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Information and Notices

Notice No | Contents | Page

EN

Price:
EUR 3

(Continued overleaf)

Notice No | Contents (continued) | Page

EN

EN

(Continued overleaf)

EN

(Continued on inside back cover)

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COURT OF JUSTICE OF THE EUROPEAN UNION

(2012/C 80/01)

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

OJ C 73, 10.3.2012

Past publications

OJ C 65, 3.3.2012

OJ C 58, 25.2.2012

OJ C 49, 18.2.2012

OJ C 39, 11.2.2012

OJ C 32, 4.2.2012

OJ C 25, 28.1.2012

These texts are available on:

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V

(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Judgment of the Court (First Chamber) of 2 February 2012 — European Commission v United Kingdom of Great Britain and Northern Ireland

(Case C-545/09) [1]

(Convention defining the Statute of the European Schools — Interpretation and application of Articles 12(4)(a) and 25(1) — Right of seconded teachers to access to the same progression in status and pay as those enjoyed by their national counterparts — Exclusion of certain teachers seconded by the United Kingdom to the European Schools from access to improved pay scales and other additional payments available to their national counterparts — Incompatibility with Articles 12(4)(a) and 25(1))

(2012/C 80/02)

Language of the case: English

Parties

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

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

Re:

Failure of a Member State to fulfil obligations — Infringement of Article 12(4)(a) of the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 3) — Remuneration of teachers seconded to the European Schools — Exclusion, during their secondment, from the progression in pay enjoyed by teachers employed in national schools

Operative part of the judgment

The Court:

1. *Declares that the last sentence of Article 12(4)(a) of the Convention defining the Statute of the European Schools of 21 June 1994 must be interpreted as meaning that it requires the Member States party to that Convention to ensure that teachers assigned or seconded to the European Schools enjoy, during their secondment or assignment, the same rights to career progression and retirement as those applicable to their national counterparts under the legislation of their Member State of origin;*

2. *Declares that by excluding English and Welsh teachers assigned or seconded to the European Schools, during their assignment or secondment, from access to the higher salary scales, in particular those known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers' and from access to additional payments, such as 'teaching and learning responsibility payments', provided for by the 'School Teachers Pay and Conditions Document', the United Kingdom of Great Britain and Northern Ireland has applied Articles 12(4)(a) and 25(1) of the Convention incorrectly;*

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

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[1] OJ C 63, 13.3.2010.

Judgment of the Court (First Chamber) of 9 February 2012 (reference for a preliminary ruling from the Hajdú-Bihar Megyei Bíróság — Hungary) — Márton Urbán v Vám- és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága

(Case C-210/10) [1]

(Road transport — Breach of the rules on the use of the tachograph — Obligation on Member States to establish proportionate penalties — Flat-rate fine — Proportionality of the penalty)

(2012/C 80/03)

Language of the case: Hungarian

Referring court

Hajdú-Bihar Megyei Bíróság

Parties to the main proceedings

Applicant: Márton Urbán

Defendant: Vám- és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága

Re:

Reference for a preliminary ruling — Hajdú-Bihar Megyei Bíróság — Interpretation of Article 19(1) and (4) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 1998 L 102, p. 1) and of Articles 13 to 16 of Council Regulation (EEC) No 3820/85 of 20 December 1985 on recording equipment in road transport (OJ 1985 L370, p. 8) — National legislation imposing a fine of the same amount for all breaches of the rules on the use of the tachograph regardless of the seriousness of the breach in question and without allowing any possible defence — Obligation on Member States to impose proportionate penalties

Operative part of the judgment

1. *The requirement of proportionality laid down in Article 19(1) and (4) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 must be interpreted as precluding a system of penalties, such as that introduced by Government Decree No 57/2007 fixing the amount of fines for breaches of certain provisions concerning the transport by road of goods and persons (a közúti árufuvarozáshoz és személyszállításhoz kapcsolódó egyes rendelkezések megsértése esetén kiszabható bírságok összegéről szóló 57/2007, Korm. Rendelet) of 31 March 2007, which provides for the imposition of a flat-rate fine for all breaches, no matter how serious, of the rules on the use of record sheets laid down in Articles 13 to 16 of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport, as amended by Regulation No 561/2006.*

2. *The requirement of proportionality laid down in Article 19(1) and (4) of Regulation No 561/2006 must be interpreted as not precluding a system of penalties, such as that introduced by Government Decree No 57/2007 of 31 March 2007 fixing the amount of fines for breaches of certain provisions concerning the transport by road of goods and persons, which lays down strict liability. By contrast, that requirement must be interpreted as precluding the severity of the penalty provided for by that system.*

(1) OJ C 195, 17.7.2010.

Judgment of the Court (Third Chamber) of 2 February 2012 — Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co. Ltd v Council of the European Union, European Commission, Confédération européenne de l'industrie de la chaussure (CEC)

(Case C-249/10 P) (1)

(Appeal — Dumping — Regulation (EC) No 1472/2006 — Imports of certain footwear with uppers of leather originating in China and Vietnam — Regulation (EC) No 384/96 — Articles 2(7), 9(5) and 17(3) — Market economy treatment — Individual treatment — Sampling)

(2012/C 80/04)

Language of the case: English

Parties

Appellants: Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co. Ltd (represented by: L. Ruessmann, A. Willems, S. De Knop and C. Dackö, avocats)

Other parties to the proceedings: Council of the European Union (represented by: J.-P. Hix and R. Szostak, Agents, and by G. Berrisch, Rechtsanwalt, and N. Chesaites, Barrister), European Commission (represented by T. Scharf and H. van Vliet, Agents), Confédération européenne de l'industrie de la chaussure (CEC)

Re:

Appeal brought against the judgment of the General Court (Eighth Chamber) of 4 March 2010 in Case T 401/06 *Brosmann Footwear (HK) Ltd and Others* v *Council* by which that court dismissed an action seeking the partial annulment of Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1)

Operative part of the judgment

The Court:

1. *Sets aside the judgment of the General Court of the European Union of 4 March 2010 in Case T-401/06 Brosmann Footwear (HK) and Others v Council;*

2. *Annuls Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam in so far as it relates to Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd;*

3. *Orders the Council of the European Union to pay the costs incurred by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd both at first instance and in connection with the present proceedings;*

4. *Orders the European Commission and the Confédération européenne de l'industrie de la chaussure (CEC) to bear their own costs, both at first instance and in connection with the present proceedings.*

(1) OJ C 209, 31.7.2010.

Judgment of the Court (Third Chamber) of 9 February 2012 (reference for a preliminary ruling from the Handelsgericht Wien — Austria) — Martin Luksan v Petrus van der Let

(Case C-277/10) (1)

(Reference for a preliminary ruling — Approximation of laws — Intellectual property — Copyright and related rights — Directives 93/83/EEC, 2001/29/EC, 2006/115/EC and 2006/116/EC — Sharing of the rights to exploit a cinematographic work, by contract, between the principal director and the producer of the work — National legislation allotting those rights, exclusively and by operation of law, to the film producer — Possibility of departing from that rule by an agreement between the parties — Subsequent rights to remuneration)

(2012/C 80/05)

Language of the case: German

Referring court

Handelsgericht Wien

Parties to the main proceedings

Applicant: Martin Luksan

Defendant: Petrus van der Let

Re:

Reference for a preliminary ruling — Handelsgericht Wien — Interpretation of Article 2(2), (5) and (6) and Article 4 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), of Articles 1(5) and 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), of Articles 2, 3 and 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) and of Article 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12) — Sharing of the rights to exploit a cinematographic work, by contract, between the author and the producer of the work — National legislation allotting all those rights to the producer

Operative part of the judgment

1. *Articles 1 and 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and Articles 2 and 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society in conjunction with Articles 2 and 3 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and with Article 2 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question.*

2. *European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise.*

3. *European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, the principal director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception.*

4. *European Union law must be interpreted as not allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the right to fair compensation vesting in the principal director of that work, whether that presumption is couched in irrebuttable terms or may be departed from.*

([1]) OJ C 246, 11.9.2010.

Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 2 November 2011 — Bernhard Rintisch v Klaus Eder

(Case C-553/11)

(2012/C 80/06)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Bernhard Rintisch

Defendant: Klaus Eder

Questions referred

1. Must Article 10(1) and (2)(a) of Directive 89/104/EEC ([1]) be interpreted as meaning that in principle this provision generally precludes a national rule pursuant to which the use of a trade mark (Trade Mark 1) must be presumed even if the trade mark (Trade Mark 1) is used in a form differing from the form in which it was registered, without the differences altering the distinctive character of the trade mark (Trade Mark 1), and if the trade mark in the form used is also registered (Trade Mark 2)?

2. If question 1 is answered in the negative:

   Is the national provision described above under 1 compatible with Directive 89/104/EEC if the national provision is interpreted restrictively as meaning that it is not applicable to a trade mark (Trade Mark 1) which is registered only in order to secure or expand the protection of another registered trade mark (Trade Mark 2) that is registered in the form in which it is used?

