ 1992 L 302, p. 1.
([2]) OJ 1993 L 253, p. 1.

**Appeal brought on 23 December 2009 by Bank Melli Iran against the judgment of the Court of First Instance (Second Chamber) delivered on 14 October 2009 in Case T-390/08 Bank Melli Iran v Council**

**(Case C-548/09 P)**

(2010/C 80/17)

*Language of the case: French*

**Parties**

*Appellant:* Bank Melli Iran (represented by: L. Defalque, avocate)

*Other parties to the proceedings:* Council of the European Union, United Kingdom of Great Britain and Northern Ireland, French Republic, European Commission

**Form of order sought**

— Set aside the judgment delivered on 14 October 2009 by the Second Chamber of the Court of First Instance in Case T-390/08 *Bank Melli Iran* v *Council*, served on the appellant on 15 October 2009;

— grant the forms of order sought by the appellant in the proceedings at first instance;

— order the respondent to pay the costs of the proceedings at first instance and of the appeal.

**Pleas in law and main arguments**

In support of its appeal, the appellant relies, principally, on three pleas in law and, in the alternative, on three other pleas.

By its first ground of appeal, the appellant submits that the Court erred in law by not finding the obligation of individual notification in Article 15(3) of Regulation 423/2007 [1] to be an essential procedural requirement, non-compliance with which entails annulment of the measure. The communication of the fund-freezing decision to the appellant's Paris branch by the French banking commission instead of by the Council does not satisfy the notification requirements provided for by the regulation and constitutes an infringement of a Community public policy rule.

By its second ground of appeal, the appellant submits that the Court erred in law in its interpretation of the legal bases of Regulation 423/2007. By accepting that that regulation and the decision at issue were adopted by a qualified majority on the basis of Articles 60 EC and 301 EC alone, the Court infringed the essential procedural requirements of the Treaty. Since that regulation and the decision concern entities which are engaged in, associated with or provide support for nuclear proliferation, those items of legislation are not covered by Article 60 EC and 301 EC and should also be based on Article 308 EC, which requires a unanimous vote.

By its third ground of appeal, Bank Melli Iran submits that the Court erred in law in its interpretation of the concept of the rights of the defence and of the principle of effective judicial protection in so far as it considered that it had sufficient information to carry out its review, without having received any evidence from the Council supporting the statement of reasons for the decision at issue, either before or after the proceedings were initiated.

In the alternative, the appellant complains, first, that the Court erred in law and in its assessment of the facts in so far as it took the view that the Council has an autonomous discretionary power under Article 7(2) of Regulation 423/2007, whereas its power is limited by the adoption of restrictive measures by the United Nations Security Council.

The appellant states, second, that the Court made an error of assessment of law with regard to the appellant's right to property in so far as it held that the importance of the objectives pursued by the legislation at issue — maintaining international peace and security — justified a restriction of fundamental rights, including the right to property and the right to carry on economic activity.

Lastly, the appellant submits that the Court made a manifest error of assessment of the facts by including it in the list of entities whose assets were to be frozen, since the appellant has not engaged in the Iranian nuclear programme and is not associated with entities which have engaged in it.

[1] Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

**Action brought on 23 December 2009 — European Commission v French Republic**

**(Case C-549/09)**

(2010/C 80/18)

*Language of the case: French*

**Parties**

*Applicant:* European Commission (represented by: E. Gippini Fournier and K. Walkerová, Agents)

*Defendant:* French Republic

**Form of order sought**

— declare that, by failing to implement the Commission Decision of 14 July 2004 concerning certain aid measures applied by France to assist fish farmers and fishermen [1] by recovering from the beneficiaries the aid which was declared unlawful and incompatible with the common market in Articles 2 and 3 of that decision, and by failing to inform the Commission of the measures taken to comply with that decision, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and Articles 4 and 5 of that decision;

— order the French Republic to pay the costs.

**Pleas in law and main arguments**

By its action, the Commission complains that the defendant has still not taken the measures necessary to recover, 'without delay', from the beneficiaries the aid declared unlawful and incompatible with the common market or, in any event, has not communicated those measures to the Commission.

France was to inform the Commission, within a period of two months from notification of the decision, of the measures taken to comply with that decision. However, more than five years have elapsed since the French authorities received that decision and no reimbursement of the aid granted has been made.

The applicant recalls furthermore that, according to settled case-law, the only defence available to a Member State against infringement proceedings brought by the Commission on the basis of Article 108(2) TFEU is to plead that it was absolutely impossible to implement the decision. However, the French authorities have never pleaded exceptional and unforeseeable difficulties rendering implementation of the decision impossible. They have merely indicated that they intended to take the relevant recovery measures jointly with another matter concerning recovery of other incompatible aid.

[1] Commission Decision 2005/239/EC of 14 July 2004 concerning certain aid measures applied by France to assist fish farmers and fishermen (OJ 2005 L 74, p. 49).

**Appeal brought on 24 December 2009 by Ferrero SpA against the judgment of the Court of First Instance (Second Chamber) delivered on 14 October 2009 in Case T-140/08: Ferrero SpA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Tirol Milch reg.Gen.mbH Innsbruck**

**(Case C-552/09 P)**

(2010/C 80/19)

*Language of the case: English*

**Parties**

*Appellant:* Ferrero SpA (represented by: F. Jacobacci, avvocato, C. Gielen and H.M.H. Speyart, advocaten)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Tirol Milch reg.Gen.mbH Innsbruck

**Form of order sought**

The appellant claims that the Court should:

— set aside the judgment under appeal;

— uphold Ferrero's application for annulment of the contested decision or, alternatively, refer the case back to the General Court for reconsideration; and

— order OHIM to bear its own costs and to pay those of Ferrero, both in first instance and on appeal.

**Pleas in law and main arguments**

The appellant maintains that the contested judgment should be set aside on the following grounds:

— the Court of First Instance of the European Communities ('CFI') violated the system of Article 8 of Regulation No 40/94 [1] in carrying out a single factual assessment of similarity with implications both under Article 8(1)(b) and Article 8(5), even though both provisions have entirely distinct sets of tests;

— the CFI erred in law in finding that it need not take into account the reputation of the earlier trade marks in finding that the conditions for the applicability of Article 8(1)(b) and (5) were not met;

— the CFI erred in law or distorted the facts submitted to it in applying erroneous, unfounded and unreasoned rules of evidence in assessing similarity;

— the CFI erred in law in failing to take into proper account that the earlier trade marks contain verbal trade marks and that the challenged trade mark is figurative; and

— the CFI erred in law in failing to take into proper account the existence of a family of trade marks.

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

## Reference for a preliminary ruling from the Oberlandesgericht Stuttgart (Germany) lodged on 31 December 2009 — Andreas Michael Seeger v Generalstaatsanwaltschaft Stuttgart

**(Case C-554/09)**

(2010/C 80/20)

*Language of the case: German*

**Referring court**

Oberlandesgericht Stuttgart

**Parties to the main proceedings**

*Appellant:* Andreas Michael Seeger

*Respondent:* Generalstaatsanwaltschaft Stuttgart

**Question referred**

Can the term 'materials' in the second indent of Article 13(d) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 [1] be interpreted as also capable of including packaging materials, such as empty drinks bottles (empties), carried by a wine and drinks merchant who runs a shop, makes deliveries to his customers once a week and, while doing so, collects the empties to take them to his wholesaler?

(1) OJ 2006 L 102, p. 1.

## Action brought on 8 January 2010 — European Commission v Kingdom of Belgium

**(Case C-6/10)**

(2010/C 80/21)

*Language of the case: French*

**Parties**

*Applicant:* European Commission (represented by: G. Braun and L. de Schiertere de Lophem, Agents)

*Defendant:* Kingdom of Belgium

**Form of order sought**

— declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [1] or, in any event, by failing to communicate those measures to the Commission, the Kingdom of Belgium has failed to fulfil its obligations under that directive;

— order the Kingdom of Belgium to pay the costs.

### Pleas in law and main arguments

The period for transposition of Directive 2006/46/EC lapsed on 5 September 2008. On the date the present action was commenced, the defendant had not yet adopted all the measures necessary to transpose the directive or, in any event, had not informed the Commission of those measures.

(1) OJ 2006 L 224, p. 1.

## Action brought on 8 January 2010 — European Commission v Grand Duchy of Luxembourg

**(Case C-8/10)**

(2010/C 80/22)

*Language of the case: French*

### Parties

*Applicant:* European Commission (represented by: G. Braun and L. de Schietere de Lophem, Agents)

*Defendant:* Grand Duchy of Luxembourg

### Form of order sought

— declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [1] or, in any event, by failing to communicate those measures to the Commission, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

— order the Grand Duchy of Luxembourg to pay the costs.

### Pleas in law and main arguments

The period for the transposition of Directive 2006/46/EC lapsed on 5 September 2008. At the date the present action was commenced, the defendant had not yet adopted all the measures necessary to transpose the directive or, in any event, had not informed the Commission of those measures.

(1) OJ 2006 L 224, p. 1.

## Reference for a preliminary ruling from the Hoge Raad der Nederlanden, lodged on 8 January 2010 — Staatssecretaris van Financiën v Marishipping and Transport BV

**(Case C-11/10)**

(2010/C 80/23)

*Language of the case: Dutch*

### Referring court

Hoge Raad der Nederlanden

### Parties to the main proceedings

*Appellant:* Staatssecretaris van Financiën

*Respondent:* Marishipping and Transport BV

### Questions referred

1. Is the exemption of pharmaceutical substances from customs duties laid down in Part One, Section II, Part C (i), of Annex I to Council Regulation (EEC) No 2658/87 [1] of 23 July 1987, in conjunction with the list of pharmaceutical substances contained in Part Three (annexes), Section II, Annex 3, restricted to the pure form of the (chemical) substances referred to?

2. If other substances may be added to the pharmaceutical substances indicated, what restrictions should apply in that regard?

(1) Regulation on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

**Reference for a preliminary ruling from the Finanzgericht Düsseldorf (Germany) lodged on 8 January 2010 — LECSON Elektromobile GmbH v Hauptzollamt Dortmund**

**(Case C-12/10)**

(2010/C 80/24)

*Language of the case: German*

## Referring court

Finanzgericht Düsseldorf

## Parties to the main proceedings

*Applicant:* LECSON Elektromobile GmbH

*Defendant:* Hauptzollamt Dortmund

## Question referred

Do the electric mobility scooters which are described more precisely in the order fall within heading 8713 or heading 8703 of the combined nomenclature, as amended by Commission Regulation (EC) No 1810/2004 of 7 September 2004 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff? ([1])

([1]) OJ 2004 L 327, p. 1.

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**Reference for a preliminary ruling from the Rechtbank van eerste aanleg te Brussel (Belgium), lodged on 11 January 2010 — Knubben Dak-en Leidekkersbedrijf BV v Belgische Staat**

**(Case C-13/10)**

(2010/C 80/25)

*Language of the case: Dutch*

## Referring court

Rechtbank van eerste aanleg te Brussel

## Parties to the main proceedings

*Applicant:* Knubben Dak- en Leidekkersbedrijf BV

*Defendant:* Belgische Staat

## Questions referred

1. Does Community law, in particular the principle of the freedom to provide services as laid down in Article 56 TFEU (formerly Article 49 EC), preclude rules such as those laid down in Articles 1 and 1a of Belgian Royal Decree No 20 of 20 July 1970, under which the reduced VAT rate may be applied to construction work only if the service provider is registered in Belgium as a contractor in accordance with Articles 400 and 401 of the Wetboek van Inkomstenbelastingen (Belgian Income Tax Code) 1992?

2. Does Community law, in particular the principle of the freedom to provide services as laid down in Article 56 TFEU (formerly Article 49 EC), preclude rules such as those laid down in Articles 400 and 401 of the Belgian Income Tax Code 1992 and in the Royal Decree of 26 December 1998, under which registration as a contractor in Belgium applies fully and identically to Belgian service providers and to service providers established in another Member State of the European Union?

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**Reference for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 12 January 2010 — Agrargenossenschaft Münchehofe e.G. v BVVG Bodenverwertungs- und -verwaltungs GmbH**

**(Case C-18/10)**

(2010/C 80/26)

*Language of the case: German*

## Referring court

Landgericht Berlin

## Parties to the main proceedings

*Applicant:* Agrargenossenschaft Münchehofe e.G.

