ISSN 1725-2423

Official Journal of the European Union

C 72

English edition

Information and Notices

Volume 54

5 March 2011

Notice No | Contents | Page

EN

Price:
EUR 3

(Continued overleaf)

EN

EN

(Continued overleaf)

General Court

EN

European Union Civil Service Tribunal

(Continued overleaf)

Corrigenda

EN

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COURT OF JUSTICE OF THE EUROPEAN UNION

(2011/C 72/01)

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

OJ C 63, 26.2.2011

Past publications

OJ C 55, 19.2.2011

OJ C 46, 12.2.2011

OJ C 38, 5.2.2011

OJ C 30, 29.1.2011

OJ C 13, 15.1.2011

OJ C 346, 18.12.2010

These texts are available on:

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

V

(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Appeal brought on 27 May 2010 by Sistemul electronic de arhivare, criptare și indexare digitalizată Srl (Seacid) against the order of the General Court (Sixth Chamber) delivered on 16 March 2010 in Case T-530/09: Sistemul electronic de arhivare, criptare și indexare digitalizată Srl (Seacid) v European Parliament and Council of the European Union

(Case C-266/10 P)

(2011/C 72/02)

Language of the case: English

Parties

Appellant: Sistemul electronic de arhivare, criptare și indexare digitalizată Srl (Seacid) (represented by: N.O. Curelea, avocat)

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

By order of 22 October 2010 the Court of Justice (Seventh Chamber) held that the appeal was inadmissible.

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 23 November 2010 — Deutsches Weintor eG v Land Rheinland-Pfalz

(Case C-544/10)

(2011/C 72/03)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Applicant: Deutsches Weintor eG

Defendant: Land Rheinland-Pfalz

Questions referred

1. Does the reference to health in a claim within the meaning of the first sentence of Article 4(3) in conjunction with Article 2(2)(5) or Article 10(3) of Regulation (EC) No 1924/2006 ([1]) of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as last amended by Commission Regulation (EU) No 116/2010 ([2]) of 9 February 2010 ('the Regulation'), require a beneficial nutritional or physiological effect aimed at a sustained improvement of physical condition, or is a temporary effect, limited in particular to the time taken by the intake and digestion of the food, sufficient?

2. If the assertion of a temporary beneficial effect may in itself be a reference to health:

   In order for it to be assumed that such an effect is due to the absence or reduced content of a substance within the meaning of Article 5(1)(a) and recital 15 in the preamble to the Regulation, is it sufficient merely to assert in the claim that an effect generally derived from foods of this kind and frequently perceived as being adverse is limited in a particular case?

3. If the answer to Question 2 is in the affirmative:

   Is it compatible with the first subparagraph of Article 6(1) of the Treaty on European Union, as amended on 13 December 2007, in conjunction with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the European Union, as amended on 12 December 2007, ([3]) for a producer or marketer of wine to be prohibited, without exception, from making in its advertising a health claim of the kind at issue here, even if that claim is correct?

([1]) OJ 2004 L 404, p. 9.
([2]) OJ 2010 L 37, p. 16.
([3]) OJ 2007 C 303, p. 1.

Appeal brought on 26 November 2010 by Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE against the judgment of the General Court (Fifth Chamber) delivered on 9 September 2010 in Case T-300/07: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission

(Case C-560/10 P)

(2011/C 72/04)

Language of the case: English

Parties

Appellant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis, M. Dermitzakis, Attorneys at Law)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

— set aside the decision of the General Court;

— annul the decision of the Commission (DG ENTR) to reject the bid of the Appellant in Lot 1, filed in response to the Call for Tender ENTR/05/078 — YOUR EUROPE Lot 1 (Editorial Work and Translations) for 'Your Europe Portal Management and Maintenance' (OJ 2006/S 143-153057) and to award the same Call for Tender to another bidder;

— refer the case to the General Court in order that the latter examines the remaining issues in both Lots, including the request for Damages, not examined yet by the General Court;

— order the Commission to pay the Appellant's legal and other costs including those incurred in connection with the initial procedure, even if the current Appeal is rejected as well as those of the current Appeal, in case it is accepted.

Pleas in law and main arguments

The Appellant submits that in the contested Judgment the General Court erred in law and wrongly interpreted article 100 (2) of the Financial Regulation [1] and Article 149 of the Implementing Rules by accepting that, since the Appellant's tender did not reach the 70 % threshold, the Commission rightfully did not communicate to the Appellant the relative merits of the winning tenderer. Furthermore the Appellant maintains that the Judgment is insufficiently motivated since the General Court failed to examine thoroughly and individually the plea concerning the infringement of the principle of transparency and equal treatment.

[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 L 248, p. 1

Appeal brought on 26 November 2010 by Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE against the judgment of the General Court (Fifth Chamber) delivered on 9 September 2010 in Case T-387/08: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission

(Case C-561/10 P)

(2011/C 72/05)

Language of the case: English

Parties

Appellant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis, M. Dermitzakis, Attorneys at Law)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

— set aside the decision of the General Court;

— annul OPOCE's (Publications Office of the European Union) decision to reject the bid of the Appellant, and to award the same Call for Tender to another bidder and to award damages;

— refer the case to the General Court in order that the latter examines the remaining issues in both Lots, including the request for Damages, not examined yet by the General Court;

— order the OPOCE to pay the Appellant's legal and other costs including those incurred in connection with the initial procedure, even if the current Appeal is rejected as well as those of the current Appeal, in case it is accepted.

Pleas in law and main arguments

The Appellant submits that in the contested Judgment the General Court erred in law and wrongly interpreted Article 100 (2) of the Financial Regulation [1] and Article 149 of the Implementing Rules by accepting that, since the Appellant's tender did not reach the 70 % threshold, the Commission rightfully did not communicate to the Appellant the relative merits of the winning tenderer. Furthermore, the Appellant submits that the Judgment is insufficiently motivated since the General Court failed to examine thoroughly and individually the plea concerning the infringement of the principle of transparency and equal treatment.

The Appellant also submits that the General Court breached the obligation to state reasons, since, although it acknowledged that in numerous sub-criteria the comments in the contested decision were vague and generic and do not explain the marks awarded to the applicant's tender, and that the contested decision is vitiated by an inadequate statement of reasons with regard to specific award sub-criteria, it concluded that the 'statement of reasons in respect of numerous other award criteria and sub-criteria is adequate'. Further, the General Court erred in its interpretation of the obligation to state reasons, by considering that several of the comments of the Evaluation Committee fulfilled its obligation to state reasons, and it did not examine thoroughly and failed to motivate individually and sufficiently the arguments of the Appellant concerning the infringement of the principle of transparency and equal treatment.

([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 L 248, p. 1

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 2 December 2010 — Bundesanstalt für Landwirtschaft und Ernährung v Pfeifer & Langen Kommanditgesellschaft

(Case C-564/10)

(2011/C 72/06)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Appellant: Bundesanstalt für Landwirtschaft und Ernährung

Respondent: Pfeifer & Langen Kommanditgesellschaft

Questions referred

1. Does Article 3 of the Regulation ([1]) apply also to the limitation period for claims in respect of interest due under national law in addition to the repayment of the advantage wrongly obtained on the basis of an irregularity?

2. If the answer to question 1 is in the affirmative: Is the length of the limitation period alone to be taken into account in the comparison of limitation periods provided for in Article 3(3) of the Regulation, or is it also necessary to take into account national legislation that postpones commencement of the limitation period to the end of the calendar year in which a claim arises (in this case, a claim in respect of interest), without any other circumstances being required?

3. Does the limitation period for claims in respect of interest begin to run when an irregularity is committed or when a continuous or repeated irregularity ceases even if the claims in respect of interest relate to later periods and therefore do not arise until a later date? In the case of continuous or repeated irregularities, is commencement of the limitation period postponed under the second subparagraph of Article 3(1) of the Regulation until the day on which the irregularity ceases in the case of claims in respect of interest as well?

4. When does the interrupting effect of a decision by a competent authority come to an end under the second sentence of the third subparagraph of Article 3(1) of the Regulation where that decision essentially establishes the claim in question (in this case, a claim in respect of interest)?

([1]) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

Reference for a preliminary ruling from the Tribunal Administratif de Saint-Denis de la Réunion (France) lodged on 8 December 2010 — Clément Amedée v Garde des sceaux, Ministre de la justice et des libertés, Ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État

(Case C-572/10)

(2011/C 72/07)

Language of the case: French

Referring court

Tribunal Administratif de Saint-Denis de la Réunion

Parties to the main proceedings

Applicant: Clément Amedée

Defendants: Garde des sceaux, Ministre de la justice et des libertés, Ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État

Questions referred

1. Can the scheme put in place by Article L. 12(b) of the French Civil and Military Retirement Pensions Code, as amended by Article 48 of the Law of 21 August 2003, and by Article R. 13 of that Code, as amended by Article 6 of the Decree of 26 December 2003, be regarded as giving rise to indirect discrimination, within the meaning of Article 157 of the Treaty on [the Functioning of the] European Union, against the biological parents of children, given the proportion of men liable to fulfil the condition relating to a break in their career for a continuous period of at least two months, in particular by reason of the absence of a statutory framework allowing them to fulfil that condition by taking paid leave?

2. If the first question is answered in the affirmative, can the indirect discrimination thus established be justified by the terms of Article 6(3) of the Agreement annexed to Protocol No 14 on Social Policy [annexed to the Treaty on European Union]?

3. If the second question is answered in the negative, do the provisions of Directive 79/7/EEC [1] preclude the maintenance in force of Articles L. 12(b) and R. 13 of the French Civil and Military Retirement Pensions Code?

4. If the first question is answered in the affirmative and the second and third questions are answered in the negative, must any challenge to those articles be limited solely to the discrimination that they imply or does it relate to the impossibility for civil servants of both sexes to benefit from them?

---

[1] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

Action brought on 9 December 2010 — European Commission v Federal Republic of Germany

(Case C-574/10)

(2011/C 72/08)

Language of the case: German

Parties

Applicant: European Commission (represented by: G. Wilms and C. Zadra, acting as Agents)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that, by having contracts for architectural services relating to the construction of the recreation centre awarded by the municipality of Niedernhausen without conducting a Europe-wide invitation to tender, the defendant infringed its obligations under Articles 2, 9 and 20 in conjunction with Articles 23 to 55 of Directive 2004/18/EC [1];

— order Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The subject-matter of the present action is the service contracts for consideration relating to architectural services, which the municipality of Niedernhausen as contracting authority concluded with an engineering agency. Although the architectural tasks in question all relate to a uniform construction project, namely the construction of a recreation centre, they were awarded separately to the same engineering agency as the drawing up of plans for the individual building components, without a Europe-wide invitation to tender being conducted. The contract values were accordingly separately calculated for the individual contracts.

The present architectural contracts are contracts for consideration concerning the provision of services within the meaning of Article 1(2)(d) of Directive 2004/18/EC. Architectural services are priority services in accordance with Annex II A, Category 12 to the directive.

The Commission is of the view that the drawing up of plans concerns a uniform procurement procedure for which it can find no objective grounds for it to be divided into separate individual contracts. It concerns the part performance of the construction of a single building, planned, decided and implemented as a general project. They serve that uniform aim and are in close physical, economic and functional relation. Therefore, the contract value should have been calculated according to the total value of the architectural services provided in the context of the construction. In that case, the contract value would have exceeded the threshold laid down in Article 7B of Directive 2004/18/EC and the architectural contract should have been the subject of a Europe-wide invitation to tender.

The construction of the recreation centre itself concerns a single construction contract for the purposes of European procurement law. That is at least a strong indication that the corresponding planning is also to be regarded as a uniform procurement procedure. If architectural services, such as in the present case, are connected with a uniform construction contract and its contents are defined by the planned construction, there is no logical reason to choose another method of calculation. Architectural services are therefore to a certain extent accessory to the construction service. Why a uniform construction service would require a non-uniform architectural service is, in the opinion of the Commission, unclear.

The Court considers the uniform economic and technical function of the individual parts of the contract as an indication that it concerns a single procurement procedure. Although the stated criterion of the functional approach was applicable to construction contracts, the Commission is of the opinion that it is also applicable to service contracts. The criterion of the technical and economic uniformity of the drawing up of plans is fulfilled in the present case since it concerns the construction of a single building.

An almost arbitrary division of the contracts is contrary to the effectiveness of the directive. It would indeed often lead to values artificially falling below the threshold and thereby to a reduction of its scope of application. The Court notes in its

settled case-law the significance of the directive on the award of public contracts for the free movement of services and for fair competition at European Union level. An arbitrary and subjective 'dismemberment' of uniform service contracts would undermine that objective.

Budgetary reasons for the division into construction sections could also not justify an artificial division of a unified contract value. It is contrary to the objective of the European public procurement directives for a unified proposed purchase which is carried out in several stages purely for budgetary reasons to be considered solely for that reason to consist of several independent contracts and thereby to be prevented from coming within the scope of application of the directive. Article 9(3) of the directive indeed forbids such an artificial division of a unified proposed purchase.

It must be concluded that the contracts in question constitute a unified proposed purchase, the value of which at the time of the contract award exceeded the threshold laid down in the directive. The contract should therefore have been the subject of a Europe-wide invitation to tender and awarded according to the procedure provided for in the directive. That is not the case and therefore the defendant infringed Directive 2004/18/EC.