3. If question 1 is answered in the affirmative or question 2 is answered in the negative:

   (a) Is there no use of a registered trade mark (Trade Mark 1) within the meaning of Article 10(1) and (2)(a) of Directive 89/104/EEC

   (aa) if the trade mark proprietor uses the form of a sign which differs only in elements from the form in which it (Trade Mark 1) and a further trade mark (Trade Mark 2) of the trade mark proprietor are registered but the differences do not alter the distinctive character of the trade marks (Trade Mark 1 and Trade Mark 2);

   (bb) if the trade mark proprietor uses two forms of sign, neither of which corresponds to the registered trade mark (Trade Mark 1), but one of the forms used (Form 1) is the same as another registered trade mark (Trade Mark 2) of the trade mark proprietor and the second form used by the trade mark proprietor (Form 2) differs in elements from both registered trade marks (Trade Mark 1 and Trade Mark 2), without the differences altering the distinctive character of the trade marks, and if this form of sign (Form 2) displays greater similarity to the other trade mark (Trade Mark 2) of the trade mark proprietor?

   (b) Is a court of a Member State permitted to apply a national provision (here the second sentence of Paragraph 26(3) of the Law on trade marks (MarkenG)) which conflicts with a provision of a directive (here Article 10(1) and (2)(a) of Directive 89/104/EEC) in cases in which the facts of the case had already occurred prior to a decision of the Court of Justice of the European Union in which indications of the incompatibility of the Member State's legislation with the provision of the directive became apparent for the first time (the judgment of 13 September 2007 in Case C-234/06 *Il Ponte Finanziaria* v *OHIM* (BAINBRIDGE) [2007] ECR I-7333) if the national court values the reliance of a party to the court proceedings on the validity of his position, secured under constitutional law, more highly than the interest in the implementation of a provision of the directive?

([1]) First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

Appeal brought on 28 November 2011 by the French Republic against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 9 September 2011 in Case T-257/07 France v Commission

(Case C-601/11 P)

(2012/C 80/07)

Language of the case: French

Parties

Appellant: French Republic (represented by: E. Belliard, G. de Bergues, C. Candat, S. Menez and R. Loosli-Surrans, acting as Agents)

Other parties to the proceedings: European Commission, United Kingdom of Great Britain and Northern Ireland

Form of order sought

— Set aside the judgment of the General Court of the European Union of 9 September 2011 in Case T-257/07 *France* v *Commission*;

— give final judgment in the dispute by annulling Commission Regulation (EC) No 746/2008 of 17 June 2008 amending Annex VII to Regulation (EC) No 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, [1] or refer the case back to the General Court;

— order the Commission to pay the costs.

Pleas in law and main arguments

The French Government raises four pleas in law in support of its application.

By its first plea in law, the appellant submits that the General Court infringed its obligation to state reasons by failing to respond sufficiently (i) to the appellant's complaints that the Commission had failed to take account of the scientific data available, in so far as the General Court mistakenly found that those complaints amounted to an allegation that the Commission had had no knowledge of such data, and (ii) to the French Government's complaints relating to infringement of Article 24a of Regulation No 999/2001, in so far as the General Court found that those complaints effectively established that the contested measures were appropriate for the purpose of ensuring a high level of human health protection.

By its second plea in law, which is divided into three parts, the French Government submits that the General Court distorted the facts put before it. Thus, the appellant submits, first of all, that the General Court distorted the opinions of the European Food Safety Authority ('EFSA') of 8 March 2007 and 24 January 2008 when it found that the Commission had been entitled, without manifest error of assessment, to infer from those opinions that the risk of transmissibility to humans of TSE other than BSE was extremely low (first part). By the second part, the appellant submits that the General Court distorted the opinions of EFSA of 17 May and 26 September 2005 when it found that the Commission had been entitled, without manifest error of assessment, to take the view that the evaluation of the reliability of the rapid tests that is included in those opinions was valid in relation to the use of those tests in controlling the release for human consumption of meat from ovine or caprine animals. Finally, by the third part, the French Government submits that the General Court distorted the facts put before it, by finding that all of the scientific evidence relied on by the Commission in order to justify the adoption of the contested measures of Regulation No 746/2008 constituted new evidence in relation to the earlier preventive measures.

By its third plea in law, the French Government submits that the General Court erred in the legal characterisation of the facts when it characterised the scientific evidence relied on by the Commission as new evidence capable of altering the perception of the risk or showing that that risk can be contained by measures that are less restrictive than existing measures.

By its fourth plea in law, which is in three parts, the appellant takes the view that the General Court erred in law in the application of the precautionary principle. In that context, the appellant submits, first of all, that the General Court erred in law in finding that the Commission had not infringed Article 24a of Regulation No 999/2001 since, according to the General Court, the Commission had complied with the obligation contained in Article 152(1) EC to ensure a high level of human health protection. By the second part of its plea, the French Government submits that the General Court erred in law in assuming that the scientific evidence relied on by the Commission in order to justify the adoption of Regulation No 746/2008 necessarily had to entail a change in the level of risk deemed acceptable. In the alternative, the French Government submits that the General Court erred in law in failing to ascertain whether, in determining the level of risk deemed acceptable, the Commission took into account the gravity and irreversibility of the adverse effects of TSEs on human health. Finally, by the third part, the French Government submits that the General Court erred in law in failing to take account of the fact that Regulation No 746/2008 does not replace the earlier preventive measures but supplements them with more flexible alternative measures.

[1] OJ 2008 L 202, p. 11.

Appeal brought on 29 November 2011 by Centrotherm Systemtechnik GmbH against the judgment of the General Court (Sixth Chamber) delivered on 15 September 2011 in Case T-427/09 centrotherm Clean Solutions GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-609/11 P)

(2012/C 80/08)

Language of the case: German

Parties

Appellant: Centrotherm Systemtechnik GmbH (represented by: A. Schulz and C. Onken, lawyers)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), centrotherm Clean Solutions GmbH & Co. KG

Form of order sought

— Set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-427/09,

— dismiss the action brought by centrotherm Clean Solutions GmbH & Co. KG against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 in Case R 6/2008-4,

— order centrotherm Clean Solutions GmbH & Co. KG to pay the costs.

Pleas in law and main arguments

The present appeal is brought against the judgment of the General Court dismissing the action of the appellant against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 on revocation proceedings between centrotherm Clean Solutions GmbH & Co. KG and Centrotherm Systemtechnik GmbH.

The appellant bases its appeal on the following grounds of appeal:

1. The contested decision infringes Article 65 of Regulation No 207/2009 [1] and Article 134(2) and (3) of the Rules of Procedure of the General Court. According to these provisions, the General Court was obliged to take account of all of the pleas in law made by the appellant.

2. Furthermore, the judgment under appeal is incompatible with Articles 51(1)(a) and 76 of Regulation No 207/2009. It relies on a mistaken premiss that it is the appellant that bears the burden of proof of use such as to preserve the rights attached to the contested marks. In actual fact, in revocation proceedings under Article 51(1)(a) of Regulation No 207/2009 and Article 76(1) of Regulation No 207/2009 the principle of a competent authority's duty to examine facts of its own motion applies. Moreover, it follows from the provisions and the scheme of Regulation No 207/2009, in particular from a comparison of the revocation procedure provisions with those governing opposition and invalidity due to relative grounds for refusal, that, in revocation proceedings, in principle it is not the proprietor of the contested mark who has to adduce evidence of use.

   It follows, in particular, that the failure of OHIM to take account of evidence on the ground of an alleged submission being out of time is not justified.

3. By wrongly accepting, in contrast to the case-law of the Court of Justice, that the concept of genuine use constitutes a contrast to mere minimal use, the General Court misinterpreted Article 51(1)(a) of Regulation No 207/2009.

4. Finally, OHIM's statement, which was not contradicted by the General Court, according to which the sworn statement of the manager of the appellant does not constitute evidence under Article 78(1)(f) of Regulation No 207/2009 is incorrect and contradicts the case-law of the General Court itself.

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

Appeal brought on 29 November 2011 by Centrotherm Systemtechnik GmbH against the judgment of the General Court (Sixth Chamber) delivered on 15 September 2011 in Case T-434/09 Centrotherm Systemtechnik v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-610/11 P)

(2012/C 80/09)

Language of the case: German

Parties

Appellant: Centrotherm Systemtechnik GmbH (represented by: A. Schulz and C. Onken, lawyers)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), centrotherm Clean Solutions GmbH & Co. KG

Form of order sought

— Set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-434/09,

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 in Case R 6/2008-4, in so far as it grants the application for a declaration of revocation of Community trade mark No 1 301 019 CENTROTHERM,

— order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and centrotherm Clean Solutions GmbH & Co. KG to pay the costs.

Grounds of appeal and main arguments

The present appeal is brought against the judgment of the General Court dismissing the action of the appellant against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 on revocation proceedings between centrotherm Clean Solutions GmbH & Co. KG and Centrotherm Systemtechnik GmbH.

The appellant bases its appeal on the following grounds of appeal:

1. The contested decision infringes Article 51(1)(a) of Regulation No 207/2009 ([1]) in that it disregards the evidential value of the sworn statement of the manager of the appellant produced before the Cancellation Division. Contrary to the view of the Board of Appeal and the General Court, the sworn statement is indeed in accordance with the case-law of the General Court admissible evidence within the meaning of Article 78(1)(f) of the Regulation No 207/2009.