*Defendant:* BVVG Bodenverwertungs- und -verwaltungs GmbH

## Question referred

Do the provisions of Paragraph 5(1)(ii) and (iii) of the Flächenerwerbsverordnung (Land Purchase Regulations), implementing Paragraph 4(3)(i) of the Ausgleichsleistungsgesetz (Compensation Act), in the version in force until 11 July 2009, infringe Article 87 EC?

# Action brought on 12 January 2010 — European Commission v Italian Republic

## (Case C-19/10)

(2010/C 80/27)

*Language of the case: Italian*

## Parties

*Applicant:* European Commission (represented by: P. Oliver and S. Mortoni, Agents)

*Defendant:* Italian Republic

## Form of order sought

— Declare that, by failing to adopt the national measures for the implementation of Article 12 of Regulation (EC) No 273/2004 [1] of the European Parliament and of the Council of 11 February 2004 on drug precursors, by failing to inform the Commission of those measures as required under Article 16 of that regulation, and by failing to adopt the national measures for the implementation of Article 31 of Council Regulation (EC) No 111/2005 [2] of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, the Italian Republic has failed to fulfil its obligations under those regulations.

— Order the Italian Republic to pay the costs.

## Pleas in law and main arguments

Regulation No 273/2004 entered into force on 18 August 2005; Regulation No 111/2005 entered into force on 15 February 2005 and has applied since 18 August 2005. Having received no notification of the provisions that Italy was required to adopt under Article 12 of Regulation No 273/2004 and under Article 31 of Regulation No 111/2005 and, in any event, having received no information from the Italian Republic which might indicate that the necessary measures have in fact been adopted, the Commission submits that the Italian Republic has failed to adopt such measures and that it has therefore failed to fulfil its obligations under Regulation No 273/2004 and Regulation No 111/2005.

[1] OJ 2004 L 47, p. 1.
[2] OJ 2005 L 22, p. 1.

# Appeal brought on 14 January 2010 by REWE-Zentral AG against the judgment of the Court of First Instance (Sixth Chamber) delivered on 11 November 2009 in Case T-150/08 REWE-Zentral AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs), intervener: Aldi Einkauf GmbH & Co. OGH

## (Case C-22/10 P)

(2010/C 80/28)

*Language of the case: German*

## Parties

*Appellant:* REWE-Zentral AG (represented by: M. Kinkeldey and A. Bognár, lawyers)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs), Aldi Einkauf GmbH & Co. OHG

## Form of order sought

The appellant claims that the Court should:

— set aside the contested decision of the Court of First Instance of 11 November 2009;

— order the defendant and respondent to pay the costs of these proceedings and the costs of the proceedings before the Court of First Instance

## Pleas in law and main arguments

The present appeal is against the judgment of the Court of First Instance by which that court dismissed the appellant's action for annulment of the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market of 15 February 2008 rejecting its application for registration of the word sign CLINA. By its judgment the Court of First Instance confirmed the Board of Appeal's decision according to which there is a likelihood of confusion with the earlier Community word mark CLINAIR.

The appellant relies on one ground of appeal alleging breach of Article 8(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

The Court of First Instance erred in law by not carrying out a comprehensive global assessment of all the relevant factors when it assessed the likelihood of confusion. As a result of its assumption that there is a high degree of aural and visual similarity between the signs at issue, which was in turn the result of an error of law, it held that the conceptual differences between those signs could not be counteracted, which is correspondingly likewise due to an error of law. Furthermore, the Court of First Instance did not assess the very low degree of distinctiveness of the earlier mark in a legally correct manner. The Court of First Instance therefore erred in law in its application of Article 8(1)(b) of Regulation No 40/94 and thus breached Community law.

In particular, the Court of First Instance did not sufficiently take into account the fact that the signs to be compared CLINAIR and CLINA exhibit fundamental aural and visual differences which have to be taken into account for legal reasons and that the earlier mark CLINAIR has a particular meaning, which likewise has to be taken into account for legal reasons and which the later mark completely lacks. Likewise, the Court of First Instance did not take into consideration that the element 'CLIN' has a particularly weak distinctive character and can therefore, for legal reasons, only have a minimal effect on the overall impression made by the mark CLINAIR. For that reason in turn the mere fact that there is correspondence as regards that element is not, for legal reasons, sufficient to give rise to a likelihood of confusion under Article 8(1)(b) of Regulation No 40/94, particularly as the existing aural, visual and conceptual differences are significant.

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## Appeal brought on 21 December 2009 by Mehmet Salih Bayramoglu against the order of the Court of First Instance (Second Chamber) delivered on 24 September 2009 in Case T-110/09: Mehmet Salih Bayramoglu v European Parliament, Council of the European Union

**(Case C-28/10 P)**

(2010/C 80/29)

*Language of the case: English*

### Parties

*Appellant(s):* Mehmet Salih Bayramoglu (represented by: A. Riza QC)

*Other parties to the proceedings:* European Parliament, Council of the European Union

### Form of order sought

The applicant claims that the Court should:

— Annul the Council Decision 2004/511/EC [1] on the ground that it is based on an unlawful failure to act to enable the Turkish Cypriot people to take part in European elections in violation of Article 189 of the EC Treaty read together with Articles 5 and 6 if the Treaty on European Union.

— Declare that the six MEPs notified by the RoC after 6 June 2009 returned under the present electoral arrangements do not represent the Turkish Cypriot as required by law.

### Pleas in law and main arguments

The appellant maintains that the Court of First Instance was wrong when it ruled that his action was lodged out of time. In support of this argument he submits that the case law relied upon by the CFI did not involve a failure to provide for the fundamental right of participating in elections of an entire people and did not concern a decision whose legal premise was a failure to act and make provisions for elections rather than to purport to postpone the right to hold such elections.

The appellant also submits that it was not the case that he did not invoke the existence of an excusable error or force majeure when lodging his application.

(1) 2004/511/EC:Council Decision of 10 June 2004 concerning the representation of the people of Cyprus in the European Parliament in case of a settlement of the Cyprus problem
OJ L 211, p. 22

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## Reference for a preliminary ruling from the Cour d'appel (Luxembourg) lodged on 18 January 2010 — Heiko Koelzsch v État du Grand-Duché de Luxembourg

**(Case C-29/10)**

(2010/C 80/30)

*Language of the case: French*

### Referring court

Cour d'appel

### Parties to the main proceedings

*Applicant:* Heiko Koelzsch

*Defendant:* État du Grand-Duché de Luxembourg

### Questions referred

Is the rule of conflict in Article 6(2)(a) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, [1] which states that an employment contract is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, to be interpreted as meaning that, in the situation where the employee works in more than one country, but returns systematically to one of them, that country must be regarded as that in which the employee habitually carries out his work?

(1) Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

## Action brought on 21 January 2010 — European Commission v French Republic

**(Case C-35/10)**

(2010/C 80/31)

*Language of the case: French*

### Parties

*Applicant:* European Commission (represented by: A. Marghelis and J. Sénéchal, Agents)

*Defendant:* French Republic

### Form of order sought

— declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC [1] or, in any event, by failing to communicate those provisions to the Commission, the French Republic has failed to fulfil its obligations under Article 25 of that directive;

— order the French Republic to pay the costs.

### Pleas in law and main arguments

The period for transposition of Directive 2006/21/EC lapsed on 30 April 2008. At the date the present action was commenced, the defendant had not yet adopted all the measures necessary to transpose the directive or, in any event, had not informed the Commission of those measures.

(1) OJ 2006 L 102, p. 15.

## Action brought on 22 January 2010 — European Commission v Kingdom of Belgium

**(Case C-36/10)**

(2010/C 80/32)

*Language of the case: French*

### Parties

*Applicant:* European Commission (represented by: A. Sipos and J.-B. Laignelot, acting as Agents)

*Defendant:* Kingdom of Belgium

### Form of order sought

— Declare that, by failing to adopt all the measures to correctly transpose the second subparagraph of Article 12(1) of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances [1], as amended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 [2], the Kingdom of Belgium has failed to fulfil its obligations under that directive;

— order Kingdom of Belgium to pay the costs.

### Pleas in law and main arguments

By its action, the European Commission claims that the defendant did not correctly implement the provisions of the second subparagraph of Article 12(1) of Directive 96/82/EC in the Région de Bruxelles-Capitale (Brussels-Capital Region). In order to prevent major accidents and to limit the consequences of such accidents, that provision creates the obligation that the Member States ensure that their land use takes account of the need, in the long term, to maintain appropriate distances between establishments covered by the directive and areas such as residential areas, buildings and areas of public use or leisure

areas covered by Article 12 of that directive. However, it is apparent from an examination of the provisions implemented by the authorities of Brussels that those provisions concern only the procedures for granting planning permission or for division into plots, which inevitably takes place after the creation of a land-use policy. Thus, the regional measures are incomplete in so far as they do not cover the procedures for defining and implementing that policy.

(1) OJ 1997 L 10, p. 13.

(2) Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances (OJ 2003 L 345, p. 97).

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**Action brought on 22 January 2010 — European Commission v Portuguese Republic**

**(Case C-38/10)**

(2010/C 80/33)

*Language of the case: Portuguese*

## Parties

*Applicant:* European Commission (represented by: R. Lyal and G. Braga, Agents)

*Defendant:* Portuguese Republic

## Form of order sought

— A declaration that, by adopting and maintaining in force the legislative provisions contained in Articles 76A, 76B and 76C of the Portuguese Corporation Tax Code, by virtue of which, in the case of the transfer of the registered office and effective centre of management of a Portuguese undertaking to another Member State or of the cessation of activities in Portugal of a permanent establishment or of the transfer of its assets in Portugal to another Member State:

  — the basis of assessment for the year in which that event takes place includes all unrealised capital gains relating to the assets in question, whereas unrealised capital gains relating to exclusively national transactions are not included in the basis of assessment;

  — the members of a company transferring its registered office and effective centre of management out of Portugal are subject to taxation based on the difference between the value of the company's liquid assets (calculated at the date of the transfer and at market prices) and the cost price of the respective shareholdings,

  the Portuguese Republic has failed to fulfil its obligations under Article 49 of the Treaty on the functioning of the European Union and Article 31 of the Agreement on the European Economic Area;

— an order that the Portuguese Republic should pay the costs.

## Pleas in law and main arguments

The Commission takes the view that those articles of the Corporation Tax Code may constitute an impediment to the freedom of establishment enshrined in Article 49 TFEU.

In accordance with that Portuguese legislation, unrealised capital gains are taxed only when a company transfers its registered office and effective centre of management out of Portuguese territory or when it transfers individual assets to a permanent establishment in another Member State, whereas similar transfers of the registered office within Portuguese territory or of assets from the principal place of business to a branch in the same Member State do not entail any immediate tax consequences.

The Commission does not challenge the Member States' rights to tax capital gains made by a person who, as a resident taxpayer, has been subject to taxation on his worldwide income. None the less, the Commission considers that the Portuguese legislation must apply the same rule and that the chargeable events giving rise to tax obligations must be the same, in particular, the realisation of the asset or any factor necessitating an adjustment of depreciation, whether the registered office, effective centre of management or assets are transferred out of Portuguese territory or whether they remain there.

The Commission considers that companies must have the right to transfer their registered office or individual assets to another Member State without being subject to excessively complex and burdensome procedures, there being, in its view, no justification for the immediate charging of taxes on unrealised capital gains when a Portuguese company transfers its registered office or effective centre of management to another Member State or when a permanent establishment ceases activity in Portuguese territory or transfers its assets from Portugal to another Member State, if that kind of taxation is not found in comparable national situations.

The need to ensure that the rights of certain interested persons, in particular, the rights of creditors, minority shareholders and the tax authorities, receive special protection has to be guaranteed, but in accordance with the principle of proportionality, as interpreted by the Court of Justice.

In that regard, the Portuguese Republic could, for example, determine the value of the unrealised capital gains which it seeks to keep within its fiscal sovereignty, if that did not mean that the tax was immediately payable and if it did not involve other conditions attaching to the deferment of payment.

The objective of ensuring effective fiscal supervision and combating tax avoidance, while legitimate, could also be attained by less restrictive means, using the mechanisms provided by Council Directive 77/799/EC [1] of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, or by Council Directive 2008/55/EC [2] of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures.