([1]) 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 9 December 2010 — European Commission v Republic of Hungary

(Case C-575/10)

(2011/C 72/09)

Language of the case: Hungarian

Parties

Applicant(s): European Commission (represented by: D. Kukovec and A. Sipos, Agents)

Defendant(s): Republic of Hungary

Form of order sought

— Declare that the Republic of Hungary has failed to fulfil its obligations under Articles 47(2) and 48(3) of Directive 2004/18/EC, ([1]) and Article 54(5) and (6) of Directive 2004/17/EC, ([2]) by failing to ensure that, in public procurement procedures, economic operators may, in a specific case, rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities.

— order Republic of Hungary to pay the costs.

Pleas in law and main arguments

Both Directive 2004/17 and Directive 2004/18 allow tenderers in public procurement procedures to rely on the capacity of other entities to demonstrate their suitability and the satisfaction of the selection criteria whatever the legal nature of the link between itself and those entities.

In the view of the Commission, Hungarian rules which, in the case of certain suitability criteria, allow tenderers to use the resources of other entities which are not directly participating in the performance of the contract only if they have a controlling share in such entities do not comply with those provisions of the Directives. Thus, in the case of entities which do not participate as subcontractors in the performance of the contract, the contested national rules impose an additional requirement to be met to allow the tenderer to rely on the capacity of such entities in the public procurement procedure.

The provisions of the Directives are unequivocal: without requiring the entities which provide the resources to be directly involved in the performance of the contract, they require the national legislation to guarantee the possibility of relying on the resources of such entities, *whatever the legal nature* of the link between the tenderer and those entities. The sole requirement is that the tenderer be able to demonstrate to the awarding authority that it will actually have the resources necessary for the performance of the contract.

However, the Commission goes on to argue that the Hungarian rules at issue restrict the possibilities open to tenderers in this regard, so that, in practice, they have no option but to involve in the contract as subcontractors those entities which have such resources, unless, from the outset, they have a controlling share in such entities.

The Commission asserts that the national rules at issue cannot be justified by the objective of eliminating practices intended to evade the public procurement rules, because that objective cannot be relied on to justify a provision contrary to European Union law on public procurement which disproportionately restricts the rights and procedural obligations arising from the Directives. Of course, it is open to the Member States, within the limits imposed by the Directives, to decide the manner in which the tenderers must demonstrate that they actually will have the resources of other entities, but they must do so without making a distinction on the basis of the legal nature of the legal links with such entities.

The Commission rejects the argument of the Republic of Hungary that an entity which does not participate in the performance of the contract cannot demonstrate that it meets the minimum selection criteria which consist in being able actually to provide the necessary resources at the time of performance of the contract. In that connection, the Commission points out that Article 48(3) of Directive 1004/18/EC expressly provides that the tenderer may prove that it will have the resources of other entities at its disposal '*by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator*'. Thus, an entity which contributes its resources may prove that it has the resources which it must provide at the time of the performance of the contract, without being required to participate directly in the performance of the contract.

The Commission points out, finally, that the disputed national rules may discriminate against foreign tenderers. Although the relevant Hungarian legislation applies to all tenderers, in practice it limits the possibility of participating in tender procedures for foreign tenderers in particular. In general, such tenderers do not have at their disposal, in the place of performance of the contract, all the resources necessary for performance, since, in public procurement procedures, they are obliged to have recourse, more frequently than Hungarian tenderers, to the capacities of local economic operators who are independent of them.

([1]) 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).

([2]) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

Action brought on 10 December 2010 — European Commission v Kingdom of Belgium

(Case C-577/10)

(2011/C 72/10)

Language of the case: French

Parties

Applicant: European Commission (represented by: E. Traversa and C. Vrignon, acting as Agents)

Defendant: Kingdom of Belgium

Form of order sought

— declare that by adopting Articles 137(8), third indent of 138, 153 and 157(3) of Framework Law (I) of 27 December 2006 ([1]), in the version in force since 1 April 2007, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 of the Treaty on the Functioning of the European Union;

— order the Kingdom of Belgium to pay the costs.

Pleas in law and main arguments

By this action, the Commission claims that the national legislation which imposes a prior notification requirement on independent service providers established in other Member States (the 'Limosa' declaration), who wish to provide services in Belgium on a temporary basis, constitutes a restriction on the freedom to provide services.

The Commission points out, in the first place, that the provisions at issue constitute a discriminatory restriction insofar as, firstly, they impose non-negligible and deterrent additional administrative formalities on the independent service providers at issue and, secondly, they establish a monitoring system that applies only to providers established in another Member State, without any objective reasons to justify that difference in treatment.

In the second place, the applicant asserts that that restriction on the freedom to provide services, even if it is not discriminatory, is not justified by objectives in relation to the public interest, the maintenance of the financial balance of the social security system, the prevention of fraud or the protection of workers.

([1]) Moniteur Belge, 28 December 2006, p. 75178.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 6 December 2010 — Staatssecretaris van Financiën v L.A.C. van Putten

(Case C-578/10)

(2011/C 72/11)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applellant: Staatssecretaris van Financiën

Other party: L.A.C. van Putten

Question referred

In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven by a resident of the first Member State in the territory of that Member State?

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 8 December 2010 — Staatssecretaris van Financiën, other party: P. Mook

(Case C-579/10)

(2011/C 72/12)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Appellant: Staatssecretaris van Financiën

Other party: P. Mook

Question referred

In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven for private purposes by a resident of the first Member State between those two Member States?

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 9 December 2010 — Staatssecretaris van Financiën, other party: G. Frank

(Case C-580/10)

(2011/C 72/13)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Appellant: Staatssecretaris van Financiën

Other party: G. Frank

Question referred

In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven for private purposes in the territory of the first Member State by a person who is a resident of that Member State but a national of the other Member State?

Reference for a preliminary ruling from the Amtsgericht Köln (Germany), lodged on 13 December 2010 — Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v Deutsche Lufthansa AG

(Case C-581/10)

(2011/C 72/14)

Language of the case: German

Referring court

Amtsgericht Köln

Parties to the main proceedings

Applicants: Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson

Defendant: Deutsche Lufthansa AG

Questions referred

1. Does the right to compensation provided for in Article 7 of Regulation (EC) No 261/2004 [1] constitute a claim for non-compensatory damages within the meaning of the second sentence of Article 29 of the Montreal Convention of 28 May 1999 for the unification of certain rules for international carriage by air ('the Montreal Convention')?

2. What is the relationship between, on the one hand, the right to compensation based on Article 7 of Regulation (EC) No 261/2004 which a passenger has, according to the judgment of the Court of Justice of 19 November 2009 in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, if he reaches his final destination three hours or more after the scheduled arrival time and, on the other hand, the right to compensation in respect of delay provided for in Article 19 of the Montreal Convention, regard being had to the exclusion under the second sentence of Article 29 of the Montreal Convention?

3. How may the interpretative criterion underlying the Court of Justice's judgment in *Sturgeon and Others*, which allows the right to compensation under Article 7 of Regulation (EC) No 261/2004 to be extended to cover cases of delay, be reconciled with the interpretative criterion which the Court of Justice applied to that regulation in its judgment in Case C-344/04 *IATA and ELFAA* [2006] ECR I-403?

(1) Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) — Commission Statement (OJ 2004 L 46, p. 1).

Appeal brought on 13th December 2010 by the European Commission against the judgment of the General Court (Seventh Chamber) delivered on 30th September 2010 in Case T-85/09: Yassin Abdullah Kadi v European Commission

(Case C-584/10 P)

(2011/C 72/15)

Language of the case: English

Parties

Appellant: European Commission (represented by: P. Hetsch, S. Boelaert, E. Paasivirta, and M. Konstantinidis, Agents)

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

Form of order sought

The appellants claims that the Court should:

— Set aside, in whole, the contested judgment;

— Dismiss Yassin Abdullah Kadi's application for the annulment of Commission adopted Regulation No 1190/2008 (1) insofar as it concerns him, as unfounded;

— Order that Yassin Abdullah Kadi pays the Commission's costs of this appeal and the proceedings before the General Court.

Pleas in law and main arguments

The Commission submits that the General Court's findings are vitiated by errors of law, as they are based on a legally erroneous standard for judicial review. The pleas of the Commission are as follows:

1. Pleas relating to the General Court's findings on the applicable standard of judicial review: The Commission submits that the standard of judicial review adopted by the General Court is legally erroneous because the Court of Justice has not settled the precise standard of judicial review applicable to this case and because the particular standard of judicial review adopted by the General Court cannot be required from the EU.

2. Pleas relating to the General Court's findings on the infringement of the rights of the defence and the right to effective judicial protection and to the infringement of the principle of proportionality: The Commission argues that the General Court erroneously held that the procedures applied by the Commission did not fulfil the fundamental rights requirements for this type of restrictive measures regime; that the GC erroneously dismissed the Commission's argument regarding the domestic proceedings brought by Mr Kadi in the United States; and that the GC erroneously dismissed the Commission's arguments regarding the administrative review and re-examination procedures established pursuant to UNSC Resolutions 1822(2008) and 1904(2009) – including the Focal Point procedure and the Office of the Ombudsperson.

(1) OJ L 322, p. 25

Appeal brought on 16 December 2010 by the Council of the European Union against the judgment of the General Court (Seventh Chamber) delivered on 30 September 2010 in Case T-85/09: Yassin Abdullah Kadi v European Commission

(Case C-593/10 P)

(2011/C 72/16)

Language of the case: English

Parties

Appellant: Council of the European Union (represented by: M. Bishop, E. Finnegan and R. Szostak, Agents)

Other parties to the proceedings: Yassin Abdullah Kadi, European Commission, French Republic, United Kingdom of Great Britain and Northern Ireland

Form of order sought

The appellant claims that the Court should:

— Set aside the judgment of the General Court in case T-85/09;

— Dismiss the respondent's application for the annulment of Commission Regulation 1190/2008 [1] in so far as it concerns him, as unfounded;

— Order the respondent to bear the costs of proceedings before the General Court and the Court of Justice.

Pleas in law and main arguments

By this Appeal the Council seeks to challenge several determinations of the General Court. The Council argues that:

— The General Court erred in law in considering that the Contested Regulation did not benefit from an immunity of jurisdiction;

In the alternative, the Council argues that:

— The General Court misconstrued and misapplied the case-law of the Court of Justice in considering that the review to be carried out should be '*full and rigorous*' and in requiring the transmission of underlying evidence to the designated person or entity as well as to the Union judicature in order to ensure respect for that person or entity's rights of defence; and

— The General Court erred in law in failing to give due regard to the creation by United Nations Security Council Resolution 1904(2009) of the Office of the Ombudsperson.

[1] OJ L 322, p. 25

Appeal brought on 16 December 2010 by the United Kingdom of Great Britain and Northern Ireland against the judgment of the General Court (Seventh Chamber) delivered on 30 September 2010 in Case T-85/09: Yassin Abdullah Kadi v European Commission

(Case C-595/10 P)

(2011/C 72/17)

Language of the case: English

Parties

Appellant: United Kingdom of Great Britain and Northern Ireland (represented by: E. Jenkinson, Agent, D. Beard and M. Wood, Barristers)

Other parties to the proceedings: Yassin Abdullah Kadi, European Commission, Council of the European Union, French Republic

Form of order sought

The appellant claims that the Court should:

— Set aside, in whole, the decision of the General Court in case T-85/09;

— Dismiss the application of Mr Yassin Abdullah Kadi for annulment of Regulation 881/2002 [1] insofar as it concerns him;

— Order Mr Yassin Abdullah Kadi to bear the costs of the United Kingdom in the proceedings before the Court.

Pleas in law and main arguments

The conclusion of the General Court that full judicial review is appropriate for EU measures faithfully implementing United Nations Security Council resolutions is contrary to the terms of the EU Treaties and the case law of the EU Courts. It is directly at odds with the history and purpose of the EU and, in particular, the development of common foreign and security policy competence.

The United Nations Charter requires compliance with its obligations by its Member States. Such obligations prevail over the obligations which may arise under any other international agreement. Such obligations include those imposed under Security Council resolutions intended to combat international terrorism.

Having regard, in particular, to Articles 3(5) and 21 TEU and Article 351 TFEU, the obligation upon EU Member States to comply with the decisions of the Security Council prevails over any obligations which may arise under the EU Treaties.

The EU must consider itself bound by the terms of the UN Charter and the UN Security Council decisions made under it.

It is inconsistent with the binding effect of UN Security Council decisions for the judicature of the Union to engage in a full review of the EU measures that seek to implement the Security Council decisions.

To the extent that any review of EU measures faithfully implementing Security Council resolutions is appropriate, the Union judicature must pay due regard to the nature and purpose of the United Nations Charter and the role of the Security Council as the principal body charged with ensuring international peace and security. Given the nature of the Security Council and the important role which it fulfils, having regard to the creation and operation of the Office of Ombudsperson, and taking due account of the summary of reasons provided to the Commission and Mr Yassin Abdullah Kadi, there is no reason to annul Regulation 881/2002 so far as it concerns Mr Yassin Abdullah Kadi.

(1) OJ L 139, p. 9

Pleas in law and main arguments

The Commission raises two complaints in support of its action relating to the non-compliance with the VAT Directive by the national legislation that, firstly, makes transactions that do not fall within the exceptions set out in Annex III to that directive subject to a reduced rate of 5,5 % and, secondly, makes some transactions subject to a reduced rate of 2,1 %.