2. The General Court also misinterpreted Article 76(1) of Regulation No 207/2009. In contrast to the finding of the lower instances, according to the unambiguous wording of Article 76(1) of that Regulation as well as its scheme, in revocation proceedings under Article 51(1)(a) of Regulation No 207/2009, the principle is that the competent authority has a duty to examine relevant facts of its own motion.

3. The documents presented by the appellant in the proceedings before the Board of Appeal ought not to have been dismissed as being out of time. This arises from, first, the scheme of Regulation No 207/2009, in particular a comparison between the rules governing use in revocation proceedings and those in opposition and invalidity proceedings due to absolute grounds for refusal, and, second, from the general principles of the allocation of the burden of proof.

   In this context a teleological interpretation restricting the scope of Rule 40(5) of Regulation No 2868/95 ([2]) is necessary.

4. Should the Court of Justice reject such a teleological interpretation of Rule 40(5) of Regulation No 2868/95, that rule would be inapplicable, since it would be contrary to the provisions and the scheme of Regulation No 207/2009 and would infringe the general fundamental principle of proportionality.

([1]) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ 2009 L 78, p. 1.
([2]) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, OJ 1995 L 303, p. 1.

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 30 November 2011 — Niederösterreichische Landes-Landwirtschaftskammer v Anneliese Kuso

(Case C-614/11)

(2012/C 80/10)

Language of the case: German

Referring court

Oberster Gerichtshof

Parties to the main proceedings

Applicant: Niederösterreichische Landes-Landwirtschaftskammer

Defendant: Anneliese Kuso

Question referred

Does Article 3(1)(a) and (c) of Directive 76/207/EEC, ([1]) as amended by Directive 2002/73/EC, preclude national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which is effected solely by lapse of time pursuant to a fixed-term individual employment contract entered into before the entry into force of the above directive (in this case before Austria's accession to the European Union) is to be examined not on the basis of a contractual provision stipulating the fixed term to be a 'condition governing dismissal' but only in connection with the rejection of the request for a contract extension as a 'condition governing recruitment'?

([1]) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 39, 14.2.1976, p. 40, and amended by Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002.

Reference for a preliminary ruling from the Oberlandesgericht Braunschweig (Germany) lodged on 7 December 2011 — Proceedings for a financial penalty against International Jet Management GmbH

(Case C-628/11)

(2012/C 80/11)

Language of the case: German

Referring court

Oberlandesgericht Braunschweig

Parties to the main proceedings

International Jet Management GmbH

Questions referred

1. Does it fall within the scope of the prohibition of discrimination laid down in Article 18 TFEU (formerly Article 12 EC) if a Member State (Federal Republic of Germany) requires an airline to obtain permission to make inward flights in respect of charter flights (commercial flights in non-scheduled traffic) from non-member countries into the territory of that Member State, where that airline holds a valid operating licence within the meaning of Articles 3 and 8 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, issued in another Member State (Republic of Austria)?

2. If the reply to question 1 is in the affirmative, is the requirement for permission in itself contrary to Article 18 TFEU (formerly Article 12 EC) if permission to make an inward flight, the obtaining of which can be enforced by means of an administrative fine, is required for flight services from non-member countries by airlines which have received an operating licence in the other Member States, but not by airlines with an operating licence in the Federal Republic of Germany?

3. If the case falls within the scope of Article 18 TFEU (formerly Article 12 EC) (question 1) but the requirement for permission is not itself found to be discriminatory (question 2), may the grant of permission to make an inward flight in respect of the appellant's flight services from non-member countries to the Federal Republic of Germany be made conditional, on pain of an administrative fine, and without breaching the prohibition of discrimination, on whether the airline of the Member State proves to the authority which grants permission that airlines with an operating licence in the Federal Republic of Germany are not in a position to carry out the flights (non-availability declaration)?

Reference for a preliminary ruling from the Administrativen Sad — Varna (Bulgaria) lodged on 15 December 2011 — EOOD Stroy Trans v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — gr. Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia po Prihodite

(Case C-642/11)

(2012/C 80/12)

Language of the case: Bulgarian

Referring court

Administrativen Sad — Varna

Parties to the main proceedings

Applicant: EOOD Stroy Trans

Defendant: Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — gr. Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia po Prihodite

Questions referred

1. Must Article 203 of Council Directive 2006/112/EC [1] of 28 November 2006 on the common system of value added tax be interpreted as meaning that VAT entered by a person on an invoice shall be payable regardless of whether there are grounds for entering it on the invoice (lack of a supply or of services or a payment), and as meaning that the authorities who review the application of the Zakon za danak varhu dobavenata stoynost (Law on VAT) are not authorised to carry out adjustments to the tax entered on the invoice by a person in the light of a national provision pursuant to which an invoice may only be adjusted by its issuer?

2. Are the principles of fiscal neutrality, proportionality and of legitimate expectations infringed by a practice in the administration and in the courts, under which one party (the person named in the invoice as the buyer) is refused the right to deduct input VAT by means of a tax assessment notice, whilst in relation to the other party (the issuer of the invoice) no adjustment of the VAT entered on the invoice is carried out, again by means of a tax assessment notice, specifically in the following cases:

   — the issuer of the invoice did not submit any documents for the purposes of the tax assessment conducted in relation to him;

   — the issuer of the invoice submitted documents during the tax assessment procedure but his suppliers did not submit any evidence or on the basis of the evidence submitted it is not possible to establish that the goods or services were actually supplied;

— during the tax assessment procedure to which the issuer of the invoices was subjected, the supplies at issue in the chain were not reviewed?

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

Reference for a preliminary ruling from the Varneski administrativen sad (Bulgaria) lodged on 15 December 2011 — LVK-56 EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — grad Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia za Prihodite

(Case C-643/11)

(2012/C 80/13)

Language of the case: Bulgarian

Referring court

Varneski administrativen sad

Parties to the main proceedings

Applicant: LVK-56 EOOD

Defendant: Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — grad Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia za Prihodite

Questions referred

1. Does Article 203 of Council Directive 2006/112/EC (1) of 28 November 2006 on the common system of value added tax cover all cases of incorrectly charged VAT, including cases in which an invoice showing VAT was issued without a chargeable event having occurred? If the answer to that question is in the affirmative, do Articles 203 and 273 require the Member States to lay down express rules to the effect that VAT shown on an invoice in respect of which no supply has taken place is payable, or is it sufficient for them to transpose the general rule in the Directive to the effect that that tax is payable by any person who enters it on an invoice?

2. In the light of recital 39 in the preamble to Directive 2006/112 and with a view to ensuring the accuracy of deductions, do Articles 73, 179 and 203 of Directive 2006/112 require that, where VAT is shown on an invoice without a chargeable event having occurred, the revenue authorities must correct the tax base and the tax charged?

3. Can the special measures provided for in Article 395 of Directive 2006/112 consist in a tax practice such as that in the main proceedings, whereby, for the purposes of verifying deductions, the revenue authorities check only the deduction made, while the tax on the output supplies is regarded as being necessarily payable solely because it was shown on an invoice? If that question is answered in the affirmative, is it permissible under Article 203 of Directive 2006/112 — and, if so, in what circumstances — for VAT on the same transaction to be collected once from the provider of the goods or services, because he entered the tax on an invoice, and a second time from the purchaser of the goods or recipient of the services, inasmuch as he is refused the right to deduct?

4. Is a tax practice such as that in the main proceedings — whereby the purchaser of taxable goods or the recipient of taxable services is refused the right to deduct on the ground that there is 'no evidence that the supply took place', without any account being taken of findings already made to the effect that a right to claim tax has accrued against the provider of the goods or services and that tax is payable by him, bearing in mind that, up to the point at which the accrual of the right to deduct was evaluated, the tax assessment notice in question had not been adjusted and no reason to adjust it in the manner prescribed by the State had emerged or been established — in breach of the non-cumulative nature of VAT and at odds with the principles of legal certainty, equal treatment and fiscal neutrality?

5. Is it permissible under Articles 167 and 168(a) of Directive 2006/112 for the purchaser of taxable goods or the recipient of taxable services who fulfils all the conditions laid down in Article 178 of the Directive to be refused the right to deduct after a tax assessment notice which was issued to the provider of the goods or services and has become final did not correct the VAT charged on that supply because 'no chargeable event occurred', but, rather, the right to claim tax was recognised as having accrued and was taken into consideration in determining the net tax due for the tax period in question? Is it relevant to the answer to that question that the provider of the goods or services did not submit any accounting documents during the tax assessment and that the net tax due for that period was determined solely by reference to the information given in the VAT declarations and in the sales and purchase books?

6. Depending on the answers to the above questions, are Articles 167 and 168(a) of Directive 2006/112 to be interpreted as meaning that, in circumstances such as those in the main proceedings, the neutrality of VAT requires that a taxable person must be able to deduct the tax charged on supplies made to him?