In the Commission's view, the Portuguese legislation goes beyond what is necessary in order to attain the objectives pursued, that is to say, to ensure the effectiveness of the tax system. In consequence, the Commission considers that the Portuguese legislation must apply the same rule whether the registered office, effective centre of management or assets are transferred out of Portuguese territory or whether they remain there: the tax must be charged only after the increase in the value of the assets has been realised.

[1] OJ 1977 L 336, p. 15
[2] OJ 2008 L 150, p. 28

## Action brought on 25 January 2010 — European Commission v Kingdom of Belgium

**(Case C-41/10)**

(2010/C 80/34)

*Language of the case: French*

### Parties

*Applicant:* European Commission (represented by: G. Rozet and N. Yerrell, acting as Agents)

*Defendant:* Kingdom of Belgium

### Form of order sought

— Declare that, by incorrectly and incompletely transposing Directive 73/239/EEC [1] and Directive 92/49/EEC [2], the Kingdom of Belgium failed to fulfil its obligations under, inter alia, Articles 6, 8, 15, 16 and 17 of First Directive 73/239/EEC and Articles 20, 21 and 22 of Third Directive 92/49/EEC;

— order Kingdom of Belgium to pay the costs.

### Pleas in law and main arguments

By the present action, the Commission claims that as the activities of the Belgian mutual companies in the field of supplementary sickness insurance are not part of the statutory social security scheme, they do not comply with the first and third non-life insurance directives. In so far as the mutual companies compete directly with the insurance companies in the market for supplementary sickness insurance, they should be subject to the same legal regime as those insurance companies. The applicant disputes in that regard the defendant's assertion that the supplementary sickness insurance services offered by the mutual companies are covered by the exception provided for in Article 2(1)(d) of the First Directive and claims that the cover under the supplementary insurance cannot be treated in the same way as 'insurance forming part of a statutory system of social security'.

The Commission maintains, first, that Article 6 of the First Directive requires that access to the activity of direct insurance be subject to a prior official authorisation sought from the competent authorities of the Member State in the territory of which the undertaking has its company seat. However, the Belgian mutual companies were not authorised in accordance with that provision in relation to their supplementary sickness insurance activities.

Secondly, the applicant alleges that the defendant infringed Article 8(1)(a) of the First Directive in so far as mutual companies are not included among the legal forms required for insurance companies in Belgium. Furthermore, the mutual companies are authorised to carry out a broad range of activities which are not directly connected with their insurance activities whereas Article 8(1)(b) lays down that the undertaking must limit its business activities to the business of insurance and operations directly arising therefrom to the exclusion of all other commercial business. The Belgian legislation also poses a problem with regard to Articler 8(1)(c) in so far as it provides that the undertaking must present a scheme of operations in accordance with Article 9 of the directive. However, no scheme of that type was presented by the mutual companies in relation to their supplementary sickness insurance activities. Finally, the Belgian mutual companies were not obliged to possess the minimum guarantee fund, contrary to the requirement set out in Article 8(1)(d) of the First Directive.

Thirdly, the Commission claims that, under Article 13 et seq. of the First Directive (in particular, Articles 16, 16a and 17) and Articles 15 and 20 to 22 of the Third Directive, the mutual companies must establish sufficient technical reserves in relation to their supplementary sickness insurance activities as well as a sufficient solvency margin in relation to all of their activities. However, in Belgium, the solvency margin for supplementary insurance provided by mutual companies was established only in 2002 and the method of calculating that margin differed from that provided for by the First Directive.

(1) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance.

(2) Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive).

**Reference for a preliminary ruling from the Højesteret (Denmark), lodged on 28 January 2010 — Viking Gas A/S v BP Gas A/S**

**(Case C-46/10)**

(2010/C 80/35)

*Language of the case: Danish*

**Referring court**

Højesteret

**Parties to the main proceedings**

*Appellant:* Viking Gas A/S

*Respondent:* BP Gas A/S

**Questions referred**

1. Is Article 5, in conjunction with Article 7, of First Council Directive 89/104/EEC (1) of 21 December 1988 to approximate the laws of the Member States relating to trade marks to be interpreted in such a way that company B is guilty of an infringement of a trade mark if it fills gas bottles which originate from company A with gas which it then sells, where the following circumstances apply:

   1. A sells gas in so-called composite bottles with a special shape, which is registered as such, that is to say, as a shape trade mark, under a Danish trade mark and an EC trade mark. A is not the proprietor of those shape trade marks but has an exclusive licence to use them in Denmark and has the right to take legal proceedings in respect of infringements in Denmark.

   2. On first purchase of a composite bottle filled with gas from one of A's dealers the consumer also pays for the bottle, which thus becomes the consumer's property.

   3. A refills the composite bottles by a procedure under which the consumer goes to one of A's dealers and, on payment for the gas, has an empty composite bottle exchanged for a similar one filled by A.

   4. B's business consists in filling gas into bottles, including composite bottles covered by the shape trade mark referred to in 1., by a procedure under which consumers go to a dealer associated with B and, on payment for the gas, can have an empty composite bottle exchanged for a similar one filled by B.

   5. When the composite bottles in question are filled with gas by B, adhesive labels are attached to the bottles indicating that the filling was undertaken by B?

2. If it may be assumed that consumers will generally receive the impression that there is an association between B and A, is this to be regarded as significant for the purpose of answering Question 1?

3. If Question 1 is answered in the negative, may the outcome be different if the composite bottles — apart from being covered by the shape trade mark referred to — also feature (are imprinted with) the registered figurative and/or word mark of A, which is still visible irrespective of any adhesive labels affixed by B?

4. If either Question 1 or Question 3 is answered in the affirmative, may the outcome be different if it is assumed that, with regard to other types of bottle which are not covered by the shape trade mark referred to but which feature A's word and/or figurative mark, A has for many years accepted, and continues to accept, the refilling of the bottles by other companies?

5. If either Question 1 or Question 3 is answered in the affirmative, may the outcome be different if the consumer himself goes to B directly and there:

   (a) on payment for the gas, obtains, in exchange for an empty composite bottle, a similar one filled by B, or

   (b) on payment, has a composite bottle which he has brought filled with gas?

(1) OJ 1989 L 40, p. 1.

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**Appeal by the Republic of Austria brought on 28 January 2010 against the judgment of the Court of First Instance (Sixth Chamber) of 18 November 2009 in Case T-375/04 Scheucher-Fleisch GmbH and Others v Commission of the European Communities**

**(Case C-47/10 P)**

(2010/C 80/36)

*Language of the case: German*

**Parties**

*Appellant:* Republic of Austria (represented by: E. Riedel, acting as Agent; M. Núñez-Müller and J. Dammann, lawyers)

*Other parties to the proceedings:* Scheucher-Fleisch GmbH, Tauernfleisch Vertriebs GmbH, Wech-Kärntner Truthahnverarbeitung GmbH, Wech-Geflügel GmbH, Johann Zsifkovics, European Commission

**Forms of order sought**

The Republic of Austria claims that the Court should:

— set aside the judgment of the Court of First Instance of 18 November 2009 in Case T-375/04 (*Scheucher and Others* v *Commission*);

— give final judgment in the case and dismiss the application as inadmissible or, in the alternative, as unfounded;

— order the applicants in the original proceedings to pay the costs on appeal and the costs of the first instance proceedings in Case T-375/04.

**Pleas in law and main arguments**

The appellant argues that the contested judgment infringes Article 263(4) TFEU. The Court overlooked the fact that the applicants in the original proceedings were not individually or directly affected by the Commission decision in dispute. The contested decision did not lead to any noticeable prejudice to their market position, and the general sectoral aid rules of the Republic of Austria, approved by the Commission, did not lead to any distortions of competition since the granting of aid was dependent in each case on an individual decision by the relevant authorities. Finally, the applicants in the original proceedings do not have the necessary legal interest in bringing proceedings, as the contested decision of the Commission does not affect them themselves.

The appellant further argues that the contested judgment infringes Article 108(2) TFEU. The Court erred in law by assuming that, during the preliminary investigation procedure, the Commission encountered serious difficulties in assessing the disputed measures and was therefore obliged to initiate the formal investigation procedure.

The appellant also takes the view that the contested judgment infringes the rules on the burden of proof. The Court obliged the Commission to initiate the formal investigation procedure, even though the applicants had not produced the necessary evidence that they were affected.

In the appellant's submission, the contested judgment also infringes Article 81 of the Rules of Procedure of the Court for contradictory reasoning.

Finally, the appellant argues that the contested decision infringes Article 64 of the Rules of Procedure, because the Court failed to verify circumstances that were relevant for the decision by measures of organisation of procedure.

## Action brought on 29 January 2010 — European Commission v Republic of Slovenia

**(Case C-49/10)**

(2010/C 80/37)

*Language of the case: Slovene*

### Parties

*Applicant:* European Commission (represented by: A. Alcover San Pedro and B. Rous Svete)

*Defendant:* Republic of Slovenia

### Form of order sought

— a declaration that, by failing to take the measures necessary to ensure that the competent authorities see to it, by means of permits in accordance with Articles 6 and 8 of Directive 2008/1/EC [1] or, as appropriate, by reconsidering and, where necessary, by updating the conditions, that existing installations operate in accordance with the requirements of Articles 3, 7, 9, 10 and 13, Article 14(a) and (b) and Article 15(2) not later than 30 October 2007, without prejudice to specific Community legislation, the Republic of Slovenia has failed to fulfil its obligations under Article 5(1) of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control ('the IPPC Directive');

— an order that the Republic of Slovenia should pay the costs.

### Pleas in law and main arguments

On the basis of the answer given by the Republic of Slovenia to the reasoned opinion, the European Commission finds that a great many installations in Slovenia still operate without valid permits, which amounts to infringement of Article 5(1) of Directive 2008/1/EC.

(1) OJ 2008 L 24, p. 8.

## Appeal brought on 9 February 2010 by Internationale Fruchtimport Gesellschaft Weichert & Co. KG against the order of the Court of First Instance (Eighth Chamber) delivered on 30 November 2009 in Case T-2/09: Internationale Fruchtimport Gesellschaft Weichert & Co. KG v European Commission

**(Case C-73/10 P)**

(2010/C 80/38)

*Language of the case: English*

### Parties

*Appellant:* Internationale Fruchtimport Gesellschaft Weichert & Co. KG (represented by: A. Rinne, Rechtsanwalt, S. Kon, Solicitor, C. Humpe, Solicitor, C. Vajda QC)

*Other party to the proceedings:* European Commission

### Form of order sought

The applicant claims that the Court should:

— set aside the Order of the CFI in Case T- 2/09 dated 30 November 2009; and

— declare Weichert's application for annulment in Case T-2/09 admissible and refer the case back to the General Court of the European Union for judgment on Weichert's claims seeking annulment of the decision of the Commission of the European Communities of 15 October 2008 (Case COMP/39.188 — Bananas) — in so far as it relates to Weichert, or

— in the alternative, refer the case back to the General Court of the European Union for judgment on the admissibility of Weichert's application for annulment in Case T-2/09.

### Pleas in law and main arguments

The applicant submits that the CFI erred in law by declaring the application inadmissible on the basis that there could only be a derogation from the application of the Community rules on procedural time limits where the circumstances are either unforeseeable or amount to force majeure. It is submitted that such an approach is unduly narrow and fails to take any, or any proper account, of the importance of the right of access to a court in criminal proceedings, the principle of legality in criminal proceedings, and principle of proportionality, and the overriding need to avoid an unjust result.

# GENERAL COURT

## Judgment of the General Court of 9 February 2010 — Evropaïki Dynamiki v Commission

**(Case T-340/07)** [1]

***(Arbitration clause — 'eContent' programme — Contract relating to a project designed to ensure maximum effectiveness of the programme and the widest possible participation of target groups — Non-performance of the contract — Termination of the contract)***

(2010/C 80/39)

*Language of the case: English*

### Parties

*Appellant:* Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

*Defendant:* European Commission (represented by: E. Manhaeve, Agent, assisted by D. Philippe and M. Gouden, lawyers)

### Re:

Action brought under Articles 235 EC, 238 EC and 288 EC for an order that the Commission make good damage suffered as a result of its failure to comply with contractual obligations in the context of the performance of the EDC-53007 EEBO/27873 contract relating to the project entitled 'e-Content Exposure and Business Opportunities'.