In its first complaint, the applicant points out that, apart from the fact that it applies a reduced rate of VAT of 5,5 % to transactions concerning live equidae without differentiating as to their use, the French legislation lays down yet more provisions which are not in accordance with the VAT Directive and, in particular, with paragraphs (1) and (11) of Annex III to that directive.

In its second complaint, the Commission criticises the defendant's administrative practice of applying a rate of 2,1 % to sales to persons not subject to VAT of live animals not intended for use as meat and meat products, and in particular horses for racing, competitions, pleasure and riding.

(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1)

Action brought on 16 December 2010 — European Commission v French Republic

(Case C-596/10)

(2011/C 72/18)

Language of the case: French

Parties

Applicant: European Commission (represented by: F. Dintilhac and M. Afonso, acting as Agents)

Defendant: French Republic

Form of order sought

— declare that, in applying a reduced rate of VAT to transactions relating to equidae and in particular to horses, where they are not as a matter of course intended for use in the preparation of foodstuffs or in agricultural production, the French Republic has failed to fulfil its obligations under Articles 96 to 99 of the VAT Directive (1) and of Annex III thereto;

— order the French Republic to pay the costs.

Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovak Republic) lodged on 17 December 2010 — SAG ELV Slovensko, a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe, a.s., TESLA Stropokov, a.s., Autostrade per l'Italia S.p.A., EFKON AG, Stalexport Autostrady S.A. v Úrad pre verejné obstarávanie

(Case C-599/10)

(2011/C 72/19)

Language of the case: Slovak

Referring court

Najvyšší súd Slovenskej republiky

Parties to the main proceedings

Applicants: SAG ELV Slovensko, a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe, a.s., TESLA Stropokov, a.s., Autostrade per l'Italia S.p.A., EFKON AG, Stalexport Autostrady S.A.

Defendant: Úrad pre verejné obstarávanie

Intervener: Národná diaľničná spoločnost, a.s.

Questions referred

1. Is the interpretation that, under Article 51, in conjunction with Article 2, of Directive 2004/18/EC [1] 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, taking account of the principle of non discrimination and transparency in the award of public contracts, the contracting authority is obliged to seek clarification of a tender, respecting the subjective procedural right of the individual to be requested to supplement or clarify certificates and documents submitted pursuant to Articles 45 to 50 of the Directive, if a disputable or unclear understanding of the tenderer's bid could result in the exclusion of that tenderer, in conformity with the above Directive in the wording in effect in the relevant period?

2. Is the interpretation that, under Article 51, in conjunction with Article 2 of Directive 2004/18/EC, taking account of the principle of non discrimination and transparency in the award of public contracts, the contracting authority is not obliged to seek clarification of a tender if the contracting authority considers it established that the requirements regarding the subject matter of the contract have not been met, in conformity with the Directive in the wording in effect in the relevant period?

3. Is a provision of national law under which a committee established to evaluate tenders only *may* request tenderers in writing to clarify their bid in conformity with Article 51 and Article 2 of Directive 2004/18/EC in the wording in effect in the relevant period? Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of Directive 2004/18/EC, and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did Applicants I and II have the opportunity to explain sufficiently the constituent features of the tender submitted?

[1] OJ 2004 L 134, p. 114.

Reference for a preliminary ruling from the Conseil d'Etat (France) lodged on 22 December 2010 — Association nationale d'assistance aux frontières pour les étrangers (Anafé) v Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration

(Case C-606/10)

(2011/C 72/20)

Language of the case: French

Referring court

Conseil d'Etat

Parties to the main proceedings

Applicant: Association nationale d'assistance aux frontières pour les étrangers (Anafé)

Defendant: Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration

Questions referred

1. Does Article 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [1] apply to re-entry by a third-country national into the territory of a Member State which has issued that person with a temporary residence permit, where re-entry into its territory does not require entry, transit or stay in the territory of the other Member States?

2. In what circumstances may a Member State issue to third-country nationals a 're-entry visa' within the meaning of Article 5(4)(a) of that regulation? In particular, may such a visa limit entry only to points of entry into the territory of that State?

3. In so far as Regulation No 562/2006 excludes all possibility of entry into the territory of the Member States for third-party nationals who hold only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, contrary to what was allowed under the Convention of 19 June 1990 implementing the Schengen Agreement, in the version prior to its amendment by that regulation, did the principles of legal certainty and protection of legitimate expectations require that transitional measures should be laid down in respect of third-country nationals who left the territory of those States when they were holders of only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, and wish to return there after the entry into force of Regulation No 562/2006?

[1] OJ L 105, p. 1.

Action brought on 22 December 2010 — European Commission v Kingdom of Spain

(Case C-610/10)

(2011/C 72/21)

Language of the case: Spanish

Parties

Applicant: European Commission (represented by: B. Stromsky and C. Urraca Caviedes, acting as Agents)

Defendant: Kingdom of Spain

Form of order sought

— Declare that the Kingdom of Spain has failed to fulfil its obligations under Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel, and small electric appliances (OJ 1991 L 5, p. 18; 'Decision 91/1') and under Article 260 TFEU, since it has failed to take all the measures necessary to comply with the judgment of the Court of Justice of 2 July 2002 in Case C-499/99 *Commission* v *Spain* [2002] ECR I-603 ('the 2002 judgment'), concerning the Kingdom of Spain's failure to fulfil its obligations under Decision 91/1;

— Order the Kingdom of Spain to pay to the Commission a penalty payment of EUR 131 136 for each day of delay in complying with the 2002 judgment, running from the day on which judgment is delivered in the present proceedings until the day on which the 2002 judgment is fully complied with;

— Order the Kingdom of Spain to make a lump sum payment to the Commission, to be calculated by multiplying a daily amount of EUR 14 343 by the number of days over which the infringement continued, from the date of the 2002 judgment until:

  — the date on which the Kingdom of Spain recovered the aids declared unlawful by Decision 91/1, if the Court of Justice finds that those aids have in fact been recovered before judgment is delivered in the present proceedings;

  — the date of judgment in the present proceedings, if the 2002 judgment has not been fully complied with by that date.

— Order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The measures adopted by Spain have not resulted in immediate enforcement of the 2002 judgment or Decision 91/1; nor have they resulted in full and immediate recovery of the unlawful and incompatible aid.

According to settled case-law, the only defence available to a Member State which has failed to fulfil its obligations is to plead that it was absolutely impossible for it properly to implement the decision.

In the present case, in the course of an extremely lengthy correspondence between the Commission's staff and the Spanish authorities concerning the measures adopted for the purpose of complying with Decision 91/1, the Spanish authorities have not claimed that it is absolutely impossible to enforce that decision and have merely referred to imprecise internal difficulties.

Action brought on 22 December 2010 — European Commission v Republic of Austria

(Case C-614/10)

(2011/C 72/22)

Language of the case: German

Parties

Applicant: European Commission (represented by: B. Martenczuk and B.-R. Killmann, acting as Agents)

Defendant: Republic of Austria

Form of order sought

— Declare that the Republic of Austria has infringed its obligations under the second subparagraph of Article 28(1) of Directive 95/46/EC because the legal situation in Austria of a Data Protection Commission created as data protection inspection body does not fulfil the criterion of complete independence.

— order the Republic of Austria to pay the costs.

Pleas in law and main arguments

The Commission is of the opinion that the independence of the Data Protection Commission as inspection body for the control of data protection regulations in Austria is not guaranteed.

The Data Protection Commission is organisationally closely connected with the Federal Chancellor's Office (Bundeskanzleramt). The latter supervises the employees of the Data Protection Commission and is also responsible for that commission's material provisions. Furthermore, an administrative officer of the Federal Chancellor's Office is responsible for the management of the Data Protection Commission, who is also for the duration of his duties bound by the directions of his supervisor and subject to that supervision. That situation leads to clear conflicts of loyalty and interests.

Moreover, the Federal Chancellor (Bundeskanzler), who like other public posts is subject to the control of the Data Protection Commission, has a comprehensive right to supervise and instruct that commission. As a result, it is possible for the Federal Chancellor at any time and without any concrete ground to inform himself about all aspects of the management of the Data Protection Commission. There exists thereby the risk that that right could be used in order to exercise political influence.

Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 23 December 2010 — Insinööritoimisto InsTiimi Oy

(Case C-615/10)

(2011/C 72/23)

Language of the case: Finnish

Referring court

Korkein hallinto-oikeus

Parties to the main proceedings

Appellant: Insinööritoimisto InsTiimi Oy

Other party: Puolustusvoimat

Question referred

Is Directive 2004/18/EC [1] 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 applicable, having regard to Article 10 of that directive and to Article 346(1)(b) of the Treaty on the Functioning of the European Union and to the list of arms, munitions and war material adopted by decision of the Council on 15 April 1958, to a procurement which otherwise falls within the scope of the directive, when according to the contracting entity the intended purpose of the object of procurement is specifically military, but there also exist largely identical technical applications of the object of procurement in the civilian market?

[1] OJ 2004 L 134, p. 114.

Reference for a preliminary ruling from the Haparanda Tingsrätten (Sweden) lodged on 27 December 2010 — Åklagaren v Hans Åkerberg Fransson

(Case C-617/10)

(2011/C 72/24)

Language of the case: Swedish

Referring court

Haparanda Tingsrätten

Parties to the main proceedings

Applicant: Åklagaren

Defendant: Hans Åkerberg Fransson

Questions referred

1. Under Swedish law there must be clear support in the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Additional Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the Charter of Fundamental Rights of the European Union of 7 December 2000 ('the Charter'). Is such a condition under national law for disapplying national provisions compatible with Union law and in particular its general principles, including the primacy and direct effect of Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Additional Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle mentioned in Question 2, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest, which are described in greater detail below. If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax

offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?

Reference for a preliminary ruling from the Latvijas Republikas Augstâkâs tiesas Senâts (Republic of Latvia) lodged on 29 December 2010 — Trade Agency Limited v Seramico Investments Limited

(Case C-619/10)

(2011/C 72/25)

Language of the case: Latvian

Referring court

Latvijas Republikas Augstâkâs tiesas Senâts

Parties to the main proceedings

Applicant: Trade Agency Limited

Defendant: Seramico Investments Limited

Questions referred

1. Where a decision of a foreign court is accompanied by the certificate provided for in Article 54 of Regulation No 44/2001 ([1]), but the defendant nevertheless objects on the ground that he was not served with notice of the action brought in the Member State of origin, is a court in the Member State where enforcement is sought competent, when considering a ground for withholding recognition provided for in Article 34(2) of Regulation No 44/2001, to examine for itself the conformity with the evidence of the information contained in the certificate? Is such wide jurisdiction on the part of a court in the Member State in which enforcement is sought compatible with the principle of mutual trust in the administration of justice set out in recitals 16 and 17 to Regulation No 44/2001?

2. Is a decision given in default of appearance, which disposes of the substance of a dispute without examining either the subject-matter of the claim or the grounds on which it is based and sets out no reasoning as to the substantive basis of the claim, compatible with Article 47 of the Charter and does it not infringe the defendant's right to a fair hearing, laid down by the provision?

([1]) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Reference for a preliminary ruling from the Kammarrätten I Stockholm — Migrationsöverdomstolen (Sweden) lodged on 27 December 2010 — Migrationsverket v Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati

(Case C-620/10)

(2011/C 72/26)

Language of the case: Swedish

Referring court

Kammarrätten I Stockholm — Migrationsöverdomstolen

Parties to the main proceedings

Applicant: Migrationsverket

Defendants: Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati

Questions referred

1. In the light inter alia of the stipulations of Article 5(2) of Regulation No 343/2003 ([1]) and/or the absence of provisions in the regulation on the cessation of a Member State's responsibility to examine an asylum application other than those contained in the second subparagraph of Article 4(5) and Article 16(3) and (4), is Regulation No 343/2003 to be interpreted as meaning that the withdrawal of an asylum application does not affect the possibility of applying the regulation?

2. Is the stage in the process at which the asylum application is withdrawn relevant in answering the question set out above?

([1]) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50, p. 1

Reference for a preliminary ruling from the Administrativen sad Varna (Bulgaria) lodged on 29 December 2010 — 'Balkan and Sea Properties' ADSITS v Director of the Varna Office 'Appeals and the Administration of Enforcement' (Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna)

(Case C-621/10)

(2011/C 72/27)

Language of the case: Bulgarian

Referring court

Administrativen sad Varna

Parties to the main proceedings

Applicant: 'Balkan and Sea Properties' ADSITS

Defendant: Director of the Varna Office 'Appeals and the Administration of Enforcement' (Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna)

Questions referred

1. Is Article 80(1)(c) of Council Directive 2006/112/EC ([1]) of 28 November 2006 on the common system of value added tax to be interpreted as meaning that where there are supplies between connected persons, in so far as the consideration is higher than the open market value, the taxable amount is the open market value of the transaction only if the supplier does not qualify for the full right to deduct the VAT chargeable on the purchase or production of the goods which are supplied?

2. Is Article 80(1)(c) of Directive 2006/112 to be interpreted as meaning that, if the supplier has exercised the full right to deduct VAT on goods and services which are the subject of subsequent supplies between connected persons at a price which is higher than the open market value, and that right to deduct input VAT has not been corrected under Articles 173 to 177 of that Directive, a Member State is not permitted to adopt measures whereby the taxable amount is exclusively the open market value?

3. Does Article 80(1) of Directive 2006/112 constitute an exhaustive list of cases representing the circumstances in which the Member States may take measures whereby the taxable amount in respect of supplies is to be the open market value of the transaction?