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

Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 16 December 2011 — Land Berlin v Ellen Mirjam Sapir and Others

(Case C-645/11)

(2012/C 80/14)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Land Berlin

Defendants: Ellen Mirjam Sapir, Michael J. Busse, Mirjam M. Birgansky, Gideon Rumney, Benjamin Ben-Zadok, Hedda Brown

Questions referred

1. Does a claim for the repayment of an amount unduly paid constitute a civil matter within the meaning of Article 1(1) of Regulation (EC) No 44/2001 [1] in the circumstances where a Land ordered by a public authority to pay to victims by way of compensation part of the proceeds from a sale of land instead, erroneously, pays to those parties the entire purchase price?

2. Can claims be regarded as so closely connected as required pursuant to Article 6(1) of Regulation (EC) No 44/2001 where the defendants rely on additional compensation claims susceptible only to uniform determination?

3. Does Article 6(1) of Regulation (EC) No 44/2001 apply also to defendants not domiciled in the European Union? If that question is answered in the affirmative, does this also apply where, in the defendant's State of domicile, pursuant to a bilateral convention with the State determining the claim, recognition of the judgment might be refused for lack of jurisdiction?

[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 Juzgado Mercantil de Barcelona (Spain) lodged on 30 December 2011 — Serveis en Impressió i Retolació Vargas, S.L. v Banco Mare Nostrum, S.A.

(Case C-664/11)

(2012/C 80/15)

Language of the case: Spanish

Referring court

Juzgado Mercantil de Barcelona

Parties to the main proceedings

Applicant: Serveis en Impressió i Retolació Vargas, S.L.

Defendant: Banco Mare Nostrum, S.A.

Questions referred

1. If a credit institution offers a client an interest rate swap arrangement to cover the risk of variations of interest rates on previous financial transactions, must this be regarded as investment advice within the meaning of point (4) of Article 4(1) of the MiFID Directive? [1]

2. Must omission of the suitability test provided for in Article 19(4) of the MiFID Directive with regard to a retail investor give rise to fundamental nullity of the interest rate swap arrangement entered into between the investor and the advising credit institution?

3. In the event that the service provided in the terms described is not regarded as investment advice, does the mere fact of purchasing a complex financial instrument, into which category falls an interest rate swap arrangement, without the appropriateness test provided for in Article 19(5) of the MiFID Directive being carried out, for reasons imputable to the investment institution, give rise to fundamental nullity of the purchase contract concluded with the same credit institution?

4. Under Article 19(9) of the MiFID Directive, does the mere fact that a credit institution offers a complex financial instrument linked to a mortgage loan that has been concluded with the institution itself or with a different institution constitute sufficient cause to exclude application of the obligation to carry out the suitability and appropriateness tests provided for by the said Article 19 which the investment institution must undertake in the case of a retail investor?

5. In order to enable the obligations laid down in Article 19 of the MiFID Directive to be excluded, is it necessary for the

financial product to which the financial instrument offered is linked to be subject to statutory investor-protection standards similar to those laid down in that directive?

(1) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

Reference for a preliminary ruling from the Juzgado Mercantil de Barcelona (Spain) lodged on 30 December 2011 — Alfonso Carlos Amselem Almor v NCG Banco, S.A.

(Case C-665/11)

(2012/C 80/16)

Language of the case: Spanish

Referring court

Juzgado Mercantil de Barcelona

Parties to the main proceedings

Applicant: Alfonso Carlos Amselem Almor

Defendant: NCG Banco, S.A.

Questions referred

1. If a credit institution offers a client with whom it has previously signed a mortgage loan contract an interest rate swap arrangement to cover the risk of variations of interest rates on that loan, must this be regarded as investment advice within the meaning of point (4) of Article 4(1) of the MiFID Directive? (1)

2. Must omission of the suitability test provided for in Article 19(4) of the MiFID Directive with regard to a retail investor give rise to fundamental nullity of the interest rate swap arrangement entered into between the investor and the advising credit institution?

3. In the event that the service provided in the terms described is not regarded as investment advice, does the mere fact of purchasing a complex financial instrument, into which category falls an interest rate swap arrangement, without the appropriateness test provided for in Article 19(5) of the MiFID Directive being carried out, for reasons imputable to the investment institution, give rise to fundamental nullity of the purchase contract concluded with the same credit institution?

4. Under Article 19(9) of the MiFID Directive, does the mere fact that a credit institution offers a complex financial instrument linked to a mortgage loan constitute sufficient cause to exclude application of the obligation to carry out the suitability and appropriateness tests provided for by the said Article 19 which the investment institution must undertake in the case of a retail investor?

5. In order to enable the obligations laid down in Article 19 of the MiFID Directive to be excluded, is it necessary for the financial product to which the financial instrument offered is linked to be subject to statutory investor-protection standards similar to those laid down in that directive?

(1) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

Reference for a preliminary ruling from the Tribunale Amministrativo per la Sardegna (Italy) lodged on 2 January 2012 — Danilo Tola v Ministero della Difesa

(Case C-4/12)

(2012/C 80/17)

Language of the case: Italian

Referring court

Tribunale Amministrativo per la Sardegna

Parties to the main proceedings

Applicant: Danilo Tola

Defendant: Ministero della Difesa

Following the withdrawal of the reference for a preliminary ruling on 5 January 2012, by order of 18 January 2012 the Court of Justice removed the case from the register.

Reference for a preliminary ruling from the Augstākās tiesas Senāts (Latvia) lodged on 17 January 2012 — Mohamad Zakaria

(Case C-23/12)

(2012/C 80/18)

Language of the case: Latvian

Referring court

Augstākās tiesas Senāts/Latvia

Parties to the main proceedings

Applicant: Mohamad Zakaria

Questions referred

1. Does Article 13(3) of Regulation (EC) No 562/2006 ([1]) 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) provide persons with a right of appeal not only against a decision refusing entry into a country, but also against infringements committed in the procedure leading to the adoption of a decision authorising entry?

2. If question 1 is answered in the affirmative, in the light of recital 20 in the preamble to, and Article 6(1) of, Regulation No 562/2006, and Article 47 of the Charter of Fundamental Rights of the European Union, does Article 13(3) of Regulation No 562/2006 require the Member States to guarantee an effective remedy before a court of law?

3. If question 1 is answered in the affirmative and question 2 in the negative, in the light of recital 20 in the preamble to, and Article 6(1) of, Regulation No 562/2006, and Article 47 of the Charter of Fundamental Rights of the European Union, does Article 13(3) of Regulation No 562/2006 require the Member States to guarantee an effective remedy before an administrative body which, from an institutional and functional perspective, provides the same guarantees as a court of law?

([1]) OJ 2006 L 105, p. 1.

Action brought on 31 January 2012 — European Commission v Republic of Poland

(Case C-48/12)

(2012/C 80/19)

Language of the case: Polish

Parties

Applicant: European Commission (represented by: P. Hetsch, S. Petrova and K. Herrmann, acting as Agents)

Defendant: Republic of Poland

Form of order sought

— declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe and in any event by not notifying the Commission of such provisions, the Republic of Poland has failed to fulfil its obligations under Article 33(1) of that directive;

— impose upon the Republic of Poland, in accordance with Article 260(3) TFEU, a penalty payment for failure to fulfil its obligation to notify measures transposing Directive 2008/50/EC at the daily rate of EUR 71 521,38 from the day on which judgment is delivered in the present case;

— order the Republic of Poland to pay the costs.

Pleas in law and main arguments

The Commission alleges that the Republic of Poland has failed to fulfil the obligation laid down in Article 33(1) of Directive 2008/50/EC ('the CAFE Directive').

The CAFE Directive is the principal legal instrument at European Union level relating to air pollutants, and thus seeks to protect the environment and human health. It sets out inter alia assessment and measurement standards, and reduction targets for the atmospheric concentration of particulate matter constituting the most harmful substances in the air for human health. It obliges the Member States to limit the exposure concentration for particulate matter PM 2.5 to 20 micrograms/m^3 in 2015. In addition, it lays down a target value for PM 2.5 of 25 micrograms/m^3 to be achieved by 2010. It also requires the Member States to achieve by 2015 a limit value for PM 2.5 of 25 micrograms/m^3 (stage 1), and in the second stage (by 2020) one of 20 micrograms/m^3. Furthermore, the CAFE Directive requires the Member States to give to the public information about air quality and other measures adopted on the basis of the directive (Article 26 et seq.).

Under Article 33(1) of the CAFE Directive, the Republic of Poland had to adopt and to bring into force the national legal provisions necessary to implement the directive by 11 June 2010.

The Republic of Poland has not incorporated into Polish law or brought into force all the necessary provisions. The drawing up of the fundamental principles of a draft law to amend the Law on environmental protection and certain other laws by the Ministry of the Environment does not constitute fulfilment of the obligation laid down in Article 33(1) of the CAFE Directive.

The Commission has been informed by the Polish authorities only that Articles 6(1) and 23 of the CAFE Directive have been partially implemented by Articles 13 and 15 of the Law of 17 June 2009 on the system for the management of emissions of greenhouse gases and other substances, through the creation of a system for the management of emissions of sulphur dioxide (SO_2) and nitrogen oxides and the obligation to draw up a draft national reduction plan.