### Operative part of the judgment

*The Court:*

1. *Dismisses the action;*

2. *Orders Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.*

([1]) OJ C 269, 10.11.2007.

## Judgment of the General Court of 10 February 2010 — O2 (Germany) v OHIM (Homezone)

**(Case T-344/07)** [1]

***(Community trade mark — Application for the Community word mark Homezone — Absolute grounds for refusal — Distinctive character — Descriptive character — Article 7(1)(b) and (c) of Regulation (EC) No 40/94 (now Article 7(1)(b) and (c) of Regulation (EC) No 207/2009))***

(2010/C 80/40)

*Language of the case: German*

### Parties

*Applicant:* O2 (Germany) GmbH & Co. OHG (Munich, Germany) (represented by: A. Fottner and M. Müller, lawyers)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: S. Schäffner, Agent)

### Re:

Action brought against the decision of the Fourth Board of Appeal of OHIM of 5 July 2007 (Case R 1583/2006-4), concerning an application to register the word sign Homezone as a Community trade mark

### Operative part of the judgment

*The Court:*

1. *Annuls the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 5 July 2007 (Case R 1583/2006-4);*

2. *Orders OHIM to pay the costs.*

([1]) OJ C 269, 10.11.2007.

**Judgment of the Court of 3 February 2010 — Enercon v OHIM — Hasbro (ENERCON)**

**(Case T-472/07)** [1]

***(Community trade mark — Opposition proceedings — Application for the Community word mark ENERCON — Earlier Community word mark TRANSFORMERS ENERGON — Relative ground for refusal — Article 8(1)(b) of Regulation (EC) No 40/94 (now Article 8(1)(b) of Regulation (EC) No 207/2009))***

(2010/C 80/41)

*Language of the case: English*

**Parties**

*Applicant:* Enercon GmbH (Aurich, Germany) (represented by: R. Böhm and V. Henke, lawyers)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: D. Botis, Agent)

*Other party to the proceedings before the Board of Appeal of OHIM intervening before the Court:* Hasbro Inc. (Pawtucket, Rhode Island, United States) (represented by: M. Edenborough, lawyer)

**Re:**

Action brought against the decision of the Fourth Board of Appeal of OHIM for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 25 October 2007 (Case R 959/2006-4), relating to opposition proceedings between Hasbro, Inc. and Enercon GmbH

**Operative part of the judgment**

*The Court:*

1. *Dismisses the action;*

2. *Orders Enercon GmbH to pay the costs.*

[1] OJ C 79, 29.3.2008.

**Judgment of the General Court of 11 February 2010 — Deutsche BKK v OHIM (Deutsche BKK)**

**(Case T-289/08)** [1]

***(Community trade mark — Application for Community word mark Deutsche BKK — Absolute ground for refusal — Descriptive character and no distinctive character — No distinctive character acquired through use — Article 7(1)(b) and (c) of Regulation (EC) No 40/94 (now Article 7(1)(b) and (c) of Regulation (EC) No 207/2009) — Article 73 and Article 74(1), first sentence, of Regulation No 40/94 (now Article 75 and Article 76(1), first sentence, of Regulation No 207/2009))***

(2010/C 80/42)

*Language of the case: German*

**Parties**

*Applicant:* Deutsche BKK (Wolfsburg, Germany) (represented by: H.-P. Schrammek, C. Drzymalla and S. Risthaus, lawyers)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: B. Schmidt, Agent)

**Re:**

Action brought against the decision of the Fourth Board of Appeal of OHIM of 29 May 2008 (Case R 318/2008-4) concerning an application for registration of the word mark 'Deutsche BKK' as a Community trade mark.

**Operative part of the judgment**

*The Court:*

1. *Dismisses the action;*

2. *Orders the Deutsche Betriebskrankenkasse (Deutsche BKK) to pay the costs.*

[1] OJ C 247, 27.9.2008.

**Judgment of the General Court of 9 February 2010 — PromoCell bioscience alive GmbH v OHIM (SupplementPack)**

**(Case T-113/09)** [1]

***(Community trade mark — Application for a Community word mark SupplementPack — Absolute ground for refusal — Descriptive character — Article 7(1)(c) of Regulation (EC) No 40/94 (now Article 7(1)(c) of Regulation (EC) No 207/2009))***

(2010/C 80/43)

*Language of the case: German*

**Parties**

*Applicant:* PromoCell bioscience alive GmbH Biomedizinische Produkte (Heidelberg, Germany) (represented by: K. Mende, lawyer)

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: S. Schäffner, Agent)

**Re:**

Action brought against the decision of the Fourth Board of Appeal of OHIM of 15 January 2009 (Case R 996/2008-4) concerning an application for registration of the word sign SupplementPack as a Community trade mark.

**Operative part of the judgment**

*The Court:*

1. *Dismisses the action;*

2. *PromoCell bioscience alive GmbH Biomedizinische Produkte is ordered to pay the costs.*

[1] OJ C 129, 6.6.2009.

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**Order of the President of the General Court of 4 February 2010 — Portugal v Transnáutica and Commission**

**(Case T-385/05 TO R)**

***(Interim measures — Customs union — Third-party proceedings — Judgment of the General Court — Application for stay of execution — Failure to have regard to formal requirements — Inadmissibility)***

(2010/C 80/44)

*Language of the case: English*

**Parties**

*Third party:* Portuguese Republic (represented by: L. Inez Fernandes, A.C. Santos, J. Gomes and P. Rocha, Agents)

*Other parties to the proceedings:* Transnáutica — Transportes e Navegação, SA (Matosinhos, Portugal) (represented by: C. Fernández Vicién and D. Ortigão Ramos, lawyers); and European Commission (represented by: R. Lyal and L. Bouyon, Agents)

**Re:**

Application for stay of execution, in third-party proceedings, of the judgment of the Court of First Instance of 23 September 2009 *Transnáutica* v *Commission* (Case T-385/05, not published in the ECR).

**Operative part of the order**

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

2. *The costs are reserved.*

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**Order of the Judge hearing the application for interim measures of 5 February 2010 — De Post v Commission**

**(Case T-514/09 R)**

***(Interim measures — Public procurement — Community tendering procedure — Application for suspension of operation and for interim measures — No urgency)***

(2010/C 80/45)

*Language of the case: English*

**Parties**

*Applicant:* De Post NV van publiek recht (Brussels, Belgium) (represented by: R. Martens and B. Schutyser, lawyers)

*Defendant:* European Commission (represented by: E. Manhaeve and N. Bambara, Agents, and assisted by P. Wytinck, lawyer)

**Re:**

Application for interim measures seeking, in essence, first, an order suspending the operation of the decision by which the Publications Office of the European Union awarded the contract referred to in Invitation to Tender No 10234 'Daily transport and delivery of the Official Journal, books, other periodicals and publications' to Entreprise des postes et télécommunications Luxembourg, second, an order prohibiting the signature of the contract referred to in the Invitation to Tender and, third, if the contract has already been signed, that its performance be suspended until the Court has ruled on the substance of the action.

**Operative part of the order**

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

2. *Costs are reserved.*

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## Action brought on 22 December 2009 — Cañas v Commission

**(Case T-508/09)**

(2010/C 80/46)

*Language of the case: French*

**Parties**

*Applicant:* Guillermo Cañas (Buenos Aires, Argentina) (represented by: F. Laboulfie, lawyer)

*Defendant:* European Commission

**Form of order sought**

— Annul the decision of the European Commission of 12 October 2009 in Case COMP/39471, Guillermo Cañas v WAA, ATP and ICAS

**Pleas in law and main arguments**

The applicant, a professional Argentinian tennis player, seeks the annulment of the decision of the Commission of 12 October 2009 by which the Commission rejected, on the ground of insufficient Community interest, the applicant's complaint against the World Anti-doping Agency (WAA), ATP Tour Inc. (ATP) and the International Council of Arbitration for Sport (ICAS) concerning alleged breaches of Article 81 EC and/or Article 82 EC in connection with agreements or concerted practices and an abuse of dominant position by those sporting bodies.

In support of his action, the applicant submits that the rules of the World Anti-doping Code drafted, applied and validated by the WAA, ATP and ICAS are discriminatory because they permit different punishments, according to the category of substance found in bodily fluids, to be handed down to two athletes, who tested positive due to negligence, who committed the same infringement. To be exact, the applicant submits that those anti-doping rules penalise doping due to negligence with a substance categorised as prohibited with a minimum suspension of one year, while the minimum penalty for doping due to negligence with a substance categorised as specific (now specified) is a warning.

In the view of the applicant, the anti-doping rules in question are excessive, since the penalty system which they lay down does not permit account to be taken of the effect, in this case adverse, of a substance accidentally ingested. The anti-doping rules and their application are disproportionate in relation to the (relative) seriousness of the infringement alleged.

The WAA, ATP and ICAS, three undertakings within the Community meaning of that term, concluded agreements or adopted concerted practices unlawfully restricting competition between professional tennis players and affecting trade between the Member States. The anti-doping rules in question apply to all athletes in all sporting disciplines, at least, Olympic ones, and not solely to the applicant, for which reason their prohibition is of considerable Community interest.

In addition, the WAA, ATP and ICAS, jointly and/or severally, abused their dominant position, first by actual and potential discrimination between competing professional sportsmen and women and next because the anti-doping rules allow ATP to refuse to enter into a contract with a tennis player who tested positive due to negligence for a prohibited substance for a minimum period of one year.

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## Action brought on 18 December 2009 — Portugal v Commission

**(Case T-509/09)**

(2010/C 80/47)

*Language of the case: Portuguese*

**Parties**

*Applicant:* Portuguese Republic (Lisbon, Portugal) (represented by: L. Inez Fernandes, A. Trindade Mimoso and A. Miranda Boavida, acting as Agents)

*Defendant:* European Commission

**Form of order sought**

1. Annulment of the European Commission's decision of 14 October 2009, notified to the Portuguese Government by letter No 11656, refusing to reimburse the amount of the contribution originally approved for the purchase of two Ocean Patrol Vessels (OPV) for surveillance of fishing activities, in the sum of EUR 11 025 000;

2. an order that the defendant should adopt a favourable decision with regard to the requests for reimbursement made by the Portuguese Government in connection with European Commission Decision 2002/978/EC of 10 December 2002;

3. an order that the European Commission should pay the costs.

**Pleas in law and main arguments**

(a) Error as regards the legal requirements, given that the Portuguese State has complied in full with all the rules in the sphere of public procurement;

(b) error as to the facts;

(c) breach of the obligation to state reasons: the contested decision does not contain any grounds whatsoever, however slight, justifying the decision adopted. Inasmuch as it is contrary to and profoundly affects duly consolidated legal situations in a Member State, so causing the latter serious damage, such a decision ought, more than any other, to contain solid and persuasive reasoning, of which there is absolutely none in this case.

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**Action brought on 21 December 2009 — Niki Luftfahrt v European Commission**

**(Case T-511/09)**

(2010/C 80/48)

*Language of the case: German*

**Parties**

*Applicant:* Niki Luftfahrt GmbH (Vienna, Austria) (represented by: H. Asenbauer, lawyer)

*Defendant:* European Commission

**Form of order sought**

— Annul the European Commission's decision of 28 August 2009 'State Aid C 6/2009 (ex N 663/2008) — Austria Austrian Airlines — Restructuring Plan' in accordance with the first paragraph of Article 264 TFEU (formerly the first paragraph of Article 231 EC); and

— Order the European Commission to pay the applicant's costs in accordance with Article 87(2) of the Rules of Procedure.

**Pleas in law and main arguments**

The applicant challenges Commission Decision C (2009) 6686 final of 28 August 2009 concerning State aid in the course of the Austrian State's sale of its shares in the Austrian Airlines group to Deutsche Lufthansa AG (C 6/2009 (ex 663/2008)). In that decision the Commission takes the view that, subject to certain conditions, the restructuring aid granted by the Republic of Austria to Austrian Airlines is compatible with the common market, provided that the restructuring plan notified to the Commission is implemented in full.