4. Is a provision of national law such as Article 27(3)(1) of the Zakon za danak varhu dobavenata stoynost (Law on VAT) permissible in cases other than those listed in Article 80(1)(a), (b) and (c) of Directive 2006/112?

5. In a case such as the present does Article 80(1)(c) of Directive 2006/112 have direct effect, and may the domestic court apply it directly?

([1]) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Action brought on 21 December 2010 — European Commission v French Republic

(Case C-624/10)

(2011/C 72/28)

Language of the case: French

Parties

Applicant: European Commission (represented by: M. Afonso, acting as Agent)

Defendant: French Republic

Form of order sought

— declare that, by providing in Title IV of Administrative Instruction No 105 of 23 June 2006 (3 A-9-06) for an administrative concession derogating from a VAT reverse charge scheme and necessitating, among other things, the designation of a tax representative by a seller or provider established outside of France, the French Republic has failed to fulfil its obligations under the VAT Directive and, in particular, Articles 168, 171, 193, 194, 204 and 214 thereof;

— order the French Republic to pay the costs.

Pleas in law and main arguments

By its action, the Commission claims that the French legislation derogating from a VAT reverse charge scheme is, in a number of respects, contrary to the law of the European Union.

Firstly, the taxable persons who wish to benefit from the scheme introduced by Title IV of Administrative Instruction 3 A-9-06 are obliged to designate a tax representative, which is not in accordance with Article 204 of the VAT Directive. That article allows Member States to impose such an obligation only in the case where no instrument exists, with the country in which the taxable person is established, organising mutual assistance in indirect taxation matters similar to that provided for within the European Union.

Secondly, the administrative concession is also subject to the obligation for the seller to identify him or herself for VAT purposes in France, which is not in accordance with Article 214(1) of the VAT Directive. Under that provision the duty to identify oneself for VAT purposes does not apply to those taxable persons who carry out, in the territory of a Member State in which they are not established, supplies of goods or services subject to reverse charge by the customer, in particular in application of Article 194 of the VAT Directive.

Thirdly and finally, the scheme provides for the offsetting of the deductible VAT of the seller or provider against the VAT collected by one or more of his or her customers. That is not in accordance with the provisions of Articles 168 and 171 of the VAT Directive, which provide that the set-off between deductible VAT and collected VAT is to apply on an individual level to each taxable person. Such a derogating scheme also cannot be based upon Article 11 of that directive.

Appeal brought on 29 December 2010 by Alliance One International, Inc., Standard Commercial Tobacco Company, Inc. against the judgment of the General Court (Fourth Chamber) delivered on 27 October 2010 in Case T-24/05: Alliance One International, Inc., Standard Commercial Tobacco Co., Inc., Trans-Continental Leaf Tobacco Corp. Ltd v European Commission

(Case C-628/10 P)

(2011/C 72/29)

Language of the case: English

Parties

Appellant: Alliance One International, Inc., Standard Commercial Tobacco Company, Inc. (represented by: M. Odriozola Alén, abogado, A. João Vide, abogada)

Other parties to the proceedings: Trans-Continental Leaf Tobacco Corp. Ltd, European Commission

Form of order sought

The appellant claims that the Court should:

— set aside the judgment of the General Court of 27 October 2010 in Case T-24/05 insofar as it rejects the pleas in law alleging manifest error of assessment in the application of Article 101(1) TFEU and Article 23(2) Regulation 1/2003 ([1]), failure to state sufficient reasons and breach of the principle of equal treatment for the finding that Alliance One International, Inc., formerly Standard Commercial Corp. and Standard Commercial Tobacco Co. were jointly and severally liable;

— annul the decision of the Commission of 20 October 2004 in Case COMP/C.38.238/B.2 — Raw Tobacco Spain insofar as it relates to the appellants and reduce the fine imposed on the appellants accordingly; and

— order the Commission to pay the costs.

Pleas in law and main arguments

First, the appellants submit that the Commission and the General Court misapplied Article 101(1) of the TFEU Treaty and Article 23(2) of Regulation 1/2003 by holding SCC and SCTC liable for the infringement committed by WWTE. In particular, the appellants argue that joint control is not sufficient to demonstrate they were in a position to exercise decisive influence over the conduct of WWTE during the period prior to May 1998. In any case, even if it were possible to attribute liability in this manner, both parents exercising joint control had to be taken into account for the purposes of identifying a single economic unit. In the alternative, the appellants submit that, by failing to state sufficient reasons for holding them liable, the Commission and then the General Court infringed Article 296 TFEU. In addition, for the period after May 1998, the General Court's judgment deprives the appellants of their rights derived under the general principles of EU law, the rights contained in the ECHR and the Charter of Fundamental Rights, now part of the Lisbon Treaty and therefore having the full weight of primary law.

Second, the appellants submit that the General Court breached Article 48(2) of its rules of procedure, the appellants' rights of defence and Article 296 TFEU by allowing the Commission to introduce a new argument and amend its pleadings in a reply to a written question. The appellants further submit that the General Court may not clarify in the judgment (and therefore ex post facto) the reasoning applied in the Commission's decision.

Finally, the appellants submit that, by treating other undertakings more favourably, the General Court infringed the principle of equal treatment laid down in Article 20 of the Charter of Fundamental Rights. On the one hand, the appellants submit that the General Court erred in law in defining the method for attributing liability, in particular by adopting a dual basis method which served to discriminate between companies on the strength of their case on appeal but otherwise failed to establish a standard. On the other hand, the appellants submit that the General Court applied the method for attributing liability in a discriminatory manner, either by failing to apply the dual basis test to Universal Corporation and Universal Leaf or by failing to apply to SCC and SCTC the method applied to Universal Corporation and Universal Leaf.

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

GENERAL COURT

Order of the President of the General Court of 24 January 2011 — Rubinetterie Teorema v Commission

(Case T-370/10 R)

(Application for interim measures — Competition — Decision of the Commission to impose a fine — Bank guarantee — Application for suspension of application — Financial harm — Lack of exceptional circumstances — Lack of urgency)

(2011/C 72/30)

Language of the case: Italian

Parties

Applicant: Rubinetterie Teorema SpA (Flero, Italy) (represented by: R. Cavani, M. di Muro and P. Preda, lawyers)

Defendant: European Commission (represented by: A. Antoniadis, F. Castillo de la Torre and L. Malferrari, agents)

Re:

Application for suspension of application of Commission Decision C(2010) 3 4185 final of 23 June 2010 relating to a proceeding pursuant to Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/39.092 — Bathroom fittings and fixtures).

Operative part of the order

1. *The application for suspension of application is rejected.*

2. *The costs are reserved.*

Action brought on 16 December 2010 — Vivendi v Commission

(Case T-567/10)

(2011/C 72/31)

Language of the case: French

Parties

Applicant: Vivendi (Paris, France) (represented by: O. Fréget, J.Y. Ollier and M. Struys, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— declare the present action admissible;

— annul the Commission's decision of 1 October 2010 by which it rejected the complaint lodged by Vivendi on 2 March 2009 (registered under number 2009/4269), for infringement by the French Republic of Directive 2002/77/EC of 16 December 2002 on competition in the markets for electronic communications networks and services and, consequently, Article 106 TFEU, by granting a regulatory advantage as regards setting the level of telephone subscriptions;

— order the Commission to pay the costs incurred by the applicant before the General Court.

Pleas in law and main arguments

In support of its action, the applicant raises three pleas as regards the substance:

1. The first plea is based on an infringement of the principle of sound administration in that the Commission limited itself to a summary examination of the complaint submitted to it by the applicant.

2. The second plea is based on an error of law in relation to the assessment of the concept of special and exclusive rights within the meaning of Directive 2002/77/EC [1] and of Article 106(3) TFEU.

   — The applicant submits that the Commission cannot refrain from sanctioning the fact that the French Republic granted a regulatory advantage to France Télécom by setting the tariff for the universal service telephone subscription at a level which excludes the services offered by any of France Télécom's competitors by referring to the fact that no private operator made an application to eliminate the regulatory advantage.

   — The applicant claims, in the alternative, that such applications were made.

3. The third plea is based on an error of law and a manifest error of assessment in relation to the scope of the obligations of the national regulator resulting from the electronic communications directives, since the conduct of the Member State cannot be excused by the incompleteness or imprecision of the regulatory framework.

---

[1] Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

Action brought on 16 December 2010 — Vivendi v Commission

(Case T-568/10)

(2011/C 72/32)

Language of the case: French

Parties

Applicant: Vivendi (Paris, France) (represented by: O. Fréget, J.-Y. Ollier and M. Struys, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— declare the present action admissible;

— annul the Commission's decision of 1 October 2010 by which it rejected the complaint lodged by Vivendi on 2 March 2009 (registered under number 2009/4267), for infringement by the French Republic of Directive 2002/77/EC of 16 December 2002 on competition in the markets for electronic communications networks and services and, consequently, Article 106(1) TFEU, by granting a regulatory advantage in refusing ARCEP the right to use its powers to force the incumbent operator to reimburse the operators seeking access to the local loop the sums charged in excess of the costs incurred in providing the service which is subject to cost-orientation;

— order the Commission to pay the costs incurred by the applicant before the General Court.

Pleas in law and main arguments

In support of its action, the applicant raises four pleas as regards the substance:

1. The first plea is based on an error of law concerning the definition of a 'special right' within the meaning of Directive 2002/77/EC. [1]

2. The second plea is based on the Commission's failure to comply with its duty to ensure application under Article 106(3) TFEU.

3. The third plea is based on an error of law, in so far as the Commission wrongly considered that the obligation to orientate certain tariffs towards costs is not laid down in a European Union directive, but is the responsibility of the national regulator.

4. The fourth plea is based on an error of law in that the Commission considered that the rights of the private operators were not infringed since they could resort to the national commercial law courts to obtain reimbursements of the excessively high sums levied by France Télécom, given that the complexity of such a case makes it impossible to fully exercise the right to reimbursement before those courts.

---

[1] Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

Action brought on 21 December 2010 — Commission v Commune de Millau

(Case T-572/10)

(2011/C 72/33)

Language of the case: French

Parties

Applicant: European Commission (represented by: S. Petrova, Agent, and E. Bouttier, avocat)

Defendant: Commune de Millau (Millau, France)

Form of order sought

The applicant claims that the General Court should:

— declare that the Commune de Millau (municipality of Millau) is jointly and severally liable for the undertakings made by, and the debts of, the Société d'économie mixte d'équipement de l'Aveyron (the Aveyron semi-public installations company) (SEMEA) with respect to the European Commission;

— order the Commune de Millau to pay jointly and severally with SEMEA to the applicant the principal sum of EUR 41 012, plus interest outstanding since 10 March 1992 or, in the alternative, from 27 April 1993;

— order the capitalisation of interest;

— order the Commune de Millau to pay jointly and severally with SEMEA the sum of EUR 5 000 in respect of SEMEA's wrongful obstruction of legal process;

— order the Commune de Millau to pay jointly and severally with SEMEA the costs of the present case;

— order the joining of the present case with Case T-168/10 *Commission* v *SEMEA*

Pleas in law and main arguments

The pleas in law and main arguments put forward by the applicant are identical to those advanced in Case T-168/10 *Commission* v *SEMEA*, ([1]) the Commission claiming furthermore that the Commune de Millau is jointly and severally liable for repayment of SEMEA's debt, in so far as the Commune de Millau took over SEMEA's assets and liabilities, including the contract concluded between SEMEA and the Commission which forms the basis of the dispute.

([1]) OJ 2010 C 161, p. 48.

Action brought on 29 December 2010 — Just Music Fernsehbetrieb v OHIM — France Télécom (Jukebox)

(Case T-589/10)

(2011/C 72/34)

Language in which the application was lodged: English

Parties

Applicant: Just Music Fernsehbetrieb GmbH (Landshut, Germany) (represented by: T. Kaus, lawyer)

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

Other party to the proceedings before the Board of Appeal: France Télécom SA (Paris, France)

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 14 October 2010 in case R 1408/2009-1

— Order the defendant to reject the opposition decision of 30 September 2010 in case B 1304494 and to allow the application No 6163778 for registration in its entirety

— Order the defendant to bear the costs of the proceedings

— Order the other party to the proceedings before the Board of Appeal to bear the costs of the proceedings incurred by the applicant before the Board of Appeal and the Opposition Division and

— In the alternative, stay the proceedings until a final decision is taken on the application for revocation lodged by the applicant on 21 December 2010 at OHIM against the earlier Community trade mark No 3693108.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant

Community trade mark concerned: The figurative mark 'Jukebox', for services in classes 38 and 41 — Community trade mark application No 6163778

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited in opposition: Community trade mark registration No 3693108 of the figurative mark 'JUKE BOX', for goods and services in classes 9, 16, 35, 38, 41 and 42

Decision of the Opposition Division: Upheld the opposition

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: The applicant considers that the contested decision infringes: (i) Articles 15 and 42(2) of Council Regulation (EC) No 207/2009, as no proof of genuine use has been provided of the mark cited in the opposition proceedings — Community trade mark registration No 3693108 'JUKE BOX', (ii) Articles 8(1)(b), 9 and 65(2) of Council Regulation (EC) No 207/2009, as the Board of Appeal erred in its assessment of the similarity of the contested trade mark, and (iii) Article 78 of Council Regulation (EC) No 207/2009, as the Board of Appeal failed to exercise its powers of investigation and failed to exercise the full remit of its powers.