Appeal brought on 1 February 2012 by Kendrion NV against the judgment of the General Court (Fourth Chamber) delivered on 16 November 2011 in Case T-54/06 *Kendrion v Commission*

(Case C-50/12 P)

(2012/C 80/20)

Language of the case: Dutch

Parties

Appellant: Kendrion NV (represented by: P. Glazener and T. Ottervanger, advocaten)

Other party to the proceedings: European Commission

Form of order sought

— Set aside the judgment, in whole or in part, in accordance with the pleas in law put forward in this appeal;

— annul the decision, in whole or in part, in so far as it concerns the appellant;

— annul or reduce the fine imposed on the appellant;

— in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice;

— order the Commission to pay the costs of these proceedings as well as the costs of the proceedings before the General Court.

Pleas in law and main arguments

1. According to the ***first plea in law***, the General Court misconstrued Union law and provided contradictory and insufficient grounds for its judgment in ruling that the Commission had explained to the requisite legal standard why it had imposed a fine on Kendrion that is higher than the fine imposed on Fardem.

2. According to the ***second plea in law***, the General Court made an error of assessment in its determination of the question whether the Commission was entitled to deem Kendrion jointly and severally liable for the fine to be imposed on its former subsidiary Fardem, and made mistakes in its specific examination of the evidence, thereby committing procedural errors. In its judgment, the General Court erred in its allocation of the burden of proof, manifestly misconstrued the facts and clearly erred in its assessment of the evidence. Moreover, the General Court failed to provide sufficient grounds for its findings and did not sufficiently address the arguments put forward by Kendrion.

3. By the ***third plea in law*** Kendrion challenges the considerations in the judgment under appeal in which the General Court addresses and dismisses the second, fourth and fifth pleas in law put forward by Kendrion at first instance. In Kendrion's view, the General Court proceeded on the basis of a misconstruction of Union law in assuming that the parent company Kendrion, which did not participate in the infringement, could itself be subject to a fine higher than the fine imposed on the subsidiary undertaking Fardem, which carried out the infringement. Furthermore, the General Court infringed the principle of equal treatment, and gave reasons for its findings that were contradictory and inadequate.

4. By the ***fourth plea in law*** Kendrion submits that the General Court was wrong to reject as irrelevant Kendrion's argument regarding the excessive duration of the proceedings in the General Court. The General Court thus appears to take the view that it has no jurisdiction to adjudicate on procedural irregularities in General Court proceedings. Even if it were the case that the General Court does not itself have the power to reduce fines on account of the excessive duration of its own proceedings, the Court of Justice is in any event obliged to rule on this point, which is one that is essential for legal certainty, and to draw the appropriate conclusions from it.

GENERAL COURT

Judgment of the General Court of 2 February 2012 — EI du Pont de Nemours and Others v Commission

(Case T-76/08) ([1])

(Competition — Agreements, decisions and concerted practices — Market for chloroprene rubber — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Price-fixing — Market-sharing — Imputability of the unlawful conduct — Joint venture — Guidelines on the method of setting fines — Mitigating circumstances — Cooperation)

(2012/C 80/21)

Language of the case: English

Parties

Applicants: EI du Pont de Nemours and Company (Wilmington, Delaware, United States); DuPont Performance Elastomers LLC (Wilmington); and DuPont Performance Elastomers SA (Grand-Saconnex, Switzerland) (represented by: J. Boyce and A. Lyle-Smythe, Solicitors)

Defendant: European Commission (represented: initially by X. Lewis and V. Bottka, subsequently by V. Bottka and V. Di Bucci, and lastly by V. Bottka, S. Noë and A. Biolan, Agents)

Re:

APPLICATION for, first, annulment of Articles 1 and 2 of Commission Decision C(2007) 5910 final of 5 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.629 — Chloroprene Rubber), as amended by Commission Decision C(2008) 2974 final of 23 June 2008, in that they refer to EI du Pont de Nemours and Company and, second, a reduction in the amount of the fine imposed jointly and severally on the applicants by that decision.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC and DuPont Performance Elastomers SA to pay the costs.*

([1]) OJ C 116, 9.5.2008.

Judgment of the General Court of 2 February 2012 — Dow Chemical v Commission

(Case T-77/08) ([1])

(Competition — Agreements, decisions and concerted practices — Market for chloroprene rubber — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Price-fixing — Market-sharing — Imputability of the unlawful conduct — Joint venture — Guidelines on the method of setting fines — Mitigating circumstances — Cooperation)

(2012/C 80/22)

Language of the case: English

Parties

Applicant: The Dow Chemical Company (Midland, Michigan, United States) (represented by: D. Schroeder and T. Graf, lawyers)

Defendant: European Commission (represented: initially by X. Lewis and V. Bottka, subsequently by V. Bottka and V. Di Bucci, and lastly by V. Bottka, P. Van Nuffel and L. Malferrari, Agents)

Re:

APPLICATION for, principally, annulment of Commission Decision C(2007) 5910 final of 5 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.629 — Chloroprene Rubber), as amended by Commission Decision C(2008) 2974 final of 23 June 2008, in so far as it concerns the applicant and, in the alternative, a reduction in the amount of the fine imposed on the applicant by that decision.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders The Dow Chemical Company to pay the costs.*

([1]) OJ C 116, 9.5.2008.

Judgment of the General Court of 2 February 2012 — Denki Kagaku Kogyo and Denka Chemicals v Commission

(Case T-83/08) ([1])

(Competition — Agreements, decisions and concerted practices — Market for chloroprene rubber — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Price-fixing — Market-sharing — Proof of participation in the cartel — Proof of having distanced oneself from the cartel — Duration of the infringement — Rights of the defence — Access to the file — Guidelines on the method of setting — Non-retroactivity — Legitimate expectation — Principle of proportionality — Mitigating circumstances)

(2012/C 80/23)

Language of the case: English

Parties

Applicants: Denki Kagaku Kogyo Kabushiki Kaisha (Tokyo, Japan); and Denka Chemicals GmbH (Düsseldorf, Germany) (represented: initially by G. van Gerven, T. Franchoo and D. Fessenko, and subsequently by T. Franchoo, B. Bär-Bouyssière and A. de Beaugrenier, lawyers)

Defendant: European Commission (represented by: S. Noë and V. Bottka, Agents)

Re:

APPLICATION for, principally, annulment of Commission Decision C(2007) 5910 final of 5 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.629 — Chloroprene Rubber), in that it concerns the applicants and, in the alternative, a reduction in the amount of the fine imposed jointly and severally on the applicants by that decision.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH to pay the costs.*

([1]) OJ C 107, 26.4.2008.

Judgment of the General Court of 2 February 2012 — skytron energy v OHIM (arraybox)

(Case T-321/09) ([1])

(Community trade mark — Application for Community word mark arraybox — Absolute ground for refusal — Descriptive character — Lack of distinctive character — Article 7(1)(b) and (c) of Regulation (EC) No 207/2009)

(2012/C 80/24)

Language of the case: German

Parties

Applicant: skytron energy GmbH & Co. KG (Berlin, Germany) (represented by: H.J. Omsels and C. Danziger, lawyers)

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

Re:

Action brought against the decision of the First Board of Appeal of OHIM of 4 June 2009 (Case R 1680/2008-1) concerning an application for registration of the word sign arraybox as a Community trade mark.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders skytron energy GmbH & Co. KG to pay the costs.*

([1]) OJ C 267, 7.11.2009.

Judgment of the General Court of 2 February 2012 — Greece v Commission

(Case T-469/09) ([1])

(EAGGF — Guarantee Section — Expenses excluded from Community financing — Tomato processing and rice storage sectors — Integrated administration and control system for certain Community aid schemes — Principle of proportionality)

(2012/C 80/25)

Language of the case: Greek

Parties

Applicant: Hellenic Republic (represented by: I.K. Chalkias and S. Papaïoannou, Agents)

Defendant: European Commission (represented by: P. Rossi and A. Markoulli, Agents)

Re:

Application of annulment of Commission Decision 2009/721/EC of 24 September 2009 excluding from Community 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) (OJ 2009 L 257, p. 28).

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders the Hellenic Republic to pay the costs.*

([1]) OJ C 24, 30.1.2010.

Judgment of the General Court of 7 February 2012 — Hartmann-Lamboy v OHIM — Diptyque (DYNIQUE)

(Case T-305/10) ([1])

(Community trade mark — Opposition proceedings — Application for Community word mark DYNIQUE — Earlier Community word mark DIPTYQUE — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009)

(2012/C 80/26)

Language of the case: German

Parties

Applicant: Marlies Hartmann-Lamboy (Westerburg, Germany) (represented by: R. Loos, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented: initially by A. Pohlmann and subsequently by G. Schneider, Agents)

Other party to the proceedings before the Board of Appeal of OHIM: Diptyque SAS (Paris, France)

Re:

Action brought against the decision of the First Board of Appeal of OHIM of 7 May 2010 (Case R 1217/2009-1) concerning opposition proceedings between Diptyque SAS and Ms Marlies Hartmann-Lamboy.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Ms Marlies Hartmann-Lamboy to pay the costs.*

([1]) OJ C 288, 23.10.2010.