In support of its action for annulment the applicant, which operates a privately financed airline and lodged a complaint with the Commission regarding the restructuring aid at issue, submits, first, that the Commission has infringed Article 87(1) and (3)(c) EC, Article 88(2) EC and the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2). In particular it claims that the Commission failed to appreciate that:

— the beneficiary of the aid at issue was not Austrian Airlines but Lufthansa, which is not a firm in difficulty and is therefore not a firm which merits aid,

— neither Austrian Airlines nor Lufthansa has provided an appropriate contribution of its own to the restructuring of Austrian Airlines,

— the notified restructuring measures are not in accordance with the guidelines, and

— the compensatory measures offered by the Republic of Austria are insufficient to reduce as far as possible negative effects of the aid on trading conditions.

Moreover, the applicant also submits that the aid at issue is inseparable from conditions which infringe the Community rules on freedom of establishment and thus Article 43 EC.

It also alleges infringement of Article 253 EC, inasmuch as the Commission has not stated proper reasons for the contested decision, in that:

— it did not ascertain and examine the situation on the relevant markets, in particular the position of the undertaking benefiting from the aid and the position of competitors on the markets, and

— it failed it to take account of the fact that in the past Austrian Airlines has received a large amount of aid that was contrary to Community law.

Lastly, the applicant complains that the Commission has abused its discretion.

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**Action brought on 21 December 2009 — Rusal Armenal v Council**

**(Case T-512/09)**

(2010/C 80/49)

*Language of the case: English*

**Parties**

*Applicant:* Rusal Armenal ZAO (represented by: B. Evtimov, lawyer)

*Defendant:* Council of the European Union

**Form of order sought**

— annul Council Regulation (EC) No 925/2009 of 24 September 2009 imposing an definitive anti–dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China, insofar as it affects the applicant;

— order the Council to pay the costs of and occasioned by these proceedings.

**Pleas in law and main arguments**

By means of its application, the applicant seeks the annulment of Council Regulation (EC) No 925/2009 of 24 September 2009 imposing an definitive anti–dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China ('the contested regulation'), insofar as it affects the applicant (OJ 2009 L 262, p. 1).

In support of its application, the applicant puts forward the following five legal grounds for annulment, one of which is based on an incidental plea of illegality.

On the basis of its first ground for annulment, the applicant claims that the Commission and the Council breached Article 2, paragraphs 1 to 6, of the Basic Regulation [1] and Article 2.1 and 2.2 of the Agreement on Implementation of Article VI GATT 1994 (hereinafter 'Anti-dumping agreement' or 'ADA'), by establishing normal value for the applicant, based on data from a third analogue country, thereby reaching fundamentally flawed findings of dumping and of cumulation, injury and causality regarding imports from Armenia. According to the applicant, the Council and the Commission should have established normal value for the applicant based on its own Armenian data, and not pursuant to Article 2(7)(a) of the Basic Regulation.

Further, the applicant claims that, for the purpose of reviewing the merits of the first ground for annulment, the Court should declare, in an incidental manner pursuant to Article 277 TFEU (ex Article 241 EC), the inapplicability of Article 2(7) of the Basic Regulation towards the applicant, to the extent that it served as a legal basis for the analogue country methodology, used to establish the applicant's normal value in the contested regulation. The applicant invokes this incidental plea of illegality, since it claims to be entitled to benefit from a judicial review of the application of Article 2(7) to itself and since it claims to have been affected by findings on normal value in the contested regulation which are legally based on Article 2(7) of the Basic Regulation. The latter should be declared inapplicable, according to the applicant, on the ground that its application with respect to the applicant infringes provisions 2.1 and 2.2 of the Anti-dumping agreement, which the EU intended to implement as multilateral obligations into EU law and which are part of the Treaties on which the EU is based and are binding on the Council and the Commission pursuant to well-settled case law of the Court of Justice.

On the basis of its second ground for annulment, the applicant submits that, even if it is assumed that the institutions did not act in breach of Article 2, paragraphs 1 to 6 of the Basic Regulation and the Anti-dumping agreement, they committed a breach of Article 2(7)(c) of the Basic Regulation and wrongly denied market economy treatment ('MET') to the applicant and made a series of manifest errors of assessments of the facts in the context of application of Article 2(7)(c).

On the basis of its third ground for annulment, the applicant contends that the institutions breached Article 3(4) of the Basic Regulation and made a manifest error of assessment, by failing to decumulate Armenia from allegedly dumped imports and, in that context, failing to consider the fundamental overhaul of Armenia's production activity during the period 2004-2006 and quality problems of Armenian product concerned during the re-launch and readjustement of manufacturing operations in 2007 during the investigation period.

On the basis of its fourth ground for annulment, the applicant claims that the Commission, by its process of consideration and its statement of reasons for rejecting the price undertaking offer from the applicant and at the same time accepting an undertaking offer from a Brazilian exporting producer in similar circumstances, has committed a breach of the fundamental legal principle of equal treatment/non-discrimination and made manifest errors of assessment.

On the basis of its fifth ground for annulment, it is submitted that the Commission has breached the fundamental principle of EU law of good governance, thereby breaching an essential procedural requirement, by making a public and direct reference to the applicant, to the on-going anti-dumping investigation at issue and allegedly creating a bias with the institutions responsible for the anti-dumping investigation, in the direction of imposing anti-dumping duties on exports of the applicant.

(1) Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1)

**Action brought on 23 December 2009 Ecoceane v EMSA**

**(Case T-518/09)**

(2010/C 80/50)

*Language of the case: French*

**Parties**

*Applicant:* Ecoceane (Paris, France) (represented by: S. Spalter, lawyer)

*Defendant:* European Maritime Safety Agency (EMSA)

**Forms of order sought**

— Declare Ecoceane's action admissible;

— Annul the contested decision of EMSA of 28 October 2009 rejecting Ecoceane's tender;

— Annul EMSA's decision to award the contract (2009/S 42-060271) and the signature thereof;

— Order EMSA to pay to Ecoceane, the applicant, the amount of EUR 224 774 by way of damages and interest;

— Order EMSA to pay to Ecoceane, the applicant, the amount of EUR 25 000 by way of non-recoverable costs;

— Order EMSA to pay the costs.

**Pleas in law and main arguments**

In the present case the applicant seeks annulment of the decision of 28 October 2009 by which EMSA rejected its tender at the end of a tendering procedure for the award of a public services contract relating to intervention by support vessels for combating oil pollution, and EMSA's decision to award the contract and the signature thereof. The applicant also seeks damages for the losses occasioned by the contested decision.

The applicant puts forward four pleas in law in support of its application.

First, it submits that EMSA, in failing to provide the information requested by the applicant, namely the analysis report of the tenders containing the information relating to the running of the procedure, the grounds for the rejection of its tender, the scores obtained by the tenders using the percentages set out in the tender specifications, and also the features and advantages of the successful tenderer's tender, infringed Article 100(2) of Financial Regulation No 1605/2002/EC [1] and Article 149(3) of Regulation No 2342/2002/EC [2], as the reasons given for the rejection decision do not comply with those provisions.

The applicant submits, secondly, that the additional criteria imposed by EMSA in its tender specifications, with a view to examining and assessing the tenders, were not objective and justifiable, given the subject-matter of the contract; consequently, the choice of the additional criteria corresponding to a pre-identified technology does not ensure equal access to candidates offering an innovative method and infringes the Community principles of equal treatment, non-discrimination and transparency, referred to in Article 89(1) of Financial Regulation No 1605/2002/EC.

The applicant submits, thirdly, that the defendant infringed the principles of equal treatment, non-discrimination and transparency in dealing with the candidates, by refusing to visit the de-pollution vessel offered by Ecoceane, contrary to the treatment accorded the other candidates. The defendant also infringed those principles by failing to have Ecoceane heard by a committee for the evaluation of tenders, composed of at least three members present throughout the meeting, in accordance with Article 146 of Regulation No 2342/2002/EC.

Lastly, the applicant submits that EMSA made manifest errors of assessment.

(1) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

(2) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 (OJ 2005 L 201, p. 3).

## Action brought on 24 December 2009 — TF1 and Others v Commission

**(Case T-520/09)**

(2010/C 80/51)

*Language of the case: French*

### Parties

*Applicants:* Télévision française 1 (TF1) (Boulogne Billancourt, France), Métropole télévision (M6) (Neuilly-sur-Seine, France), Canal + SA (Issy-Les-Moulineaux, France) (represented by: J.-P. Hordies and C. Smits, lawyers)

*Defendant:* European Commission

### Form of order sought

— Annul the decision of the European Commission of 1 September 2009 in State Aid Case C 27/09 (ex N 34/A/09 and N 34/B/09) — Budgetary grant in favour of France Télévisions (2010-2012) in so far as it decides to deem the budgetary grant notified of EUR 450 million for 2009, in favour of France Télévisions, compatible with the EC Treaty under Article 86(2) thereof;

— Order the Commission to open the formal investigation procedure into the aid, laid down in Article 108(2) TFEU;

— Order the Commission to pay all the costs of the case.

### Pleas in law and main arguments

The present action seeks the annulment of Decision C(2009) 6693 final of 1 September 2009, issued by the Commission following the procedure laid down in Article 88(3) EC (now Article 108 TFEU), by which the Commission deemed a budgetary grant, of a maximum amount of EUR 450 million for 2009 in favour of France Télévisions, compatible with the common market. The applicants request, against that background, that the formal investigation procedure be opened in accordance with Article 108(2) TFEU.

In support of their claim, the applicants put forward a single plea alleging that there were serious difficulties in the face of which the Commission was required to open the formal investigation procedure laid down in Article 88(2) EC (now Article 108(2) TFEU) and to invite interested parties to make observations.

The applicants assert that there were indications of serious difficulties resulting, on the one hand, from the circumstances of the preliminary investigation procedure and, on the other, from the content of the contested decision.

The excessive duration of the preliminary investigation procedure, the conduct of the procedure and the amount of the disputed funding are such as to show that there are serious difficulties concerning the circumstances of the preliminary investigation procedure.

The existence of indications of serious difficulties concerning the content of the contested decision is based on two factors. Firstly, it arises from the insufficient level of information, or even incorrect information, held by the Commission at the time of adoption of the contested decision and, secondly, from the fact that it was impossible for the Commission to conclude that the aid was compatible without an in-depth analysis, having regard to the structural concerns of over-compensation in the present case.

## Action brought on 28 December 2009 — MIP Metro v OHIM — Metronia (METRONIA)

**(Case T-525/09)**

(2010/C 80/52)

*Language in which the application was lodged: English*

### Parties

*Applicant:* MIP Metro Group Intellectual Property GmbH & Co. KG (Düsseldorf, Germany) (represented by: R. Kaase and J.-C. Plate, lawyers)

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

*Other party to the proceedings before the Board of Appeal:* Metronia, SA (Madrid, Spain)

### Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 8 October 2009 in case R 1315/2006-1, as far as the appeal has been dismissed on the grounds that it does not comply with Article 8(1)(b) of Council Regulation No 40/94 (which became Article 8(1)(b) of Council Regulation No 207/2009); and

— Order the defendant to bear the costs, including those incurred in the opposition and appeal proceedings.

### Pleas in law and main arguments

*Applicant for the Community trade mark:* The other party to the proceedings before the Board of Appeal

*Community trade mark concerned:* The figurative mark 'METRONIA', for goods and services in classes 9, 20, 28 and 41

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

*Mark or sign cited:* German trade mark registration of the figurative mark 'METRO', for goods and services in classes 9, 20, 28 and 41

*Decision of the Opposition Division:* Upheld the opposition and rejected the Community trade mark application;

*Decision of the Board of Appeal:* Upheld the appeal, rejected the opposition and, as a result, allowed the Community trade mark application to proceed in respect of all goods and services

*Pleas in law:* Infringement of Article 8(1)(b) of Council Regulation No 40/94 (which became Article 8(1)(b) of Council Regulation No 207/2009) as the Board of Appeal wrongly found that there was no likelihood of confusion between the trade marks concerned.

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## Action brought on 28 December 2009 — PAKI Logistics GmbH v OHIM

**(Case T-526/09)**

(2010/C 80/53)

*Language in which the application was lodged: German*

### Parties

*Applicant:* PAKI Logistics GmbH (Ennepetal, Germany) (represented by M. Bergermann, P. Mes, C. Graf von der Groeben, G. Rother, J. Bühling, A. Verhauwen, J. Künzel, D. Jestaedt and J. Vogtmeier, lawyers)

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

### Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 23 October 2009 (R 180/2007-1);

— order the defendant to pay the costs of the proceedings, including those incurred in connection with the appeal.