Action brought on 27 December 2010 — Thesing and Bloomberg Finance v ECB

(Case T-590/10)

(2011/C 72/35)

Language of the case: English

Parties

Applicants: Gabi Thesing and Bloomberg Finance LP (London, United Kingdom), (represented by: M.H. Stephens and R.C. Lands, Solicitors)

Defendant: European Central Bank

Form of order sought

— Annul the decision of the European Central Bank communicated by letters dated 17 September 2010 and 21 October 2010, refusing access to the documents requested by the applicants;

— Require the European Central Bank to grant access to those documents to the applicants, in accordance with the Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) [1]; and

— Require the ECB to pay the costs of the application.

Pleas in law and main arguments

By means of the present application, the applicants seek, pursuant to Article 263 TFEU, annulment of a decision of the European Central Bank communicated by letters dated 17 September 2010 and 21 October 2010, whereby the European Central Bank refused the applicants' request for access to the following documents pursuant to the Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3):

(i) A note entitled *The impact on government deficit and debt from off-market swaps. The Greek case (SEC/GovC/X/10/88a)*;

(ii) A second note, entitled *The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels* (SEC/GovC/X/10/88b).

In support of their action, the applicants submit the following pleas in law:

Firstly, the applicants allege that the European Central Bank misconstrued and/or misapplied Article 4.1(a) of the decision of the European Central Bank dated 4 March 2004 (ECB/2004/3), which provides for an exception to the general right of access conferred by article 2 of that decision, as:

(i) The European Central Bank failed to construe article 4.1(a) as requiring consideration of public interest factors in favour of disclosure;

(ii) The European Central Bank failed to give any sufficient or proper weight to the public interest factors in favour of disclosing the requested documents;

(iii) The European Central Bank overstated and/or misidentified the public interest against disclosure of the requested documents.

In addition, the applicants allege that the European Central Bank misconstrued and/or misapplied article 4.2 of the decision of the European Central Bank dated 4 March 2004 (ECB/2004/3), which provides for an exception to the general right of access conferred by article 2 of that decision, as:

(i) The European Central Bank ought to have construed an "overriding" public interest as meaning a public interest that is strong enough to outweigh any public interest in maintaining the exemption;

(ii) The European Central Bank ought to have concluded that there was an overriding public interest, in this sense, in favour of the disclosure of the information requested.

Finally, the applicants allege that the European Central Bank misconstrued and/or misapplied article 4.3 of the decision of the European Central Bank dated 4 March 2004 (ECB/2004/3), which provides for an exception to the general right of access conferred by article 2 of that decision, as:

(i) The European Central Bank ought to have construed an 'overriding' public interest as meaning a public interest that is strong enough to outweigh any public interest in maintaining the exemption;

(ii) The European Central Bank ought to have concluded that there was an overriding public interest, in this sense, in favour of the disclosure of the information requested;

(iii) The European Central Bank overstated and/or misidentified the public interest against disclosure of the requested documents.

[1] Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ 2004 L 80, p. 42).

Action brought on 17 December 2010 — Zenato v OHIM — Camera di Commercio Industria Artigianato e Agricoltura di Verona (RIPASSA)

(Case T-595/10)

(2011/C 72/36)

Language in which the application was lodged: Italian

Parties

Applicant: Alberto Zenato (Verona, Italy) (represented by: A. Rizzoli, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Camera di Commercio Industria Artigianato e Agricoltura di Verona (Verona, Italy)

Form of order sought

The applicant claims that the Court should:

— declare the present action, together with the related annexes, admissible;

— annul the decision of the Board of Appeal in so far as it annuls the contested decision and orders the costs of the appeal proceedings to be shared;

— uphold, in consequence, the decision of the Opposition Division;

— order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Alberto Zenato.

Community trade mark concerned: Word mark 'RIPASSA' (registration application No 106 955) for goods in Class 33.

Proprietor of the mark or sign cited in the opposition proceedings: Camera di Commercio Industria Artigianato e Agricoltura di Verona.

Mark or sign cited in opposition: Italian word mark 'VINO DI RIPASSO' (No 528 778) for goods in Class 33.

Decision of the Opposition Division: Opposition rejected.

Decision of the Board of Appeal: Contested decision annulled and case remitted to the Opposition Division.

Pleas in law: Infringement and misapplication of Article 8(1)(b) of Regulation No 207/2009.

Action brought on 29 December 2010 — Eurocool Logistik GmbH v OHIM — Lenger (EUROCOOL)

(Case T-599/10)

(2011/C 72/37)

Language in which the application was lodged: German

Parties

Applicant: Eurocool Logistik GmbH (Linz, Austria) (represented by: G. Secklehner, 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: Peter Lenger (Weinheim, Germany)

Form of order sought

— Annul in full the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 14 October 2010 in Case R 451/2010-1 in which the Opposition Division's decision of 27 January 2010 in opposition proceedings No B 751 570 is confirmed, reject the opposition and refer the trade mark back to the Office for Harmonisation in the Internal Market for continuation of the registration proceedings and order the defendant to bear all the costs associated with the present legal dispute, in particular the costs of the proceedings before the Board of Appeal.

Pleas in law and main arguments

Applicant for a Community trade mark: Eurocool Logistik GmbH

Community trade mark concerned: Word mark 'EUROCOOL' for services in Classes 39 and 42.

Proprietor of the mark or sign cited in the opposition proceedings: Peter Lenger.

Mark or sign cited in opposition: National figurative mark which contains the word element 'EUROCOOL LOGISTICS' for services in Classes 35 and 39, and the company name 'EUROCOOL LOGISTICS' used for specific services in national trade.

Decision of the Opposition Division: Uphold the opposition.

Decision of the Board of Appeal: Dismiss the appeal.

Pleas in law: Infringement of Article 63(2) and Article 75, second sentence, of Regulation (EC) No 207/2009, [1] since the applicant in the opposition proceedings was not afforded the opportunity to reply to the other party's reasoning for the opposition in the proceedings before the Board of Appeal, and infringement of Article 8(1)(b) of Regulation (EC) No 207/2009 because there is no 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 7 January 2011 — Export Development Bank of Iran v Council

(Case T-4/11)

(2011/C 72/38)

Language of the case: French

Parties

Applicant: Export Development Bank of Iran (represented by: J.-M. Thouvenin, avocat)

Defendant: Council of the European Union

Form of order sought

The applicant claims that the General Court should:

— annul Council Regulation (EU) 961/2010 in so far as it concerns the applicant;

— declare Decision 2010/413/CFSP inapplicable to the applicant;

— annul Article 16(2)(a) and (b) of Council Regulation (EU) 961/2010 in so far as it concerns the applicant;

— annul the decision taken by the Council to include the applicant on the list in Annex VIII to Council Regulation (EU) 961/2010;

— order the Council to pay the costs.

Pleas in law and main arguments

The applicant puts forward seven pleas in support of its action.

1. First plea, alleging that there is no legal basis for Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [1] and/or Article 16(2)(a) and (b) thereof

   — Under the first part of that plea, the applicant submits that Article 215 TFEU cannot serve as a legal basis for Regulation No 961/2010 since Decision 2010/413/CFSP does not make such provision;

   — Under the second part, the applicant claims that Article 215 TFEU cannot serve as a legal basis for Regulation No 961/2010 since Decision 2010/413/CFSP was not adopted in accordance with Chapter 2 of Title V of the TEU. That decision should therefore be disregarded as inapplicable to the present case.

2. Second plea, alleging infringement of international law by Article 16(2)(a) and (b) of Regulation No 961/2010, inasmuch as those provisions do not constitute implementation of a decision by the Security Council and infringe the principle of non-interference enshrined in international law.

3. Third plea, alleging infringement of Article 215 TFEU, since the procedure for inclusion on the list of Annex VIII contradicts the procedure laid down in Article 215 TFEU.

4. Fourth plea, alleging infringement of the rights of the defence, the right to sound administration and the right to effective legal protection, in so far as the Council did not respect the applicant's right to be heard, failed to provide a sufficient statement of reasons for its decisions and failed to give the applicant access to the documents in the case.

5. Fifth plea, alleging breach of the principle of proportionality

   — The applicant submits first that the contested decisions are inappropriate, since the freezing of the funds and other funds managed by the applicant amounts to freezing funds and resources which are not at its free disposal and which belong to its clients.

   — The applicant submits next that the sanction imposed on it is disproportionate in the light of the facts alleged against it and that the sanction is based on old and unsubstantiated facts.

6. Sixth plea, alleging breach of the right to respect for property, since the restriction of its right to property is disproportionate in so far as its rights of defence were not respected during the procedure.

7. Seventh plea, alleging breach of the principle of non-discrimination in so far as the applicant was punished even though it has not been established that the applicant participated knowingly and deliberately in activities having as their object or effect the circumvention of the restrictive measures.

[1] OJ 2010 L 281, p. 1.

Action brought on 7 January 2011 — Export Development Bank of Iran v Council

(Case T-5/11)

(2011/C 72/39)

Language of the case: French

Parties

Applicant: Export Development Bank of Iran (represented by: J.-M. Thouvenin, avocat)

Defendant: Council of the European Union

Form of order sought

The applicant claims that the General Court should:

— annul Decision 2010/644/CFSP of 25 October 2010 in so far as it concerns the applicant;

— annul the decision contained in the Council's letter to the applicant of 28 October 2010;

— declare Decision 2010/413/CFSP inapplicable to the applicant;

— order the Council to pay the costs.

Pleas in law and main arguments

The pleas in law and main arguments put forward by the applicant are essentially identical or similar to those advanced in Case T-4/11 *Export Development Bank of Iran* v *Council*.

Appeal brought on 5 January 2011 by the European Commission against the judgment of the Civil Service Tribunal delivered on 28 October 2010 in Case F-9/09 Vicente Carbajosa and Others v Commission

(Case T-6/11 P)

(2011/C 72/40)

Language of the case: French

Parties

Appellant: European Commission (represented by: J. Currall and B. Eggers, Agents)

Other parties to the proceedings: Isabel Vicente Carbajosa (Brussels, Belgium), Niina Lehtinen (Brussels) and Myriam Menchen (Brussels)

Form of order sought by the appellant

The appellant claims that the Court should:

— set aside the judgment of the Civil Service Tribunal of 28 October 2010 in Case F-9/09 *Vicente Carbajosa and Others* v *Commission*;

— refer the case back to the Civil Service Tribunal so that it may examine the grounds raised by the appellant seeking to have the judgment set aside;

— reserve the costs.

Pleas in law and main arguments

The appellant puts forward two grounds in support of the appeal.

1. First ground of appeal, alleging infringement of the obligation to state reasons, the rights of the defence and the principle of legal certainty inasmuch as the Civil Service Tribunal upheld a plea which was not raised in the case at issue, or of the Tribunal's own motion, but in another case.

2. Second ground of appeal, alleging in the alternative infringement of Articles 1, 5 and 7 of Annex III to the Staff Regulations of officials of the European Union and of decisions creating the European Personnel Selection Office (EPSO), as well as infringement of the obligation to state reasons inasmuch as the Civil Service Tribunal wrongly held that EPSO did not have the power to admit the persons concerned onto the list of candidates invited to submit a full application after the pre-selection phase.

Action brought on 7 January 2011 — Bank Kargoshaei and Others v Council

(Case T-8/11)

(2011/C 72/41)

Language of the case: English

Parties

Applicants: Bank Kargoshaei, Bank Melli Iran Investment Company, Bank Melli Iran Printing and Publishing Company, Cement Investment & Development Co., Mazandaran Cement Company, Melli Agrochemical Company, Shomal Cement Co., (Tehran, Iran) (represented by: L. Defalque and S. Woog, lawyers)

Defendant: Council of the European Union

Form of order sought

— annul paragraph 5, section B, of the annex to Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP [1] and paragraph 5, section B, of the annex to VIII of Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2] and annul the decision contained in the letter of the Council of 28 October 2010;

— declare Article 20(1)(b) of Council Decision of 26 July 2010 [3] and Article 16(2)(a) of Council Regulation (EC) (EU) No 961/2010 illegal and inapplicable to the applicants;

— order that the Council pay the applicants' costs of this application.

Pleas in law and main arguments

In support of the action, the applicants rely on the pleas in law which are identical as the pleas in law relied on by the applicant in Case T-7/11, *Bank Melli Iran* v *Council*.

([1]) OJ L 281, p. 81
([2]) OJ L 281, p. 1
([3]) Council Decision 2010/413/CFSP: of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ L 195, p. 39

Action brought on 6 January 2011 — Air Canada v Commission

(Case T-9/11)

(2011/C 72/42)

Language of the case: English

Parties

Applicant: Air Canada (Saint Laurent, Canada) (represented by: J. Pheasant and T. Capel, Solicitors)

Defendant: European Commission

Form of order sought

— annul the decision, including Articles 2 and 3, or, in the alternative, annul parts of the decision under Article 263 TFEU;

— annul the fine or, in the alternative, reduce the amount of the fine, including a reduction of the fine to zero, under Article 261 TFEU;

— order that the Commission takes the necessary measures to comply with the judgment of the Court under Article 266 TFEU; and

— order that the Commission pays the costs incurred by Air Canada in relation to this application and all subsequent stages of these proceedings.

Pleas in law and main arguments

In support of the action, the applicant relies on six pleas in law:

1. First plea in law, alleging an infringement of the applicant's rights of defence since the Commission materially altered its case between the statement of objections and the decision and therefore based its decision on a new factual and legal assessment upon which the applicant was afforded no opportunity to be heard.