Judgment of the General Court of 2 February 2012 — Goutier v OHIM — Euro Data (ARANTAX)

(Case T-387/10) ([1])

(Community trade mark — Opposition proceedings — Application for Community word mark ARANTAX — Earlier national word mark ANTAX — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009 — Genuine use of the earlier mark — Article 42(2) and (3) of Regulation No 207/2009)

(2012/C 80/27)

Language of the case: German

Parties

Applicant: Klaus Goutier (Frankfurt-am-Main, Germany) (represented by: E. Happe, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM intervening before the General Court: Euro Data GmbH & Co. KG, Datenverarbeitungsdienst (Saarbrucken, Germany) (represented by: D. Wagner, lawyer)

Re:

Action brought against the decision of the Fourth Board of Appeal of OHIM of 1 July 2010 (Case R 126/2009-4) concerning opposition proceedings between Euro Data GmbH & Co. KG, Datenverarbeitungsdienst and Mr Klaus Goutier.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Mr Klaus Goutier to pay the costs.*

([1]) OJ C 301, 6.11.2010.

Judgment of the General Court of 7 February 2012 — Dosenbach-Ochsner v OHIM — Sisma (Representation of elephants in a rectangle)

(Case T-424/10) ([1])

(Community trade mark — Invalidity proceedings — Community figurative mark representing elephants in a rectangle — Earlier international and national figurative marks representing an elephant and earlier national word mark elefanten — Relative ground for refusal — Likelihood of confusion — Similarity of the signs — Article 8(1)(b) of Regulation (EC) No 207/2009 — Distinctive character of the earlier marks)

(2012/C 80/28)

Language of the case: Italian

Parties

Applicant: Dosenbach-Ochsner AG Schuhe und Sport (Dietikon, Switzerland) (represented by: O. Rauscher, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM, intervener before the General Court: Sisma SpA (Mantova, Italy) (represented by: F. Caricato, lawyer)

Re:

Action against the decision of the Fourth Board of Appeal of OHIM of 15 July 2010 (Case R 1638/2008-4) concerning invalidity proceedings between Dosenbach-Ochsner AG Schuhe und Sport and Sisma SpA.

Operative part of the judgment

The General Court:

1. *Annuls the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 15 July 2010 (Case R 1638/2008-4);*

2. *Orders OHIM to bear its own costs and to pay the costs of Dosenbach-Ochsner AG Schuhe und Sport;*

3. *Orders Sisma SpA to bear its own costs.*

([1]) OJ C 317, 20.11.2010.

Judgment of the General Court of 2 February 2012 — Almunia Textil v OHIM — FIBA-Europe (EuroBasket)

(Case T-596/10) ([1])

(Community trade mark — Opposition proceedings — Application for Community word mark EuroBasket — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009)

(2012/C 80/29)

Language of the case: German

Parties

Applicant: Almunia Textil, SA (La Almunia de Doña Godina, Spain) (represented by: J.E. Astiz Suárez, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: R. Manea, acting as Agent)

Other party to the proceedings before the Board of Appeal of OHIM: FIBA-Europe eV (Munich, Germany) (represented by: T. Hogh Holub, lawyer)

Re:

Action brought against the decision of the First Board of Appeal of OHIM of 6 October 2010 (Case R 280/2010-1) concerning opposition proceedings between Almunia Textil, SA and FIBA-Europe eV.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Almunia Textil, SA to bear its own costs and to pay the costs incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and FIBA-Europe eV including, in respect of the latter, the unavoidable costs incurred for the purposes of the proceedings before the Board of Appeal.*

([1]) OJ C 80, 12.3.2011.

Judgment of the General Court of 7 February 2012 — Run2Day Franchise v OHIM — Runners Point (Run2)

(Case T-64/11) ([1])

(Community trade mark — Opposition proceedings — Application for Community figurative mark Run2 — Earlier Community word and figurative marks RUN2DAY — Earlier BENELUX figurative mark RUN2DATE — Relative ground for refusal — Likelihood of confusion — Similarity of the signs — Article 8(1)(b) of Regulation (EC) No 207/2009)

(2012/C 80/30)

Language of the case: German

Parties

Applicant: Run2Day Franchise BV (Utrecht, Netherlands) (represented by: H. Koenraad, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: A. Pohlmann, agent)

Other party to the proceedings before the Board of Appeal of OHIM intervening before the General Court: Runners Point Warenhandels GmbH (Recklinghausen, Germany) (represented by: H. Prange, lawyer)

Re:

Appeal brought against the decision of the First Board of Appeal of OHIM of 11 November 2010 (Case R 349/2010-1) concerning opposition proceedings between Run2Day Franchise BV and Runners Point Warenhandels GmbH.

Operative part of the judgment

The Court:

1. *Annuls the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 11 November 2010 (Case R 349/2010-1);*

2. *Orders OHIM and Runners Point Warenhandels GmbH to pay, apart from their own costs, those incurred by Run2Day Franchise BV.*

([1]) OJ C 89, 19.3.2011.

Order of the General Court of 20 January 2012 — Groupe Partouche v Commission

(Case T-315/10) ([1])

(Action for annulment — Concentrations — Decision declaring the concentration compatible with the common market — Article 44(1)(c) of the Rules of Procedure of the General Court — Inadmissibility)

(2012/C 80/31)

Language of the case: French

Parties

Applicant: Groupe Partouche (Paris, France) (represented by: J.-J. Sebag, lawyer)

Defendant: European Commission (represented by: A. Biolan, F. Ronkes Agerbeek and N. von Lingen, lawyers)

Interveners in support of the defendant: La Française des Jeux (Boulogne-Billancourt, France); and Groupe Lucien Barrière (Paris, France) (represented by: D. Théophile and P. Mèle, lawyers)

Re:

Application for annulment of Commission Decision C(2010) 3333 of 21 May 2010 declaring the concentration operation for the acquisition by La Française des Jeux and Groupe Lucien Barrière of joint control over the undertaking Newco (Case COMP/M.5786 — Française des Jeux/Groupe Lucien Barrière/JV) to be compatible with the internal market and the Agreement on the European Economic Area (EEA).

Operative part of the order

1. *The action is dismissed.*

2. *Groupe Partouche shall bear its own costs and those incurred by the European Commission, La Française des Jeux and Groupe Lucien Barrière.*

([1]) OJ C 274, 9.10.2010.

Order of the President of the General Court of 23 January 2012 — Henkel and Henkel France v Commission

(Case T-607/11 R)

(Application for interim measures — Competition — Commission decision refusing to transmit documents to a national competition authority — Application for interim measures — No interest in bringing proceedings — Disregard of formal requirements — Measures requested not provisional in character — Inadmissibility)

(2012/C 80/32)

Language of the case: English

Parties

Applicants: Henkel AG & Co. KGaA (Düsseldorf, Germany); and Henkel France (Boulogne-Billancourt, France) (represented by: R. Polley, T. Kuhn, F. Brunet and É. Paroche, lawyers)

Defendant: European Commission (represented by: N. Khan and P.J.O. Van Nuffel, Agents)

Re:

Application for interim measures in relation to the Commission's decision of 30 September 2011 (Case COMP/39.579 — Consumer detergents — and Case 09/0007 F) dismissing the request of the French competition authority that the Commission transfer to it, in the context of Case 09/0007 F concerning the French detergents sector, a number of documents produced in Case COMP/39.579.

Operative part of the order

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

2. *Costs are reserved.*

Order of the President of the General Court of 25 January 2012 — Euris Consult v Parliament

(Case T-637/11 R)

(Application for interim measures — Public services contract — Tendering procedure — Services of translation into Maltese — Rejection of a tender — Arrangements for communication — Application for suspension of operation of a measure — Loss of opportunity — Lack of serious and irreparable damage — Lack of urgency)

(2012/C 80/33)

Language of the case: English

Parties

Applicant: Euris Consult Ltd (Floriana, Malta) (represented by: F. Moyse, lawyer)

Defendant: European Parliament (represented by: L. Darie and F. Poilvache, Agents)

Re:

Application for suspension of operation of the decision of the European Parliament of 18 October 2011 in the tendering procedure (MT/2011/EU) for the provision of translation services into Maltese (OJ S 56 090372) and rejecting the tender submitted by the applicant.

Operative part of the order

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

2. *Costs are reserved.*

Action brought on 30 December 2011 — TV2/Danmark v Commission

(Case T-674/11)

(2012/C 80/34)

Language of the case: Danish

Parties

Applicant: TV2/Danmark (Odense, Denmark) (represented by: O. Koktvedgaard)

Defendant: European Commission

Form of order sought

— Principal head of claim: annulment of Commission Decision of 20 April 2011 on the measures implemented by Denmark for TV2/Danmark (C 2/2003), in so far as it finds that the measures investigated constituted State aid within the meaning of Article 107(1) TFEU (recitals 101 and 153 and first paragraph of the Conclusion of the Decision).

— Alternative head of claim: annulment of Commission Decision of 20 April 2011 on the measures implemented by Denmark for TV2/Danmark (C 2/2003) in so far as it finds:

  — that the measures investigated constituted new aid which therefore had to be notified (recital 154 and first paragraph of the Conclusion of the Decision);

  — that the licensing fees which, in the years 1997-2002, were transferred to the regions via TV2, constituted State aid for TV2 (recital 194 of the Decision); and

  — that the advertising revenues which, in 1995 and 1996 and at the time of the winding-up of the TV2 Fund in 1997, were transferred from the TV2 Fund to TV2, constituted State aid for TV2 (recitals 90, 92, 193 and 195, with Table 1).