### Pleas in law and main arguments

*Community trade mark concerned:* the word mark 'PAKI' for goods and services in Classes 6, 20, 37 and 39 (Application No 4 790 895)

*Decision of the Examiner:* Registration refused

*Decision of the Board of Appeal:* Appeal dismissed

*Pleas in law:* Error of law in the application of Article 7(1)(f) of Regulation No 207/2009 ([1]) in conjunction with Article 7(2) of the same Regulation, since the mark applied for is not contrary to accepted principles of morality

([1]) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

## Action brought on 31 December 2009 — In 't Veld v Council

**(Case T-529/09)**

(2010/C 80/54)

*Language of the case: English*

### Parties

*Applicant:* Sophie in 't Veld (Brussels, Belgium) (represented by: O. Brouwer and J. Blockx, lawyers)

*Defendant:* Council of the European Union

### Form of order sought

— annul the decision of the Council to refuse full access to document 11897/09;

— order the Council to pay the applicant's costs, including the costs of any intervening parties.

### Pleas in law and main arguments

By means of this application the applicant seeks annulment of the Council decision of 8 September 2009 rejecting her request, pursuant to Regulation No 1049/2001 ([1]), of the full access to document 11897/09 which is an opinion from the Legal Service of the Council concerning the legal basis of the 'Recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing'. The Council has provided the applicant with a redacted version of document 11897/09, excluding those parts which, in the applicant's opinion, would enable her to gain knowledge of the substance of the Legal Service's analysis.

The applicant submits that the contested decision should be annulled because it violates the rules on access to documents contained in Regulation No 1049/2001.

First, the applicant contends that the contested decision is wrongly based on Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations) as the Council fails to show how full disclosure of document 11897/09 would undermine the protection of the public interest as regards the protection of the European Union's international relations.

Second, the applicant claims that the contested decision is also based on an erroneous interpretation of Article 4(2), second indent of Regulation 1049/2001 (protection of legal advice) as this exception does not apply to document 11897/09 since its full disclosure would not undermine the protection of court proceedings or legal advice and since there is an overriding public interest in making document 11897/09 fully accessible to the public.

Subsidiarily, should the Court consider that these aforementioned exceptions would be applicable to document 11897/09, the applicant submits that the Council has wrongly applied Article 4(6) of Regulation 1049/2001 insofar as it redacted from document 11897/09 more information than what was strictly necessary.

Finally, the Applicant submits that the Council did not fulfil its obligation to state reasons for the contested decision.

([1]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43

## Action brought on 8 January 2010 — Commission v Earthscan

**(Case T-5/10)**

(2010/C 80/55)

*Language of the case: English*

### Parties

*Applicant:* European Commission (represented by: A.-M. Rouchaud-Joët, S. Petrova, Agents, assisted by P. Hermant and G. van de Walle de Ghelcke, lawyers)

*Defendant:* Earthscan Ltd (Kent, United Kingdom)

### Form of order sought

— order the defendant to repay the Commission the amount of EUR 44 903,22, corresponding to a principal amount of EUR 45 835,44 of which EUR 6 486,09 was already paid and interests until 30 September 2009 of EUR 5 556,87;

— order the defendant to pay interests of EUR 3,84 per day from 1 October 2009 on until the entirety of the debt is paid;

— order that the defendant pay the cost incurred by the Commission.

### Pleas in law and main arguments

By the present action, based on an arbitration clause, the applicant requests that the defendant be ordered to repay part of the advance paid by the applicant, together with default interests, as a result of the non-performance of contract No 4.1030/Z/01-035/2001, concluded between the applicant and nine contractors including the defendant, for the development, the publication and the dissemination of a guide on renewable energy (project 'Guide for Renewable Energy installations to promote biomass, photovoltaics and solar thermal in the EU') in the framework of the ALTENER programme [1].

The applicant raises a single plea in law.

Given that the defendant did not carry out the performance of the contract for phases 6 and 7 (layout, typesetting, printing and dissemination), the applicant contends that the defendant breached its contractual obligations by failing to reimburse its share of the pre-financing that was overpaid in application of the contract. It claims that the defendant must therefore be condemned to repay the overpaid amount, accrued with the default interests as calculated in the contract.

[1] Decision No 646/2000/EC of the European Parliament and of the Council of 28 February 2000 adopting a multiannual programme for the promotion of renewable energy sources in the Community (Altener) (1998 to 2002), OJ L 79, p. 1

## Action brought on 7 January 2010 — Diagnostiko kai Therapeftiko Kentro Athinon 'Ygia AE' v OHIM

**(Case T-7/10)**

(2010/C 80/56)

*Language of the case: Greek*

### Parties

*Applicant:* Diagnostiko kai Therapeftiko Kentro Athinon 'Ygia AE' (Athens, Greece) (represented by: K. Alexiou and S. Foteas, lawyers)

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

### Form of order sought

The applicant claims that the Court should:

— uphold the application;

— annul the decision of the Second Board of Appeal of OHIM in Case No R190/2009-2;

— register the word sign 'υγεία' (hygeia) as a Community trademark indicating the link between the applicant company and the services it provides;

— order OHIM to pay the costs.

### Pleas in law and main arguments

*Community trade mark concerned:* the word sign 'υγεία' for services in Class 44, medical services — application for registration No 712900

*Decision of the examiner:* rejection of the application for registration

*Decision of the Board of Appeal:* confirmation of the decision of the examiner and rejection of the application for registration

*Pleas in law:*

The application seeks annulment of the decision of the Second Board of Appeal of OHIM in Case No R 190/2009-2.

On the basis of the first plea, the applicant maintains that the contested decision wrongly ascribed purely descriptive character to the sign, despite the fact that it has a distinctive function in abstracto.

On the basis of the second plea, the applicant maintains that the contested decision wrongly rejected the distinctive function of the sign in consequence of the use reserved to it. According to the applicant, even if the descriptive character in abstracto of the word sign is accepted, the acquisition of distinctive function can be founded on use and constitutes a ground for setting aside the refusal to register.

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**Action brought on 8 January 2010 — Evropaïki Dynamiki v Commission**

**(Case T-9/10)**

(2010/C 80/57)

*Language of the case: English*

## Parties

*Applicant:* Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and M. Dermitzakis, lawyers)

*Defendant:* European Commission

## Form of order sought

— annul OPOCE's decision to reject the applicant's bid, filed in response to the open call for tenders AO 10224 for the 'Provision of electronic publications' (1) Lot 2, communicated to the Applicant by a letter dated 29 October 2009 and all further related decisions of OPOCE including the one to award the contact to the successful contractors;

— annul OPOCE's decision to award contracts to Siveco/Intrasoft and Engineering/Intrasofitn, the field of the above-mentioned call for tenders Lot 3, communicated to the Applicant by a letter dated 29 October 2009, in case one company is directly or indirectly associated to both framework contracts;

— order the defendant to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 260 760;

— order the defendant to pay the applicant's legal and other costs and expenses incurred in connection with this application even if the current application is rejected.

## Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender for services of electronic publications (AO 10224) (Lot 2) and to award the contract to the successful contractor (Lot 2 and 3). The applicant further requests compensation for the alleged damages in account of the tender procedure.

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

First, the applicant argues that the defendant committed various and manifest errors of assessment and that it refused to provide sufficient justification or explanation to the applicant in breach of the financial regulation (2) and its implementing rules as well as in breach of directive 2004/18/EC (3) and of Article 253 EC.

Second, it contends that the defendant committed manifest errors of assessment and failed to state reasons in respect of the applicant's bid as the negative considerations given by evaluation committee were vague, unsubstantiated wrong and unfounded.

(1) OJ 2009/S 109-156511

(2) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

(3) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

## Action brought on 20 January 2010 — Klaus Goutier v OHIM — Rauch (ARANTAX)

**(Case T-13/10)**

(2010/C 80/58)

*Language in which the application was lodged: German*

### Parties

*Applicant:* Klaus Goutier (Frankfurt am Main, Germany) (represented by: E.E. Happe, 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:* Norbert Rauch (Herzogenaurach, Germany)

### Form of order sought

— Annulment of the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 10 November 2009 (in Case R 1769/2008-4) in so far as the application for a Community mark annulling the contested decision was rejected for the following services:

  — Class 35 — Tax consultancy, tax preparation, accounting, auditing, professional business consultancy, business consultancy;

  — Class 36 — Fiscal assessments, mergers and acquisitions, namely financial consultancy with regard to the purchase or sale of companies and company shares, financial management;

  — Class 43 — Provision of legal services, legal research;

— Order the defendant to pay the costs.

### Pleas in law and main arguments

*Applicant for a Community trade mark:* Klaus Goutier

*Community trade mark concerned:* the word mark 'ARANTAX' for services in Classes 35, 36 and 42 (Application No 4 823 084)

*Proprietor of the mark or sign cited in the opposition proceedings:* Norbert Rauch

*Mark or sign cited in opposition:* the German word mark 'atarax' No 30 168 707 for goods and services in Classes 9, 35, 37, 41 and 42

*Decision of the Opposition Division:* Rejected the opposition

*Decision of the Board of Appeal:* Partial annulment of the Opposition Division's decision and partial rejection of the Community trade mark application

*Pleas in law:* Infringement of Article 8(1)(b) of Council Regulation No 207/2009, [1] owing to the absence of likelihood of confusion of the marks at issue

[1] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

## Action brought on 18 January 2010 — CheckMobile v OHIM (carcheck)

**(Case T-14/10)**

(2010/C 80/59)

*Language in which the application was lodged: German*

### Parties

*Applicant:* CheckMobile GmbH — The Process Solution Company (Hamburg, Germany) (represented by K. Lodigkeit, lawyer)

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

### Form of order sought

— Annul the decision of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Fourth Board of Appeal) of 18. November 2009 (Case R 595/2009-4), in so far as it dismissed the application for registration of 'carcheck' in accordance with Article 7(1)(c) of Regulation No 40/94,

— order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) to pay the costs.

**Pleas in law and main arguments**

*Community trade mark concerned:* the word mark 'carcheck' for goods and services in Classes 9, 16, 35, 36, 38, 41, 42 and 45 (Application No 7 368 681)

*Decision of the Examiner:* Partial refusal of registration

*Decision of the Board of Appeal:* Partial annulment of the Examiner's Decision

*Pleas in law:* Infringement of Article 7(1)(c) of Regulation No 40/94 [1], since the Board of Appeal interpreted the absolute ground for refusal to register a mark, based on the exclusively descriptive character of the signs of which it consists, too broadly

[1] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ L 11, 14.1.1994, p. 1)

## Action brought on 19 January 2010 — Steinberg v Commission

**(Case T-17/10)**

(2010/C 80/60)

*Language of the case: English*

**Parties**

*Applicant:* Gerald Steinberg (Jerusalem, Israel) (represented by: T. Asserson, lawyer)

*Defendant:* European Commission

**Form of order sought**

— annulment of the contested decision;

— disclosure within 15 days of all documents specified in the application;

— award for costs;

— any other relief which the Court deems appropriate.

**Pleas in law and main arguments**

By means of this application the applicant seeks annulment of the Commission decision of 15 May 2009, received by the applicant on 22 November 2009, partially rejecting his request, pursuant to Regulation No 1049/2001 [1], of the access to documents related to funding decisions for grants to Israeli and Palestinian non-governmental organisations for the past three years under the 'Partnership for Peace' (PfP) and 'European Instrument for Democracy and Human Rights' (EIDHR) programmes.

In support of its application the applicant puts forward four pleas in law.

First, the applicant contends that, by not providing the access to the requested documents, the defendant acted in violation of Article 2 of Regulation No 1049/2001.

Second, the applicant argues that by refusing full access to the requested documents the defendant acted in violation of Article 4 of Regulation No 1049/2001 as his request does not fall within the scope of any of the exceptions provided for in this article. Further, the applicant submits that, even if the exceptions would be applicable to his request, *quod non*, the right to access by the civil society organisations to the requested documents should be considered as constituting 'overriding public interest in disclosure'.