2. Second plea in law, alleging that:

   — the decision is based on inadmissible evidence since the material evidence on which the Commission relies in the decision against the applicant is inadmissible;

   — in retaining certain evidence against the applicant whilst considering the same or substantially similar evidence insufficient to prove an infringement against certain other addressees of the statement of objections and in failing to take account of factual corrections and clarifications by the applicant, the Commission has infringed the EU law principle of equal treatment and has failed to apply the correct standard of proof under EU law.

3. Third plea in law, alleging that there is no infringement in which the applicant participated since:

   — there is no finding in Articles 2 and 3 of the operative part of the decision that the applicant has participated in the single and continuous infringement described in the statement of reasons;

   — the Commission has not satisfied the relevant legal conditions under Article 101(1) TFEU and the applicable jurisprudence to attribute liability for a single and continuous infringement to the applicant;

   — on the basis of the evidence which, in the light of the second plea, the Commission is legally entitled to retain for the purposes of its re-assessment of objections against the applicant, the decision does not prove any infringement by the applicant.

4. Fourth plea in law, alleging the failure to define or, alternatively, to correctly define the relevant market in breach of the applicable legal obligation established in EU jurisprudence and in particular, in breach of the principles of certainty and of proportionality.

5. Fifth plea in law, alleging that the fine should be annulled in its entirety or, in the alternative, should be significantly reduced (including to zero) on the basis of the other pleas and on the Commission's failure to apply the EU law principle of equal treatment when assessing the level of the fine.

6. Sixth plea in law, alleging the lack of reasoning in breach of the duty to state reasons pursuant to Article 296 TFEU.

Action brought on 6 January 2011 — Sina Bank v Council

(Case T-15/11)

(2011/C 72/43)

Language of the case: English

Parties

Applicant: Sina Bank (Tehran, Iran) (represented by: B. Mettetal and C. Wucher-North, lawyers)

Defendant: Council of the European Union

Form of order sought

— annul point 8 of section B of Annex VIII to Regulation No 961/2010 ([1]) in so far as the applicant is concerned;

— annul the letter-decision of the Council of 28 October 2010;

— declare inapplicable point 8 of section B of Annex II to Council Decision 2010/413/CFSP concerning restrictive measures against Iran ([2]) in so far as it relates to the applicant;

— declare Article 16(2) of Council Regulation No 961/2010 inapplicable to the applicant;

— declare Article 20(1)(b) of Council Decision 2010/413/CFSP inapplicable to the applicant;

— order the Council to pay, in addition to its own costs, those incurred by the applicant.

Pleas in law and main arguments

In support of the action, the applicant relies on four pleas in law:

1. First plea in law, alleging that the substantive criteria for designation under the challenged 2010 Regulation and Decision are not met in respect to the applicant and/or the Council committed a manifest error of assessment in determining whether or not the criteria were met. In consequence, the designation of the applicant is not justified.

2. Second plea in law, alleging that the applicant's designation breaches the principle of equal treatment;

   — the applicant suffered an unequal treatment regarding the situation of other Iranian banks;

   — the applicant suffered an unequal treatment regarding the situation of other Iranian banks included on the list, both in 2010 Regulation and Decision;

   — the applicant suffered an unequal treatment regarding the situation of 'Daftar' and the Mostaz'afan Foundation.

3. Third plea in law, alleging that the rights of defence have not been observed and the requirement of a statement of the reason of sanctions has not been satisfied since:

   — the applicant did not receive any information from the Council to assert its position except a laconic motivation of two lines, general and inaccurate;

   — despite the applicant having made detailed requests for information to the Council as regards its designation, the Council did not answer to the applicant nor to its counsels' letters;

   — this situation makes it impossible to determine whether the measure is well founded or whether it is vitiated by an error;

   — any evidence adduced against the applicant should have been communicated to it, in so far as possible, either concomitantly with or as soon as may be after the adoption of an initial decision to freeze its funds.

4. Fourth plea in law, alleging that the restrictive measures violate the applicant's right of propriety and are not proportionate contrary to the European Union principle of proportionality of a decision since:

   — there is no link between the objective pursued by the Council and the restrictive measure imposed on the applicant;

   — the Council has not identified any transaction in which the applicant would be involved;

— it exists other, more proportionate, measures possible against the risk of the alleged Iranian 'nuclear activities' and the funding of those activities.

(1) Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, OJ 2010 L 281, p. 1

(2) Council Decision 2010/413/CFSP: of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ L 195, p. 39

Action brought on 14 January 2011 — Netherlands v Commission

(Case T-16/11)

(2011/C 72/44)

Language of the case: Dutch

Parties

Applicant: Kingdom of the Netherlands (represented by: C. Wissels, M. de Ree and M. Noort, acting as Agents)

Defendant: European Commission

Form of order sought

— Annul Article 1 of Commission Decision 2010/668/EU of 4 November 2010 excluding from European Union financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) in so far as Article 1 of that decision concerns the Netherlands and relates to the financial correction in the (total) amount of EUR 28 947 149,31 applied in respect of the expenditure declared for the years 2003 to 2008 in the context of the quota system in relation to the production of potato starch;

— Order the Commission to pay the costs.

Pleas in law and main arguments

By Decision 2010/668/EU the Commission applied a flat rate correction of 10 % to the amounts declared by the Netherlands authorities which were paid in the years 2003 to 2008 under the European aid scheme in respect of potato starch. According to the Commission, the Netherlands authorities paid the aid to the starch manufacturer and the potato producer before the latter was paid the full amount of the minimum price for the potatoes supplied.

The Netherlands Government takes the view that the minimum price was paid in full before the aid for the starch manufacturer and the potato producer was granted. The minimum price was paid, on the one hand, by setting off part of the minimum price against an outstanding (private-law) claim by the manufacturer against the producer and, on the other hand, by a transfer of the balance of the minimum price to a (bank) account nominated by the producer.

The applicant relies on five pleas in law in support of its action.

1. First plea: infringement of Article 7(4) of Regulation No 1258/99 (1) and of Article 31 of Regulation No 1290/2005, (2) in conjunction with Article 5 of Regulation No 1868/94, (3) Article 11 of Regulation No 97/95, (4) Article 10 of Regulation No 2236/2003, (5) Article 26 of Regulation No 2237/2003 (6) and Article 20 of Regulation No 1973/2004, (7) in that expenditure was excluded from financing even though the conditions for the grant of the premium and the direct aid were met, because the minimum price was paid by means of set-off and transfer.

2. Second plea: infringement of Article 7(4) of Regulation No 1258/99 and of Article 31 of Regulation No 1290/2005, in conjunction with Article 5 of Regulation No 1868/94, Article 11 of Regulation No 97/95, Article 10 of Regulation No 2236/2003, Article 26 of Regulation No 2237/2003 and Article 20 of Regulation No 1973/2004, in that expenditure was excluded from financing even though the minimum price was available to the producers before the premium and direct aid were granted.

3. Third plea: infringement of Article 7(4) of Regulation No 1258/99, Article 8 of Regulation No 1663/95, (8) Article 31 of Regulation No 1290/2005, Article 11 of Regulation No 885/2006 (9) and also of the rights of the defence in that expenditure was excluded from financing even though the *inter partes* procedure prescribed under those provisions was not followed in respect of all the findings on which that exclusion was based.

4. Fourth plea: infringement of Article 7(4) of Regulation No 1258/99 and of Article 31 of Regulation No 1290/2005, in conjunction with Article 11 of Regulation No 97/95, Article 10 of Regulation No 2236/2003, Article 26 of Regulation No 2237/2003 and Article 20 of Regulation No 1973/2004 in that expenditure was excluded from financing even though payment of the minimum price could be monitored by the recipient States through the paying agency.

5. Fifth plea: infringement of Article 7(4) of Regulation No 1258/99, Article 31(2) of Regulation No 1290/2005 and the principle of proportionality in that a flat rate correction of 10 % was applied even though the only shortcoming is an erroneous starting point for the application and monitoring of the condition regarding payment of the minimum price.

(1) Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103).
(2) Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).
(3) Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch (OJ 1994 L 197, p. 4).
(4) Commission Regulation (EC) No 97/95 of 17 January 1995 laying down detailed rules for the application of Council Regulation (EEC) No 1766/92 as regards the minimum price and compensatory payment to be paid to potato producers and of Council Regulation (EC) No 1868/94 establishing a quota system in relation to the production of potato starch (OJ 1995 L 16, p. 3).
(5) Commission Regulation (EC) No 2236/2003 of 23 December 2003 laying down detailed rules for the application of Council Regulation (EC) No 1868/94 establishing a quota system in relation to the production of potato starch (OJ 2003 L 339, p. 45).
(6) Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2003 L 339, p. 52).
(7) Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials (OJ 2004 L 345, p. 1).
(8) Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6).
(9) Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ 2006 L 171, p. 90).

Action brought on 19 January 2011 — Westfälisch-Lippischer Sparkassen- und Giroverband v Commission

(Case T-22/11)

(2011/C 72/45)

Language of the case: German

Parties

Applicant: Westfälisch-Lippischer Sparkassen- und Giroverband (Münster, Germany) (represented by: I. Liebach and A. Rosenfeld, lawyers)

Defendant: European Commission

Form of order sought

— partially annul the Commission's decision of 21 December 2010, C(2010) 9525 final, State aid, MC 8/2009 and C-43/2009 — Germany — WestLB, in so far as it rejected the application made by Germany on 28 October 2010 seeking to extend beyond 15 February 2011 the time-limit for the sale and disposal of the new operations of Westdeutsche Immobilienbank AG;

— in the alternative, partially annul the Commission's decision of 21 December 2010, C(2010) 9525 final, State aid, MC 8/2009 and C-43/2009 — Germany — West LB, in so far the Commission thereby implicitly decided that Germany had lodged only one single application seeking to extend up to 15 February 2011 the time-limit for the sale and disposal of the new operations of Westdeutsche Immobilienbank AG and, accordingly, that no decision on a further extension beyond that date was required;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant puts forward five pleas in law in support of its action.

1. First plea in law: breach of the obligation to give reasons under the second paragraph of Article 296 TFEU

— The applicant submits in this respect that the Commission has not explained why it combined two applications submitted by Germany for an extension of the time-limit into one single application.

— The Commission has also not explained why the conditions for an extension of the time-limit under Article 2(2) of Commission Decision C(2009) 3900 final, corrected on 12 May 2009, on State aid which Germany seeks to grant in favour of restructuring WestLB AG (C-43/2008 [N 390/2008] ('the decision of 12 May 2009'), are not met.

2. Second plea in law: errors of assessment and appraisal

— The applicant submits in this connection that, in relation to the grant of an extension of the time-limit, the Commission based its discretionary decision on an incorrect finding of fact. In the applicant's opinion, the contested decision wrongly presupposes that the extension of the time-limit was requested only up to 15 February 2011, or implicitly finds that it was no longer necessary to decide on a further application for a longer period.

— The applicant also argues that the Commission made no use of the option to extend the time-limit expressly provided for in Article 2(2) of the decision of 12 May 2009, notwithstanding the fact that the conditions for so doing were met. Instead, the Commission relied on an unwritten *sui generis* right of extension which has no legal basis and the specific conditions of which are utterly vague.

3. Third plea in law: infringement of the principle of proportionality

— In this respect the applicant contends, inter alia, that the Commission's decision on the cessation of the new operations of Westdeutsche Immobilienbank AG after 15 February 2011 is disproportionate to the disadvantages resulting from such cessation.

4. Fourth plea in law: infringement of the principle of equal treatment

— In this context the applicant maintains that, in other cases linked to the financial crisis, in which financial institutions were granted much greater aid, the Commission granted significantly longer time-limits for the sale of holdings and also property financing companies.

5. Fifth plea in law: breach of Article 41 of the Charter of Fundamental Rights of the European Union and of the principle of sound administration

— In the context of the fifth plea in law, the applicant claims that the Commission does not have the right to interpret and take a decision on applications made by a Member State in a manner which is at variance with their express wording, meaning and purpose.

Action brought on 18 January 2011 — Fraas v OHIM (Tartan pattern in black, beige, brown, dark red and grey colours)

(Case T-26/11)

(2011/C 72/46)

Language in which the application was lodged: German

Parties

Applicant: V. Fraas GmbH (Helmsbrechts-Wüstenselbitz, Germany) (represented by R. Kunze and G. Würtenberger, lawyers)

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

Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 15 November 2010 in Case R 1317/2010-4;

— Order the Office for Harmonisation in the Internal Market to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark, which shows a tartan pattern in black, beige, brown, dark red and grey colours, for goods in classes 18, 24 and 25.

Decision of the Examiner: Rejection of the registration.

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

Pleas in law: Infringement of Article 7(1)(b) read in conjunction with Article 7(2) of Regulation (EC) No 207/2009, [1] since the trade mark concerned is distinctive, and infringement of Articles 75 and 76 of Regulation (EC) No 207/2009 because the Board of Appeal failed to deal with the applicant's extensive factual and legal submissions.