Pleas in law and main arguments

In support of the action, the applicant submits that the contested decision is contrary to Article 107(1) TFEU, Article 14 TFEU and the Amsterdam Protocol. The applicant submits:

— that the applicant did not receive State aid, in that the measures investigated did not favour TV2/Danmark within the meaning of Article 107 TFEU, but were merely compensation for the public services provided by TV2/Danmark. The applicant submits that the Commission did not apply the conditions in *Altmark* according to their intended spirit and purpose and found, incorrectly, that the second and fourth conditions in *Altmark* were not fulfilled.

— that the alleged aid to TV2/Danmark in the form of licensing fees and corporate tax exemptions was not new aid within the meaning of Regulation No 659/1999 ([1]), since those arrangements preceded Denmark's accession to the EU;

— that the licensing fees which were transferred to the regions via TV2/Danmark from 1997 to 2002 cannot be categorised as State aid to TV2/Danmark, since TV2/Danmark was not the actual recipient of those funds; and

— that the funds which were transferred from TV2 Reklame A/S via the TV2 Fund to TV2/Danmark derived from the sale of advertising did not constitute State aid, since that was payment for TV2/Danmark's broadcasting of advertising on TV2/Danmark's broadcasting network.

([1]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of [Article 108 TFEU] (OJ 1999 L 83, p. 1).

Action brought on 2 January 2012 — France v Commission

(Case T-1/12)

(2012/C 80/35)

Language of the case: French

Parties

Applicant: French Republic (represented by: E. Belliard, G. de Bergues and J. Gstalter, agents)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul the contested decision in its entirety;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the annulment of Decision C(2011) 7808 final of 24 October 2011, by which the Commission declared incompatible with the common market the restructuring aids which the French authorities proposed to grant to SeaFrance SA in the form of an increase in capital and loans granted by SNCF to SeaFrance.

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

1. First plea in law, alleging misinterpretation of the concept of aid within the meaning of Article 107 TFEU when the Commission found that the question whether the two loans proposed by SNCF were reasonable had to be considered together with the rescue and restructuring aid. This plea is divided into two branches based:

   — first, on the fact that the Commission incorrectly interpreted the Court's judgment in Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235; and

— second, in the alternative, on the fact that the Commission incorrectly applied that judgment of the Court.

2. Second plea in law, alleging misinterpretation of the concept of State aid within the meaning of Article 107 TFEU when the Commission found, for the sake of completeness, that the French authorities have not proved that, considered in isolation, the two loans proposed by SNCF would have been granted at a market rate. That plea is divided into two branches based on:

— first, the fact that the Commission incorrectly excluded the two loans at issue from the application of the Commission Communication of 19 January 2008 on the revision of the method for setting the reference and discount rates; ([1]) and

— second, the fact that the Commission incorrectly found that, to be compatible with the market, the rate of the loans in question should have been around 14 %.

3. Third plea in law, alleging errors of law and of fact when the Commission found that the restructuring aid is incompatible with Article 107(3)(c) TFEU, interpreted in the light of the guidelines on State aid for rescuing and restructuring.

4. Fourth plea in law, alleging infringement of Article 345 TFEU which provides that the Treaties are not in any way to prejudice the rules in Member States governing the system of property ownership.

([1]) OJ 2008 C 14, p. 6.

Action brought on 9 January 2012 — Interbev v European Commission

(Case T-18/12)

(2012/C 80/36)

Language of the case: French

Parties

Applicant: Association Nationale Interprofessionnelle du Bétail et des Viandes (Interbev) (Paris, France) (represented by: P. Morrier and A. Bouviala, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul the European Commission's decision of 13 July 2011, State aid SA. 14974 (C 46/2003) — France — concerning the levies for INTERBEV, C(2011) 4923 final, not yet published in the *Official Journal of the European Union*, in so far as it classifies as State aid the measures adopted by INTERBEV between 1996 and 2004 concerning publicity, promotion, technical assistance and research and development, on the one hand, and the extended voluntary levies which finance that action as State resources forming an integral part of the abovementioned State aid measures, on the other hand;

— in the alternative, annul the European Commission's decision of 13 July 2011, State aid SA. 14974 (C 46/2003) — France — concerning the levies for INTERBEV, C(2011) 4923 final, not yet published in the *Official Journal of the European Union*, in so far as it encourages the national courts to order repayment of the extended voluntary levies (contested decision, recitals 201 and 202);

— order the European Commission to pay the costs.

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 reasoning of the contested decision is insufficient in the light of Article 296 TFEU and with regard to the conditions concerning: (i) a selective economic advantage for operators in the cattle and sheep sectors; (ii) the State origin of the measures adopted by the applicant; (iii) the distortion of competition and the effect on trade between Member States; and (iv) the direct connection between the action taken by the applicant and the extended voluntary levies, also known as binding voluntary levies, charged between 1996 and 2004.

2. Second plea in law, alleging infringement of Article 107(1) TFEU, in so far as the measures adopted by the applicant between 1996 and 2004:

— cannot be imputed to the State and the extended voluntary levies which financed them do not constitute State resources and cannot in any way be imputed to the French State;

— do not constitute an economic advantage for one or more recipients;

— do not affect, even potentially, competition or trade between Member States.

3. Third plea in law, in the alternative, alleging a manifest error of assessment with regard to the existence of a direct causal connection between the extended voluntary levies and the measures adopted by the applicant.

4. Fourth plea in law, in the further alternative, alleging a manifest error of assessment with regard to the consequences which the national courts should draw from the lack of notification of the extended voluntary levies. The Commission, in paragraph 202 of the contested decision, encourages national courts to order repayment of the extended voluntary levies and to declare the aid invalid, and calls upon the persons affected to bring their cases before the national courts, whereas the national courts are not obliged to order repayment of the aid and the extended voluntary levies because such repayment would be inappropriate and impossible in practice.

Action brought on 16 January 2012 — Fomanu v OHIM (Qualität hat Zukunft)

(Case T-22/12)

(2012/C 80/37)

Language of the case: German

Parties

Applicant: Fomanu AG (Neustadt a.d. Waldnaab, Germany) (represented by T. Raible)

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

Form of order sought

The applicant claims that the Court should:

— annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 27 October 2011 in Case R 1518/2011-1;

— order OHIM to pay the costs of the these proceedings and those incurred before the Board of Appeal.

Pleas in law and main arguments

Community trade mark concerned: Word mark 'Qualität hat Zukunft' for goods and services in Classes 9, 16 and 40.

Decision of the Examiner: Registration refused.

Decision of the Board of Appeal: Appeal dismissed.

Pleas in law: Infringement of Article 7(1)(b) of Regulation No 207/2009, since the Community trade mark concerned is distinctive.

Action brought on 20 January 2012 — PT Musim Mas v Council

(Case T-26/12)

(2012/C 80/38)

Language of the case: English

Parties

Applicant: PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) (Medan, Indonesia) (represented by: D. Luff, lawyer)

Defendant: Council of the European Union

Form of order sought

— Annul Articles 1 and 2 of Council implementing Regulation (EU) No 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (OJ L 293, 11.11.2011, p. 1) (hereafter referred to as 'the contested regulation'), in so far as it applies to the applicant;

— Order the defendant to pay the applicant's costs.

Pleas in law and main arguments

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

1. First plea in law, alleging

   — that the General Court has jurisdiction to review Articles 1 and 2 of the contested regulation and their conformity with the Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] (hereafter referred to as 'the basic Regulation') and the general principles of European law.

2. Second plea in law, alleging

   — that the Council violated Article 2(10)(i) of the basic Regulation in that:

     (a) it committed a manifest error in the assessment of facts and a misuse of powers by denying the existence of a 'single economic entity' between the applicant and its related sales subsidiary in Singapore. During its investigation, the Commission deliberately ignored the facts put forward by the applicant concerning related companies;

(b) the Council did not provide sufficient evidence that the conditions of Article 2(10)(i) of the basic Regulation are met. It also committed a misuse of powers and a manifest error of assessment in the application of art 2(10)(i) of the basic Regulation by relying on incorrect or misinterpreted facts in order to establish that the conditions of the application of article 2(10)(i) of the basic Regulation were met. The Council ignored the facts that the applicant provided to the Commission, which the Commission verified, and which it did not rebut during any of the stages of the investigation procedure.

3. Third plea in law, alleging

— that the Council violated first paragraph of Article 2(10) of the basic Regulation, since:

(a) it did not carry out a fair comparison between the export price and the normal value. It did not sufficiently demonstrate the differences in factors affecting prices and price comparability. By contrast with existing case law, it did not establish asymmetry between the normal value and the export price, in the absence of adjustment for commissions paid. The Council ignored the information and evidence provided in the applicant's Questionnaire Response and during its verification visits, which established that ICOF S also handles domestic sales. It failed to sufficiently indicate the reasons why it did not take that information and evidence into account. In doing so, the Council committed a manifest error in the assessment of facts and a misuse of powers. It did not sufficiently motivate the need for an adjustment and the latter is discriminatory towards the applicant,

(b) the Council did not avoid duplication in the deduction of profits from the export price. The Council deducted a first hypothetical margin of 5 % for ICOF E's profits, in application of Article 2(9) of the basic Regulation and a second hypothetical margin of 5 % for ICOF S' profits, thereby deducting an unreasonable total hypothetical margin of 10 % for an intra-group sales operation. This is obviously contrary to the facts and the practice for this type of business operations. The Commission, as investigative authority, should have known this. The Council therefore committed a manifest error in the assessment of facts regarding the intra-group profits and it made a wrong, discriminatory and unreasonable application of Article 2(10) of the basic Regulation.