Third, the applicant claims that by taking almost six months to respond to his confirmatory application despite the fact that Regulation No 1049/2001 required providing a response within 15 working days from the request, the defendant acted in violation of Article 7 of Regulation No 1049/2001.

Fourth, the applicant contends that the defendant failed to carry out an examination of the request 'promptly' and therefore acted in violation of Article 8 of Regulation No 1049/2001.

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43

## Action brought on 27 January 2010 — Arkema France v Commission

**(Case T-23/10)**

(2010/C 80/61)

*Language of the case: English*

### Parties

*Applicant:* Arkema France (Colombes, France) (represented by: J. Joshua, Barrister, E. Aliende Rodríguez, lawyer)

*Defendant:* European Commission

### Form of order sought

— Annul Articles 1(1) and (2) of Commission's decision C(2009) 8682 of 11 November 2009 insofar as it relates to the applicant and, in any event, annul Article 1(1) insofar as it finds that the applicant participated in an infringement in tin stabilisers between 16 March 1994 and 31 March 1996,

— cancel the fines imposed on the applicant in Article 2;

— if the Court does not annul the fines in their entirety, substantially reduce them pursuant to its full jurisdiction;

— order the Commission to pay the costs.

### Pleas in law and main arguments

By means of the present application, annulment is sought of Commission's decision of 11 November 2009 in Case COMP/38.589 — Heat stabilisers which finds that the applicant participated in two separate infringements of Article 81 EC (now Article 101 TFEU), one in tin stabilisers and one in ESBO, and imposes a fine for each product.

The applicant puts forward the following pleas in law in support of its application:

First, it is submitted that, on a proper application of Article 25 of Regulation (EC) No 1/2003 [1], the Akzo litigation [2] did not suspend the running of time and the Commission's power to impose fines was time-barred for both infringements under the ten year "double limitation" rule. The applicant claims that the Commission erred in law by finding that the period the Akzo proceedings were before the Court operated to suspend the running of time and wrongly concluded that the ten year limit provided for in Article 25(5) of the abovementioned Regulation could be extended in the present case.

Second, the applicant claims that the Commission has demonstrated no legitimate interest in making a declaratory finding of infringements in respect of which it had no power to impose fines. In fact, the applicant submits that Article 7 of Regulation (EC) No 1/2003 allows the Commission to make a declaratory finding that an infringement has been committed if it does not impose a fine, provided that the it is demonstrated that the Commission has a legitimate interest.

Third, and independently of the two first pleas, the applicant requests the Court to annul the declaratory finding enshrined in Article 1(1) of the contested decision on the basis of which it had participated in an infringement in tin stabilisers during the period 16 March 1994 — 31 March 1996 and contends that the Commission has demonstrated no legitimate interest in making such a finding.

Fourth, and if the Court does not annul the fines in their entirety, the applicant contends that the Commission has not proved duration beyond 23 February 1999 and that therefore the fine imposed for the second cartel period should be reduced to reflect a shorter duration of the infringements.

(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) Judgment of the General Court of 17 September 2007, in Joined Cases T-125/03 and T-253/03, Akzo Nobel Chemicals et Akcros Chemicals/Commission, [2007], ECR II-3523

## Action brought on 26 January 2010 — Euro-Information v OHIM (EURO AUTOMATIC PAYMENT)

**(Case T-28/10)**

(2010/C 80/62)

*Language in which the application was lodged: French*

### Parties

*Applicant:* Européenne de traitement de l'information (Euro-Information) (Strasbourg, France) (represented by A. Grolée, lawyer)

*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 11 November 2009 in Case R 635/2009-2 inasmuch as it dismissed the trade mark application No 7 077 654 for the goods and services which are the subject of this action;

— grant Community trade mark application 'EURO AUTOMATIC PAYMENT' No 7 077 654 for all goods and services refused in Classes 9 and 36;

— order OHIM to pay the applicant's costs incurred in the proceedings before OHIM and in the present action, pursuant to Article 87 of the Rules of Procedure.

**Pleas in law and main arguments**

*Community trade mark concerned:* Word mark 'EURO AUTOMATIC PAYMENT' for goods and services in Classes 9, 35, 36, 37, 38, 42 and 45 (Application for registration No 7 077 654).

*Decision of the Examiner:* Partial refusal of the registration.

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

*Pleas in law:* Infringement of Article 7(1)(b) and (c) of Regulation (EC) No 207/2009 because, for all the goods and services refused for registration, the mark applied for is not descriptive but distinctive.

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## Action brought on 28 January 2010 — Netherlands v Commission

**(Case T-29/10)**

(2010/C 80/63)

*Language of the case: Dutch*

**Parties**

*Applicant:* Kingdom of the Netherlands (represented by: C. Wissels and Y. de Vries, Agents)

*Defendant:* European Commission

**Form of order sought**

— annul in part the Commission Decision of 18 November 2009 in Case No C 10/2009 (ex. N 138/2009) — Netherlands/aid for ING Groep N.V.;

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

**Pleas in law and main arguments**

In the contested Decision, the Commission found that certain measures taken by the Netherlands State in regard to ING Groep N.V. constitute State aid within the meaning of Article 107(1) TFEU, and it declared that aid to be compatible with the common market, subject to certain commitments. According to the Decision, the modification of the repayment terms in respect of EUR 5 billion of the capital injection represents additional aid.

The application is directed against the first paragraph of Article 2 of the Decision, which is based on, inter alia, the Commission's finding that the modification of the repayment terms in respect of EUR 5 billion of the capital injection involves State aid.

First, the applicant submits that the Decision is contrary to Article 107 TFEU in so far as the Commission found in the Decision that the modification of the repayment terms concerning the holding in the core capital of ING constituted EUR 2 billion of additional State aid in favour of ING. In the applicant's view, the Commission erred, for the following reasons, in classifying the modification of the repayment terms as State aid:

— In so far as there is any question of State aid, this consists, according to the Decision, in the full shareholding in the core capital of ING; a modification of the terms under which that aid can be repaid cannot, in addition to that shareholding, constitute State aid.

— The modification of the repayment terms ought to have been included by the Commission in its appraisal of the shareholding in the core capital, and should not have been appraised separately.

— In the event that the Commission was in fact entitled to appraise the modification of the repayment terms itself in the light of the rules on State aid, it committed a number of errors in that regard.

— In its appraisal, the Commission wrongly failed to take account of the fact that one of the purposes of the modification of the repayment terms was to bring those terms further into line with market-compliant repayment terms.

Second, the applicant submits that the Decision is at variance with the principle of the duty of care in that the Commission failed to collect the necessary information concerning the relevant facts.

Third, the applicant takes the view that the Decision infringes the principle that reasons must be given, inasmuch as the Commission failed to adduce conclusive reasons for its view that the modification of the repayment terms constituted additional aid.

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## Action brought on 29 January 2010 — Reagens v Commission

### (Case T-30/10)

(2010/C 80/64)

*Language of the case: English*

### Parties

*Applicant:* Reagens SpA (San Giorgio di Piano, Italy) (represented by: B. O'Connor, L. Toffoletti, D. Gullo and E. De Giorgi, lawyers)

*Defendant:* European Commission

### Form of order sought

— Annul Commission's decision of 11 November 2009 No C(2009) 8682 final (Case COMP/38.589 — Heat Stabilisers) in relation to Tin Stabilisers in totality or insofar as it concerns the applicant;

— find that the time-limits provided for in Article 25 of Regulation No 1/2003 apply so as to preclude the imposition of a fine on the applicant;

— in the alternative, to find that the Commission has erred in the fixing of a fine of EUR 10 791 000 on the applicant and if necessary to adjust that fine to a level that is appropriate with the limited nature of the applicant's possible infringement of Article 101 TFEU after 1996;

— open a measure of enquiry into the application of paragraph 35 of the Guidelines on fines in relation to Chemson and Baerlocher and in relation to all submissions by addressees of the Tin Stabilisers decision after the notification of the Statement of Objections;

— order the Commission to pay the costs of this application.

### Pleas in law and main arguments

By means of its application, the applicant seeks partial annulment of Commission's decision of 11 November 2009 No C(2009)8682 final insofar as it held the applicant liable for an infringement of Articles 81 EC and 53 EEA (Case COMP/38.589 — Heat Stabilisers), and that it imposes a fine to it.

In support of its submissions, the applicant puts forward the following pleas in law:

The applicant claims, first, that the Commission made a manifest error in the assessment of the facts in relation to Tin stabilisers, insofar that is found that the applicant participated in an infringement of Article 81 EC (now Article 101 TFEU) after the 1996/1997 period.

Secondly, the applicant submits that the Commission made a manifest error in the application of Article 25 of Regulation (EC) No 1/2003 [1] to the facts of the Tin stabiliser market and in particular, in finding that the time-limits provided in that Article were met. According to the applicant, the failure to prove an infringement post 1996/1997 means that a decision to fine the applicant is time barred by virtue of the five year or the ten year rules provided for in that Article.

Third, the applicant contends that the Commission breached the principles of sound administration and the applicant's legitimate expectations that it would conduct an investigation to the best of its ability in a rigorous and diligent manner and that it would not ignore evidence of competition. The applicant, moreover, claims that the Commission acted in breach of its rights of defence in that it did not adequately examine the evidence provided by the applicant in response to the statement of objections and in the hearing of the parties nor did it allow the applicant re-access to the non-confidential file for the investigation.

Fourth, the applicant submits that the Commission acted in breach of the principle to treat all undertakings equally before the law in that it misapplied the Guidelines on the setting of fines [2]. The applicant further submits that the Commission breached the principle of proportionality in that the fine imposed on the applicant was disproportionate in relation to all other addressees of the Tin Stabilisers decision and, in particular, Baerlocher.

Fifth, the applicant alleged that the Commission acted so as to distort competition in the common market in breach of Article 101 TFEU to the extent that it misapplied the Guidelines on fines

Finally, the applicant argues that the Commission acted in breach of the principle of sound administration in not conducting the investigation in a diligent and timely manner, as well as prejudiced the applicant's right of defence in not continuing the investigation during the period of the 'Akzo legal privilege' applications [3] to the General Court.

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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 2003 L 1, p. 1)

[2] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2)

[3] Judgment of the General Court of 17 September 2007, in Joined Cases T-125/03 and T-253/03, Akzo Nobel Chemicals et Akcros Chemicals/Commission, [2007], ECR II-3523

## Action brought on 22 January 2010 — Ella Valley Vineyards v OHIM — Hachette Filipacchi Press (ELLA VALLEY VINEYARDS)

**(Case T-32/10)**

(2010/C 80/65)

*Language in which the application was lodged: French*

### Parties

*Applicant:* Ella Valley Vineyards (Adulam) Ltd (Jerusalem, Israel) (represented by: C. de Haas, lawyer)

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

*Other part to the proceedings before the Board of Appeal of OHIM:* Hachette Filipacchi Presse SA (Levallois-Perret, France)

### Form of order sought

— annul the decision of the First Board of Appeal of OHIM of 11 November in all its provisions because it infringed Article 8(5) of Regulation (EC) No 207/2009;

— order OHIM to pay the costs of ELLA VALLEY VINEYARDS pursuant to Articles 87 to 93 of the Rules of Procedure.

### Pleas in law and main arguments

*Applicant for a Community trade mark:* Ella Valley Vineyards (Adulam) Ltd.

*Community trade mark concerned:* the figurative mark 'ELLA VALLEY VINEYARDS' for goods in Class 33 (Application for registration No 3 360 914).

*Proprietor of the mark or sign cited in the opposition proceedings:* Hachette Filipacchi Presse SA.

*Mark or sign cited in opposition:* French word mark and the Community word mark 'ELLE' for goods in Class 16 (Community trade mark No 3 475 365).

*Decision of the Opposition Division:* Dismissal of the opposition.

*Decision of the Board of Appeal:* Annulment of the decision of the Opposition Division.