---

[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 21 January 2011 — Rheinischer Sparkassen- und Giroverband v Commission

(Case T-27/11)

(2011/C 72/47)

Language of the case: German

Parties

Applicant: Rheinischer Sparkassen- und Giroverband (Düsseldorf, Germany) (represented by: A. Rosenfeld and I. Liebach, lawyers)

Defendant: European Commission

Form of order sought

— partially annul the Commission's decision of 21 December 2010, C(2010) 9525 final, State aid, MC 8/2009 and C-43/2009 — Germany — WestLB, in so far as it rejected the application made by Germany on 28 October 2010 seeking to extend beyond 15 February 2011 the time-limit for the sale and disposal of the new operations of Westdeutsche Immobilienbank AG;

— in the alternative, partially annul the Commission's decision of 21 December 2010, C(2010) 9525 final, State aid, MC 8/2009 and C-43/2009 — Germany — West LB, in so far the Commission thereby implicitly decided that Germany had lodged only one single application seeking to extend up to 15 February 2011 the time-limit for the sale and disposal of the new operations of Westdeutsche Immobilienbank AG and, accordingly, that no decision on a further extension beyond that date was required;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant puts forward five pleas in law in support of its action.

1. First plea in law: breach of the obligation to give reasons under the second paragraph of Article 296 TFEU

   — The applicant submits in this respect that the Commission has not explained why it combined two applications submitted by Germany for an extension of the time-limit into one single application.

   — The Commission has also not explained why the conditions for an extension of the time-limit under Article 2(2) of Commission Decision C(2009) 3900 final, corrected on 12 May 2009, on State aid which Germany seeks to grant in favour of restructuring WestLB AG (C-43/2008 [N 390/2008] ('the decision of 12 May 2009'), are not met.

2. Second plea in law: errors of assessment and appraisal

   — The applicant submits in this connection that, in relation to the grant of an extension of the time-limit, the Commission based its discretionary decision on an incorrect finding of fact. In the applicant's opinion, the contested decision wrongly presupposes that the extension of the time-limit was requested only up to 15 February 2011, or implicitly finds that it was no longer necessary to decide on a further application for a longer period.

   — The applicant also argues that the Commission made no use of the option to extend the time-limit expressly provided for in Article 2(2) of the decision of 12 May 2009, notwithstanding the fact that the conditions for so doing were met. Instead, the Commission relied on an unwritten *sui generis* right of extension which has no legal basis and the specific conditions of which are utterly vague.

3. Third plea in law: infringement of the principle of proportionality

   — In this respect the applicant contends, inter alia, that the Commission's decision on the cessation of the new operations of Westdeutsche Immobilienbank AG after 15 February 2011 is disproportionate to the disadvantages resulting from such cessation.

4. Fourth plea in law: infringement of the principle of equal treatment

   — In this context the applicant maintains that, in other cases linked to the financial crisis, in which financial institutions were granted much greater aid, the Commission granted significantly longer time-limits for the sale of holdings and also property financing companies.

5. Fifth plea in law: breach of Article 41 of the Charter of Fundamental Rights of the European Union and of the principle of sound administration

   — In the context of the fifth plea in law, the applicant claims that the Commission does not have the right to interpret and take a decision on applications made by a Member State in a manner which is at variance with their express wording, meaning and purpose.

Action brought on 23 January 2011 — Koninklijke Luchtvaart Maatschappij v Commission

(Case T-28/11)

(2011/C 72/48)

Language of the case: English

Parties

Applicant: Koninklijke Luchtvaart Maatschappij NV (Amstelveen, the Netherlands) (represented by: M. Smeets, lawyer)

Defendant: European Commission

Form of order sought

— annul Commission Decision No C(2010) 7694 final on 9 November 2010 in whole or in part, and in subsidiary order,

— reduce the fine imposed.

Pleas in law and main arguments

Application pursuant to Article 263 of the Treaty on the Functioning of the European Union (the 'TFEU') (ex Article 230 EC) for the review and annulment of Commission Decision No C(2010) 7694 final on 9 November 2010, relating to proceedings under Article 101 TFEU (ex Article 81 EC), Article 53 of the EEA Agreement and article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39.258 — Airfreight) addressed to KLM N.V.; and, in subsidiary order, for the reduction of the fine imposed pursuant to Article 261 TFEU (ex article 229 EC).

In support of the action, the applicant relies on four pleas in law.

1. First plea in law, alleging that the contested decision fails to state reasons within the meaning of article 296 TFEU and article 41 (2) (C) of the Charter of Fundamental Rights of the European Union. In this regard the applicant submits the following arguments:

   — fundamental inconsistency between the operative part of the decision and the statement of reasons;

   — inconsistencies between the operative part of the decision and the statement of reasons preclude an effective review of the decision by the Court;

   — inconsistencies and lack of clarity within the statement of reasons concerning (i) the scope of the infringement and the addressees of the decision, (ii) the non-commissioning of surcharges, and (iii) the introduction of the fuel surcharge preclude an effective review of the decision by the Court;

   — inconsistencies and lack of clarity in the statement of reasons in relation to the application of the 2006 Fining Guidelines and the imposition of fines preclude an effective review of the decision by the Court.

2. Second plea in law, alleging that the decision was taken in violation of the right to due process within the meaning of article 41, 47, 48, 49, and 50 of the Charter of Fundamental Rights of the European Union. In this regard the applicant submits the following arguments:

   — the Commission failed to respect the right to be heard, the right to a fair trial and the presumption of innocence under article 41 (2) (a), 47 and 48 of the Charter by omitting to hear the addressees on the various changes to the scope of the case and the number of addressees;

   — violation of the principle of the legality and proportionality of fines under article 49 Charter by including KLM Cargo's full turnover in the value of sales under the 2006 Fining Guidelines, and the right to be heard in that regard;

   — violation of the principle of the legality and proportionality of fines under article 49 Charter and the principle of non bis in idem of article 50 Charter by including sales outside the EEA in the value of sales under the 2006 Fining Guidelines and by using an indiscriminate criterion to cap that value of sales, and the right to be heard in that regard.

3. Third plea in law, alleging that the fine has been set in breach of article 101 TFEU, article 23 of Regulation 1/2003 [1] and the 2006 Fining Guidelines since:

   — the 2006 Fining Guidelines do not allow to include sales which are not directly or indirectly related to the infringement in the value of sales;

   — the 2006 Fining Guidelines do not allow the fine to be based on sales outside the EEA.

4. Fourth plea in law, alleging that the determination of fines under the 2006 Fining Guidelines is manifestly erroneous and in violation of the principles of legitimate expectations, proportionality and equal treatment. In this regard the applicant submits the following arguments:

   — it is manifestly erroneous and a violation of the principles of legitimate expectations, proportionality and equal treatment to hold that the sales related directly or indirectly to the infringement are KLM Cargo's full sales;

   — it is manifestly erroneous and in violation of the principles of legitimate expectations, proportionality and equal treatment to hold that the sales related directly or indirectly to the infringement should include KLM Cargo's sales outside the EEA;

   — it is manifestly erroneous and in violation of the principles of proportionality and equal treatment to determine the gravity of the infringement without reference to the nature of surcharges and to determine both the value of sales and the gravity of the infringement with reference to the global scope of the infringement;

   — it is manifestly erroneous and in violation of the principles of proportionality and equal treatment to determine the additional amount of the fine ('entry fee') irrespective of the duration of the infringement;

   — it is manifestly erroneous and in violation of the principles of proportionality and equal treatment to set the reduction of the fine on account of governmental intervention at 15 %.

[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

Action brought on 20 January 2011 — Fraas v OHIM (tartan pattern in pink, violet, beige and dark grey colours)

(Case T-31/11)

(2011/C 72/49)

Language in which the application was lodged: German

Parties

Applicant: V. Fraas GmbH (Helmbrechts-Wüstenselbitz, Germany) (represented by R. Kunze and G. Würtenberger, lawyers)

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

Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 15 November 2010 in Case R 1284/2010-4;

— Order the Office for Harmonisation in the Internal Market to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark, which shows a tartan pattern in pink, violet, beige and dark grey colours, for goods in classes 18, 24 and 25.

Decision of the Examiner: Rejection of the registration.

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

Pleas in law: Infringement of Article 7(1)(b) read in conjunction with Article 7(2) of Regulation (EC) No 207/2009, [1] since the trade mark concerned is distinctive, and infringement of Articles 75 and 76 of Regulation (EC) No 207/2009 because the Board of Appeal failed to deal with the applicant's extensive factual and legal submissions.

[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 21 January 2011 — Cathay Pacific Airways v Commission

(Case T-38/11)

(2011/C 72/50)

Language of the case: English

Parties

Applicant: Cathay Pacific Airways Ltd (represented by: D. Vaughan, QC, R. Kreisberger, Barrister, B. Bär-Bouyssière, lawyer, and M. Rees, Solicitor)

Defendant: European Commission

Form of order sought

— annul Article 2 of the Commission's decision insofar as it relates to the applicant;

— annul Article 3 of the Commission's decision insofar as it relates to the applicant;

— annul Article 5 of the Commission's decision insofar as it imposes a fine on Cathay Pacific of EUR 57 120 000 or, in the alternative, reduce the amount of that fine;

— and order the Commission to pay the applicant's costs of making this application.

Pleas in law and main arguments

The applicant seeks the annulment of the Commission Decision C(2010) 7694 final of 9 November 2010 in Case COMP/39.258 — Airfreight in so far as the Commission found the applicant liable for an infringement of Article 101 TFEU and 53 EEA by coordinating various elements of price to be charged for airfreight services in respect of (i) fuel surcharges, (ii) security surcharges, and (iii) the non-payment of commissions on surcharges, on routes (i) between airports within the EEA and airports outside the EEA and (ii) between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and third countries. Alternatively, the applicant seeks an annulment or a substantial reduction of its fine.

In support of the action, the applicant relies on eight pleas in law:

1. First plea in law, alleging that the Commission erred in law and made a manifest error of assessment in finding that the applicant was party to a single and continuous global infringement. The vast majority of events reported in the decision against the applicant:

   — do not amount to an infringement as they relate to the exchange of publicly available information, or;

   — are part of a mandated collective regulatory approval process, or;

   — took place outside the period of infringement, or, fall outside of the Commission's jurisdiction.

Moreover, the Commission has failed to establish that the applicant's activities reported in the decision establish that it adhered to any common plan in pursuit of a common objective.

2. Second plea in law, alleging that the Commission erred in law and made a manifest error of assessment in finding that the applicant was not required to participate in the collective application process in seeking the approval of surcharges by the Civil Aviation Department (CAD) of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). As is made clear by the Hong Kong CAD in its letter to the President of the European Commission dated 3 September 2009, carriers were required to agree on the details of the collective applications, including the amount of the surcharge for which approval was sought and were bound to charge the surcharges fixed by the CAD.

3. Third plea in law, alleging that the Commission erred in law in finding that the state compulsion defence does not apply to the applicant's conduct in Hong Kong (and India, Sri Lanka. Japan, the Philippines and Singapore) and the finding that the applicant's conduct amounted to an infringement of Article 101 TFEU is manifestly vitiated.

4. Fourth plea in law, alleging that the Commission's finding of infringement amounts to a manifest error of law because it comprises a direct interference in the domestic administration of Hong Kong, thereby:

   — offending the public international law principle of non-interference or comity between nations and;

   — it gives rise to a direct conflict of jurisdictions which infringes the principle of legal certainty.

5. Fifth plea in law, alleging that the Commission erred in law in its treatment of the regulatory regime in Hong Kong in comparison with the relevant equivalent regulatory regime in Dubai. It should have excluded Cathay Pacific and Hong Kong on a similar basis as it excluded Dubai from the scope of the infringement.

6. Sixth plea in law, alleging that the Commission erred in law in finding that the applicant's activities in Hong Kong, and the other regulated non-EU jurisdictions, could have had the object of preventing, restricting or distorting competition in the EU/EEA. The Commission also did not allege that the infringement had anti-competitive effects.

7. Seventh plea in law, in relation to inbound flights from Hong Kong and other third country jurisdictions to the EEA, alleging that the Commission had no jurisdiction to find an infringement of Article 101 TFEU and to impose fines. As there was no effect on competition within the EU or inter-Member State trade.

8. Eighth plea in law, alleging that even if the alleged infringement with regard to the applicant is not annulled, the fine should nonetheless be annulled, or, reduced. The value of sales taken by the Commission was grossly excessive and the Commission failed to take into consideration the applicant's individual level of involvement. The applicant invites the General Court to exercise its unlimited jurisdiction under Article 261 TFEU to impose a symbolic fine or to reduce the fine substantially.

Order of the General Court of 10 January 2011 — Labate v Commission

(Case T-389/09) [1]

(2011/C 72/51)

Language of the case: English

The President of the First Chamber has ordered that the case be removed from the register.

---

[1] OJ C 312, 19.12.2009.

Order of the General Court of 12 January 2011 — Maximuscle v OHIM — Foreign Supplement Trademark (GAKIC)

(Case T-198/10) [1]

(2011/C 72/52)

Language of the case: English

The President of the Fifth Chamber has ordered that the case be removed from the register.

---

[1] OJ C 179, 3.7.2010.

EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Judgment of the Civil Service Tribunal (Second Chamber) of 20 January 2011 — Strack v Commission

(Case F-121/07) ([1])

(Civil service — Officials — Access to documents — Regulation (EC) No 1049/2001 — Jurisdiction of the Tribunal — Admissibility — Act adversely affecting an official)

(2011/C 72/53)

Language of the case: German

Parties

Applicant: Guido Strack (Cologne, Germany) (represented by: H. Tettenborn, lawyer)

Defendant: European Commission (represented by: J. Currall and B. Eggers, Agents, and B. Wägenbaur, lawyer)

Re:

Civil service — Annulment of several Commission decisions denying immediate and comprehensive access to different data and documents concerning the applicant. Claim for damages.

Operative part of the judgment

The Tribunal:

1. *Dismisses the application;*

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

([1]) OJ C 315, 22.12.2007, p. 50.

Judgment of the Civil Service Tribunal (Second Chamber) of 20 January 2011 — Strack v Commission

(Case F-132/07) ([1])

(Civil service — Officials — Articles 17, 17a and 19 of the Staff Regulations — Application for authorisation to disclose documents — Application for authorisation to publish a text — Application for authorisation to use findings before national judicial authorities — Admissibility)

(2011/C 72/54)

Language of the case: German

Parties

Applicant: Guido Strack (Cologne, Germany) (represented by: H. Tettenborn, lawyer)

Defendant: European Commission (represented by: J. Currall and B. Eggers, Agents, and B. Wägenbaur, lawyer)

Re:

Civil service — Annulment of several Commission decisions rejecting the applicant's request for authorisation to publish certain documents and to bring a complaint against (ex-) Commissioners and Commission agents — Claim for damages.

Operative part of the judgment

The Tribunal:

1. *Dismisses the application;*

2. *Orders Mr Strack to pay the costs in their entirety.*

([1]) OJ C 107, 26.4.2008, p. 44.

Action brought on 22 October 2010 — Gross and Others v Court of Justice

(Case F-106/10)

(2011/C 72/55)

Language of the case: French.

Parties

Applicants: Ivo Gross (Luxembourg, Luxembourg) and Others (represented by: J. Kayser, lawyer)

Defendant: Court of Justice of the European Union

Subject-matter and description of the proceedings

Annulment of the decisions set out in the applicants' salary adjustment slips for the period from July to December 2009 and in the salary slips issued since 1 January 2010 within the framework of the annual adjustment of the remuneration and pensions of officials and other servants pursuant to Council Regulation (EU, Euratom) No 1296/2009 of 23 December 2009.

Form of order sought

— Annul the appointing authority's decisions adjusting the applicants' remuneration, as reflected in the retroactive salary adjustment slips 12/2009, issued in 2010, salary slips 1/2010, 2/2010, 3/2010, 4/2010, 5/2010, 6/2010, 7/2010, 8/2010, 9/2010 and all of the salary slips issued subsequently until the date of the final decision bringing the present proceedings to an end, in so far as they unlawfully apply a salary adjustment rate of 1.85 % instead of a rate of 3,7 %;

— order the Court of Justice to pay the costs.

Action brought on 2 November 2010 — AT v EACEA

(Case F-113/10)

(2011/C 72/56)

Language of the case: French

Parties

Applicant: AT (represented by: S. Rodrigues, A. Blot and C. Bernard-Glanz, lawyers)

Defendant: Education, Audiovisual and Culture Executive Agency

Subject-matter and description of the proceedings

Application for, first, annulment of the applicant's career development report (CDR) for the period from 1 June to 31 December 2008; second, annulment of the contracting authority's decision to terminate the applicant's fixed-term employment contract before its due date, and, third, compensation for the damage suffered.

Form of order sought

— Annul the applicant's CDR for 2008, as adopted by the contracting authority's decision of 29 October 2009;

— annul the contracting authority's decision of 12 February 2010 by which it terminated the applicant's contract of employment; and, in so far as necessary,

— annul the contracting authority's decision rejecting the applicant's complaints against his CDR for 2008 and the decision to terminate his contract; order the EACEA to pay an amount which should be no less than the amount of the applicant's salary (and all the benefits provided for in the CEOS), calculated from the date on which the applicant's employment ended on 12 February 2010 until the date of reinstatement within the agency as a result of the annulment of the decision to terminate his employment, by way of compensation for professional and financial damage, together with late payment interest at the statutory rate from the date of the judgment to be given;

— order the EACEA to pay a sum fixed provisionally at EUR 10 000 by way of compensation for physical damage, together with late payment interest at the statutory rate from the date of the judgment to be given;

— order the EACEA to pay a sum fixed provisionally and ex aequo et bono at EUR 50 000 by way of compensation for non-material damage, together with late payment interest at the statutory rate from the date of the judgment to be given;

— in any event, order the EACEA to pay a sum fixed provisionally and ex aequo et bono at EUR 10 000 by way of compensation for the damage suffered as a result of the fact that a reasonable period was exceeded in preparing the CDR for 2008, together with late payment interest at the statutory rate from the date of the judgment to be given;

— order the EACEA to pay the costs.

Action brought on 15 November 2010 — AR v Commission

(Case F-120/10)

(2011/C 72/57)

Language of the case: French

Parties

Applicant: AR (Brussels, Belgium) (represented by: S. Rodriguez, C. Bernard-Glanz and A. Blot, lawyers)

Defendant: European Commission

Subject-matter and description of the proceedings

Annulment of EPSO's decision not to admit the applicant to the procedure for internal competition COM/INT/EU2/10/AD5 for administrators with Bulgarian or Romanian citizenship on account of the fact that the applicant failed the admission tests and of the decision on the complaint authorising the applicant to re-sit the admission tests for the competition in question.

Form of order sought

— Annul the decision of the European Personnel Selection Office (EPSO) of 31 March 2010 not to admit the applicant to internal competition COM/INT/EU2/10/AD5, so as to enable the applicant to sit the tests;

— annul the decision adopted on 3 August 2010 by the appointing authority in that it did not uphold in its entirety the applicant's complaint;

— request the Commission, if necessary be means of a measure of inquiry or measure of organisation of procedure, to produce the list of questions asked and answers given at the tests held at 13.00 on 5 March 2010 in Brussels.

— order the European Commission to pay the costs.

Action brought on 15 December 2010 — Bömcke v EIB

(Case F-127/10)

(2011/C 72/58)

Language of the case: French

Parties

Applicant: Eberhard Bömcke (Athus, Belgium) (represented by: D. Lagasse, lawyer)

Defendant: European Investment Bank

Subject-matter and description of the proceedings

Annulment of the election of the EIB staff representative declared by the BEI polling station on 8 December 2010.

Form of order sought

— Annul the election of the representative of all EIB staff declared by the EIB polling station on 8 December 2010 and the decision of 10 December 2010 of the EIB polling station rejecting the complaint made by the applicant on 9 December 2010 pursuant to Article 17 of Annex IV to the Convention on the Representation of the Staff of the EIB;

— order the EIB to pay the costs.

Action brought on 6 January 2011 — Soukup v Commission

(Case F-1/11)

(2011/C 72/59)

Language of the case: French

Parties

Applicant: Zdenek Soukup (Luxembourg, Luxembourg) (represented by: E. Boigelot and S. Woog, lawyers)

Defendant: European Commission

Subject-matter and description of the proceedings

Annulment of the decision of the selection board of Open Competition EPSO/AD/144/09 not to enter the applicant on the reserve list and the decision to enter another candidate on that list, and compensation for the material and non-material damage thereby suffered.

Form of order sought

— Annul the decision of the selection board of Open Competition EPSO/AD/144/09 of 27 April 2010 taken after re-examination of the applicant's oral test, confirming his results in the latter, namely a mark below the minimum required and, consequently, the decision not to enter him on the reserve list;

— Annul the decision of the selection board of Open Competition EPSO/AD/144/09 to admit another candidate to the written and oral tests and, subsequently, to enter him/her on the reserve list of that competition;

— Annul all the operations carried out by the selection board as from the stage at which the irregularities complained of occurred;

— Order the defendant to pay, by way of compensation for material and non-material damage and the adverse effect on the applicant's career, the sum of EUR 25 000, subject to increase or decrease in the course of the proceedings, plus interest at the rate of 7 % per annum as from 28 June 2010, the date of the complaint;

— Order the Commission to pay the costs.

Action brought on 7 January 2011 — Descamps v Commission

(Case F-2/11)

(2011/C 72/60)

Language of the case: French

Parties

Applicant: Eric Descamps (Brussels, Belgium) (represented by: L. Levi and A. Blot, lawyers)

Defendant: European Commission

Subject-matter and description of the proceedings

Annulment of the decision to dismiss the applicant at the end of the probationary period and compensation for the loss suffered as a result of that decision.

Form of order sought

— Annul the decision adopted on 1 March 2010 by the Director of Directorate HR.B-HR Core Processes 1: Career, Directorate-General Human Resources and Security of the European Commission, in its capacity as appointing authority, to dismiss the applicant with effect from 31 March 2010;

— Annul, in so far as necessary, the decision of 24 September 2010 dismissing the complaint;

— Consequently, reinstate the applicant in his functions as a titular official with effect from 1 April 2010 and award him the amount of remuneration which he should have received as a titular official since that date, including all ancillary rights (such as pension rights), which he assesses, provisionally and *ex aequo et bono*, at EUR 39 600;

— Order the defendant to pay damages, assessed provisionally and *ex aequo et bono* at EUR 10 000, for non-material damage;

— Order the defendant to pay interest for delay on the capital thus due;

— Order the European Commission to pay the costs.

CORRIGENDA

Amendment to the notice concerning Case T-507/10 in the Official Journal

(Official Journal of the European Union C 13 of 15 January 2011, p. 28)

(2011/C 72/03)

The amended notice concerning Case T-507/10 *Uspaskich* v *European Parliament* in the Official Journal is as follows:

Action brought on 28 October 2010 — Viktor Uspaskich v European Parliament

(Case T-507/10)

(2011/C 13/55)

Language of the case: Lithuanian

Parties

Applicant: Viktor Uspaskich (Kėdainiai, Lithuania) (represented by Vytautas Sviderskis, lawyer)

Defendant: European Parliament

Form of order sought

— Annul the Decision of the European Parliament of 7 September 2010 No P7_TA(2010)0296 on the request for waiver of the immunity of Viktor Uspaskich;

— Order the defendant to pay EUR 10 000 for the non-material damage suffered;

— Order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant bases his application on four pleas in law.

First of all, the applicant submits that the defendant infringed his rights of defence and the principle of good administration in procedure 2009/2147 (IMM). The European Parliament refused to hear the applicant during the procedure for waiver of his immunity both in the Committee on Legal Affairs and during the plenary session. It failed to take account of the majority of the applicant's arguments and did not answer any of them.

Second, the European Parliament adopted the contested decision on an incorrect legal basis and infringed point (a) of the first paragraph of Article 9 of the Protocol on the Privileges and Immunities of the European Union because it relied on a clearly incorrect interpretation of the first and second paragraphs of Article 62 of the Lithuanian Constitution. The applicant refers to the judgment of the General Court of 19 March 2010 in Case T-42/06 *Gollnisch* v *Parliament*, in which the Court held that there had been an analogous infringement by the European Parliament.

Third, the defendant failed to observe the *fumus persecutionis* principle and committed a manifest error of assessment when considering it. The defendant entirely disregarded its previous decisions regarding *fumus persecutionis*. The European Parliament failed, moreover, to take into account the fact that at the time of the decision to bring a criminal prosecution a political leader was not responsible for infringements connected with administration, and that material from the preliminary investigation had been published.

Fourth, the defendant infringed the applicant's right to submit a request to defend his immunity in accordance with Rule 6(3) of the Rules of Procedure of the European Parliament. It refused to examine the applicant's request that it defend his immunity on the ground that the measure requiring him to pay a security of EUR 436 000 is disproportionate to the potential maximum fine for the criminal offence with which he is charged.

2011 SUBSCRIPTION PRICES (excluding VAT, including normal transport charges)

EU Official Journal, L + C series, paper edition only	22 official EU languages	EUR 1 100 per year
EU Official Journal, L + C series, paper + annual DVD	22 official EU languages	EUR 1 200 per year
EU Official Journal, L series, paper edition only	22 official EU languages	EUR 770 per year
EU Official Journal, L + C series, monthly DVD (cumulative)	22 official EU languages	EUR 400 per year
Supplement to the Official Journal (S series), tendering procedures for public contracts, DVD, one edition per week	multilingual: 23 official EU languages	EUR 300 per year
EU Official Journal, C series — recruitment competitions	Language(s) according to competition(s)	EUR 50 per year

Subscriptions to the *Official Journal of the European Union*, which is published in the official languages of the European Union, are available for 22 language versions. The Official Journal comprises two series, L (Legislation) and C (Information and Notices).

A separate subscription must be taken out for each language version.

In accordance with Council Regulation (EC) No 920/2005, published in Official Journal L 156 of 18 June 2005, the institutions of the European Union are temporarily not bound by the obligation to draft all acts in Irish and publish them in that language. Irish editions of the Official Journal are therefore sold separately.

Subscriptions to the Supplement to the Official Journal (S Series — tendering procedures for public contracts) cover all 23 official language versions on a single multilingual DVD.

On request, subscribers to the *Official Journal of the European Union* can receive the various Annexes to the Official Journal. Subscribers are informed of the publication of Annexes by notices inserted in the *Official Journal of the European Union*.

Sales and subscriptions

Subscriptions to various priced periodicals, such as the subscription to the *Official Journal of the European Union*, are available from our sales agents. The list of sales agents is available at:

http://publications.europa.eu/others/agents/index_en.htm

EUR-Lex (http://eur-lex.europa.eu) offers direct access to European Union legislation free of charge. The *Official Journal of the European Union* can be consulted on this website, as can the Treaties, legislation, case-law and preparatory acts.

For further information on the European Union, see: http://europa.eu

Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

EN