*Pleas in law:* Infringement of Article 8(5) of Regulation (EC) No 207/2009 because the public concerned will not make any link between the marks at issue and because the use of the mark 'ELLA VALLEY VINEYARDS' does not take unfair advantage of the reputation of the earlier 'ELLE' marks

## Action brought on 28 January 2010 — ING Groep v Commission

**(Case T-33/10)**

(2010/C 80/66)

*Language of the case: English*

### Parties

*Applicant:* ING Groep NV (Amsterdam, Netherlands) (represented by: O. Brouwer, M. Knapen and J. Blockx, lawyers)

*Defendant:* European Commission

**Form of order sought**

— annul the contested decision, including for lack of or inadequate reasoning, insofar as the decision qualifies the amendment to the CTI transaction as additional aid in the amount of EUR 2 billion;

— annul the contested decision, including for lack of or inadequate reasoning, insofar as the Commission has subjected the approval of the aid to the acceptance of price leadership bans as set out in the decision and Annex II thereof;

— annul the contested decision, including for lack of or inadequate reasoning, insofar as the Commission has subjected the approval of the aid restructuring requirements that go beyond what is appropriate and required under the Restructuring Communication;

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

**Pleas in law and main arguments**

In the context of the turmoil on the financial markets in September/October 2008, the Dutch State injected, on 11 November 2008, EUR 10 billion of Core Tier 1 capital (hereinafter: 'CTI Transaction') in ING (referred to also as 'the applicant'). This aid measure was provisionally approved by the European Commission on 12 November 2008 for a period of six months.

In January 2009, the Dutch State agreed to take over the economic risk relating to a part of some of the applicant's impaired assets. This measure was provisionally approved by the European Commission on 31 March 2009, whereby the Dutch State committed itself to submit a restructuring plan concerning the applicant. In October 2009, the applicant and the Dutch State concluded an amendment to the original CTI transaction in order to allow an early repayment of half of the CTI capital injection. A final version of the applicant's restructuring plan was submitted to the Commission on 22 October 2009.

On 18 November 2009, the Commission adopted the contested decision in which it approved the aid measure subject to the restructuring commitments listed in Annex I and II of the decision.

By means of its application, the applicant seeks partial annulment of the decision of 18 November 2009 on the state aid No C 10/2009 (ex N 138/2009) implemented by the Netherlands for the applicant's Illiquid Assets Back-Up facility and Restructuring Plan insofar as it allegedly (i) qualifies the amendment to the CTI transaction as additional aid in the amount of EUR 2 billion, (ii) has subjected the approval of the aid to the acceptance of price leadership bans and (iii) subjected the approval of the aid to restructuring requirements that go beyond what is proportionate and required under the Restructuring Communication.

The applicant submits that the contested decision should be partially annulled on the following grounds:

On the basis of its first plea, relating to the amendment to the CTI transaction, the applicant claims that the Commission:

(a) infringed Article 107 TFEU, in finding that the amendment to the Core Tier transaction between the applicant and the Dutch State constituted State aid; and that it

(b) infringed the principle of care and Article 296 TFEU resulting from a failure to carefully and impartially examine all the relevant aspects of the individual case, to hear the persons concerned and to provide adequate reasoning for the contested decision.

On the basis of its second plea, relating to the price leadership ban for ING and ING Direct, the applicant submits that the Commission:

(a) infringed the principle of sound administration as a result of not having carefully and impartially examined all relevant aspects of the individual case and that it moreover violated the duty to provide adequate reasoning for the decision;

(b) infringed the principle of proportionality by making the approval of the aid measure conditional upon price leadership bans which are not adequate, necessary or proportionate;

(c) infringed Article 107(3)(b) TFEU and misapplied the principles and guidelines set out in the Restructuring Communication.

On the basis of its third plea, relating to disproportionate restructuring requirements, the applicant contends that the decision is vitiated by:

(a) an error of assessment, since the Commission wrongly calculated the absolute and relative aid amount and violated principle of proportionality and sound administration by requiring excessive restructuring without having carefully and impartially examined all the relevant facts provided to it; and

(b) an error of assessment and inadequate reasoning by deviating from the Restructuring Communication when assessing the required restructuring.

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**Appeal brought on 28 January 2010 by Carlo de Nicola against the judgment of the Civil Service Tribunal delivered on 30 November 2009 in Case F-55/08, De Nicola v EIB**

**(Case T-37/10 P)**

(2010/C 80/67)

*Language of the case: Italian*

**Parties**

*Appellant:* Carlo De Nicola (Strassen, Luxembourg) (represented by L. Isola, lawyer)

*Other party to the proceedings:* European Investment Bank (EIB)

**Form of order sought by the appellant**

The appellant claims that the General Court should:

— set aside the judgment under appeal;

— order the European Investment Bank (EIB) to pay the costs of the proceedings, together with interest, currency revaluation to be taken into account in fixing the amount awarded.

**Pleas in law and main arguments**

The present appeal is brought against the judgment of the Civil Service Tribunal (CST) of 30 November 2009. That judgment dismissed the action brought by Mr De Nicola for (i) annulment of the decision by which the EIB rejected his appeal seeking a review of his assessment for 2006 and annulment of the EIB's decision on the promotions for 2006, in so far as Mr De Nicola was not promoted; (ii) annulment of Mr De Nicola's staff report for 2006; (iii) a declaration that Mr De Nicola had been the victim of psychological harassment; (iv) an order that the EIB pay compensation for the damage purportedly sustained as a result of that harassment; and (v) annulment of the decision refusing to meet the cost of certain medical expenses for laser therapy treatment.

Mr De Nicola relies on the following pleas in law in support of his appeal:

— The CST declined, unlawfully, to give a ruling and, when it did not completely forget the subject-matter of the action (for example, the second and third arguments in the application for annulment; the refusal of the Appeals Committee to rule on the merits; and so on), deliberately decided to examine only some of the pleas;

— The CST did not rule on Mr De Nicola's request that it examine whether the conduct of his superiors was lawful in the light of the evaluation criteria adopted by the EIB. Moreover, it incorrectly attributed to other employees the harassment of which Mr De Nicola complained, whereas he attributes this directly and solely to the EIB;

— By way of ground of appeal, Mr De Nicola also refers to the refusal of the requests for production of evidence and the reversal of the burden of proof, as well as the failure to state reasons. On that last point, it is argued that the CST failed to state the reasons relating to many decisive issues, or gave contradictory and/or illogical reasons. In that connection, Mr De Nicola refers, in particular, to the refusal to apply Article 41 of the Staff Regulations, and the rejection of the request for annulment of the staff report for 2006;

— Lastly, Mr De Nicola submits that, as the contract of employment is a private-law contract, the necessary preconditions are not met for the application by analogy to his case of the rules and procedural conditions for Union officials under public-law contracts.

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**Appeal brought on 26 January 2010 by Luigi Marcuccio against the order of the Civil Service Tribunal of 10 November 2009 in Case F-70/07, Marcuccio v Commission**

**(Case T-38/10 P)**

(2010/C 80/68)

*Language of the case: Italian*

**Parties**

*Appellant:* Luigi Marcuccio (Tricase, Italy) (represented by G. Cipressa, lawyer)

*Other party to the proceedings:* European Commission

**Form of order sought by the appellant**

— In any event, set aside in its entirety and without exception the order under appeal.

— Declare that the action at first instance, in relation to which the order under appeal was made, was admissible in its entirety and without any exception whatsoever.

— Allow in its entirety and without any exception whatsoever the relief sought at first instance.

— Order the Commission to reimburse the appellant in respect of all costs, disbursements and fees incurred by him in relation to both the proceedings at first instance and the present appeal proceedings.

— In the alternative, refer the case back to the Civil Service Tribunal, sitting in a different formation, for a fresh decision.

**Pleas in law and main arguments**

The present appeal is brought against the order of the Civil Service Tribunal (CST) of 10 November 2009. That order dismissed as manifestly inadmissible the first, second, third and sixth heads of claim in an action for an order that the Commission pay compensation for the damage allegedly suffered as a result of the refusal to reimburse the appellant in respect of the recoverable costs purportedly incurred in Case T-176/04 *Marcuccio* v *Commission*.

In support of his claims, the appellant alleges misinterpretation and misapplication of the concept of a request within the meaning of Articles 90 and 91 of the Staff Regulations, illogical and unreasoned failure to have regard to the relevant case-law, absolute failure to state reasons, breach of the obligation to disregard the defence when it is lodged out of time, an error in accepting a document entitled 'application for a declaration that there is no need to adjudicate', and infringement of Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

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**Appeal brought on 3 February 2010 by Luigi Marcuccio against the order of the Civil Service Tribunal of 25 November 2009 in Case F-11/09, Marcuccio v Commission**

**(Case T-44/10 P)**

(2010/C 80/69)

*Language of the case: Italian*

**Parties**

*Appellant:* Luigi Marcuccio (Tricase, Italy) (represented by G. Cipressa, lawyer)

*Other party to the proceedings:* European Commission

**Form of order sought by the appellant**

— In any event, set aside in its entirety and without exception the order under appeal.

— Declare that the action at first instance, in relation to which the order under appeal was made, was admissible in its entirety and without any exception whatsoever.

— Allow in its entirety and without any exception whatsoever the relief sought by the appellant at first instance.

— Order the Commission to reimburse the appellant in respect of all costs, disbursements and fees incurred by him in relation to both the proceedings at first instance and the present appeal proceedings.

— In the alternative, refer the case back to the Civil Service Tribunal, sitting in a different formation, for a fresh decision.

**Pleas in law and main arguments**

The present appeal is brought against the order of the Civil Service Tribunal (CST) of 25 November 2009. That order dismissed as partly manifestly inadmissible and partly manifestly unfounded an action brought against the Commission's refusal to assume responsibility for 100 % of the appellant's medical expenses.

In support of his claims, the appellant alleges misinterpretation and misapplication of the principle that reasons must be given for a decision of an institution of the European Union, the concept of additional reasoning for a decision and the legal principles relating to the taking and assessment of evidence.

The appellant also alleges misinterpretation and misapplication of the concepts of a challengeable act and a decision which merely confirms an earlier decision.

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**Action brought on 10 February 2010 — SP v Commission**

**(Case T-55/10)**

(2010/C 80/70)

*Language of the case: Italian*

**Parties**

*Applicant:* SP SpA in liquidazione (Brescia, Italy) (represented by: G. Belotti, lawyer)

*Defendant:* European Commission

**Form of order sought**

— Annul the Commission's decision of 8 December 2009 amending the earlier decision — C(2009) 7492 final — adopted by the Commission on 30 September 2009;

— Order the defendant to pay the costs.

**Pleas in law and main arguments**

By decision of 8 December 2009 ('the contested decision'), the Commission amended its earlier decision — C(2009) 7492 final of 30 September 2009 — by which it had accused a number of companies, including the applicant, of participating in an alleged cartel. By the contested decision, the Commission acknowledged that the decision of 30 September 2009 '*referred to an annex which set out tables illustrating the price movements for concrete reinforcing bars during the time when the cartel was in operation*' and that '*that annex was not included in the decision adopted on 30 September 2009*', and decided to amend that decision in order to incorporate within it the tables annexed to the contested decision.

In support of its action, the applicant puts forward the following pleas in law:

1. Illegality of the subsequent rectification of a measure vitiated by a grave defect: the Commission is not empowered to remedy after the event a decision which, being clearly incomplete at the time of adoption, is manifestly invalid; that constitutes a particularly grave circumstance which, as such, cannot be remedied.

2. Incorrect legal basis cited: the Commission cited as the legal basis for the contested measure Article 65 CS and Regulation (EC) No 1/2003, [1] which are manifestly inappropriate as legal bases for pursuing the aim which the Commission had set itself (that is to say, for supplementing/amending one of its earlier decisions, the text of which had been incomplete). Accordingly, the second decision, which is contested in these proceedings, must be annulled because of the clear lack of an appropriate legal basis.

The applicant also alleges breach of the principle of sound administration.

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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 2003 L 1, p. 1).

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## Action brought on 10 February 2010 — Acciaierie e Ferriere Leali Luigi and Leali v Commission

**(Case T-56/10)**

(2010/C 80/71)

*Language of the case: Italian*

### Parties

*Applicants:* Acciaierie e Ferriere Leali Luigi SpA in liquidazione (Brescia, Italy) and Leali SpA (Odolo, Italy) (represented by: G. Belotti, lawyer)

*Defendant:* European Commission

### Form of order sought

— Annul the Commission's decision of 8 December 2009 amending the earlier decision C(2009) 7492 final adopted by the Commission on 30 September 2009;

— Order the defendant to pay the costs.

### Pleas in law and main arguments

The pleas in law and main arguments are the same as those advanced in Case T-55/10 *SP* v *Commission*.

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