4. Fourth plea in law, alleging

— that the Council in its assessment of the applicant's situation violated the principle of sound administration. It ignored information, evidence and arguments provided to the Commission during the investigation. Instead, the Council relied on formal invoices, commissions paid and contracts taken out of their context in order to artificially inflate the applicant's dumping margin. The Commission and Council should have exercised better diligence and a more rigorous analysis in reaching their conclusions.

5. Fifth plea in law, alleging

— that the contested regulation was adopted in violation of the principles of equality and non-discrimination. By applying an adjustment to the applicant's export price, the Council created an asymmetry between the export price and the normal value for the sole reason of the applicant's corporate and tax structure. Furthermore, the applicant suffered from a double deduction of a hypothetical profit margin by reason of that structure. Both situations are discriminatory against the applicant in relation to the other investigated companies, which sustain similar costs that have not been subject to adjustments.

([1]) OJ L 343, 22.12.2009, p. 51

Action brought on 17 January 2012 — Bauer v OHIM — BenQ Materials (Daxon)

(Case T-29/12)

(2012/C 80/39)

Language in which the application was lodged: German

Parties

Applicant: Erika Bauer (Schaufling, Germany) (represented by: A. Merz, lawyer)

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

Other party to the proceedings before the Board of Appeal: BenQ Materials Corp. (Gueishan Taoyuan, Taiwan)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 9 November 2011 in Case R 2191/2010-2 in its entirety;

— order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: BenQ Materials Corp.

Community trade mark concerned: the word mark 'Daxon' for goods in Classes 3, 5 and 10

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

Mark or sign cited in opposition: the word mark 'DALTON' for goods and services in Classes 3, 5, 18, 25, 35, 41 and 44

Decision of the Opposition Division: rejection of the opposition

Decision of the Board of Appeal: dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Regulation No 207/2009 as there is a likelihood of confusion between the marks at issue.

Action brought on 23 January 2012 — Piotrowski v OHIM (MEDIGYM)

(Case T-33/12)

(2012/C 80/40)

Language of the case: German

Parties

Applicant: Elke Piotrowski (Viernheim, Germany) (represented by J. Albrecht, lawyer)

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

Form of order sought

The applicant claims that the Court should:

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 18 November 2011 in Case R 734/2011-4;

— order the defendant to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: the word mark 'MEDIGYM' for goods in Class 10

Decision of the Examiner: the application was rejected

Decision of the Board of Appeal: the appeal was dismissed

Pleas in law: Infringement of Article 75 of Regulation No 207/2009 as the Board of Appeal's decision was based on reasons on which the applicant had had no opportunity to present her comments and infringement of Article 7(1)(b) and (c) of Regulation No 207/2009 as the Community trade mark at issue was refused protection pursuant to Article 154(3) and Article 37(1) of Regulation No 207/2009 even though the mark was not ineligible for registration either under Article 7(1)(b) or Article 7(1)(c) of Regulation No 207/2009

Action brought on 25 January 2012 — Herbacin cosmetic v OHIM — Laboratoire Garnier (HERBA SHINE)

(Case T-34/12)

(2012/C 80/41)

Language in which the application was lodged: German

Parties

Applicant: Herbacin cosmetic GmbH (Wutha-Farnroda, Germany) (represented by: J. Eberhardt, lawyer)

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

Other party to the proceedings before the Board of Appeal: Laboratoire Garnier et Cie (Paris, France)

Form of order sought

The applicant claims that the Court should:

— annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 November 2011 in Case R 2255/2010-1;

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Laboratoire Garnier et Cie

Community trade mark concerned: the word mark 'HERBA SHINE' for goods in Class 3

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

Mark or sign cited in opposition: the national and Community word mark and international registration 'HERBACIN' for goods in Class 3

Decision of the Opposition Division: the opposition was upheld

Decision of the Board of Appeal: the appeal was upheld

Pleas in law: Infringement of the first sentence of Article 42(2) of Regulation No 207/2009 in that, at the time of the first-instance opposition decision, an effective request for proof of use on the part of the applicant no longer existed; infringement of point (b) of the second sentence of Article 15(1) of Regulation No 207/2009 in that the Board of Appeal of OHIM erred in law in disregarding considerable export turnover under the opposing mark 'HERBACIN'; and infringement of the first sentence of Article 15(1) of Regulation No 207/2009 in that the proof of use submitted as regards customers within the Community was incorrectly assessed.

Action brought on 20 January 2012 — Athens Resort Casino v Commission

(Case T-36/12)

(2012/C 80/42)

Language of the case: English

Parties

Applicant: Athens Resort Casino AE Symmetochon (Marrousi, Greece) (represented by: N. Niejahr, Q. Azau, F. Spyropoulos, I. Dryllerakis and K. Spyropoulos, lawyers and F. Carlin, Barrister)

Defendant: European Commission

Form of order sought

— annul the Commission Decision 2011/716/EU of 24 May 2011 on State aid to certain Greek casinos C 16/10 (ex NN 22/10, ex CP 318/09) implemented by the Hellenic Republic (OJ L 285, 1.11.2011, p. 25) (hereafter referred to as 'the contested decision'); or

— in the alternative, annul the contested decision to the extent it applies to the applicant; or

— further in the alternative, annul the contested decision insofar as it orders the recovery of amounts from the applicant; and

— order the defendant to pay its own costs and the applicant's costs incurred in connection with these proceedings.

Pleas in law and main arguments

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

1. First plea in law, alleging that

   — the defendant violated Article 107(1) TFEU by determining that the contested decision constituted an aid measure by:

     (a) finding that the applicant benefited from an economic advantage in the form of a '*fiscal discrimination*' in the amount of 7,20 euros (EUR) per ticket;

     (b) finding that the measure involved forgone State resources;

     (c) considering that the measure was selective in favour of the applicant;

     (d) concluding that the measure distorted competition and had an effect on trade between Member States.

2. Second plea in law, alleging

   — that the defendant violated Article 296 TFEU by failing to provide adequate reasoning to enable the applicant to understand and the General Court to review the reasoning based on which it found that the applicant benefited from a selective advantage, that any such advantage involved forgone State revenues and would be liable to distort competition and affect trade between Member States.

3. Third plea in law, alleging

   — that in the event that the Court finds that incompatible aid had been granted to the applicant, the Court should annul the contested decision, insofar as it orders recovery of amounts from the applicant, since that recovery would violate:

     (a) Article 14(1) first sentence of Regulation 659/1999 ([1]), pursuant to which recovery shall relate to the aid received by the beneficiary, since the defendant failed to correctly quantify in the contested decision the amount of aid that the applicant may have received;

     (b) Article 14(1) second sentence of Regulation 659/1999, since recovery in this case infringes general principles of EU law, namely: the principle of legitimate expectations; the principle of legal certainty; and the principle of proportionality.

([1]) Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art. 108) of the EC Treaty (OJ L 83, 27.03.1999, p. 1)

Action brought on 30 January 2012 — Hamcho and Hamcho International v Council

(Case T-43/12)

(2012/C 80/43)

Language of the case: French

Parties

Applicants: Mohamad Hamcho (Damascus, Syria) and Hamcho International (Damascus) (represented by: M. Ponsard, lawyer)

Defendant: Council of the European Union

Form of order sought

— allow the present action to be dealt with under an expedited procedure;

— annul, in so far as these measures relate to the applicants:

— Decision 2011/273/CFSP, as supplemented and amended to date, including all the decisions cited at point 17 above;

— Regulation No 442/2011, as supplemented and amended to date, including all the regulations cited at point 18 above;

— Decision 2011/782/CFSP, as supplemented and amended to date, in particular by Implementing Decision 2012/37/CFSP, in accordance with point 19 above;

— Regulation No 36/2012, as supplemented and amended to date, in particular by Implementing Regulation No 55/2012, in accordance with point 20 above;

— annul the Council's decision contained in its letter to the applicants of 21 December 2011, in so far as it maintains their inclusion in the lists at issue;

— order the Council to pay the costs.

Pleas in law and main arguments

In support of the action, the applicants rely on two pleas in law which are essentially identical or similar to those relied on in Case T-653/11 *Jaber* v *Council*.

Order of the General Court of 6 February 2012 — Colegio Oficial de Farmacéuticos de Valencia v Commission

(Case T-337/09) [1]

(2012/C 80/44)

Language of the case: Spanish

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

[1] OJ C 256, 24.10.2009.

Order of the General Court of 18 January 2012 — Ghost Brand v OHIM — Procter & Gamble International Operations (GHOST)

(Case T-298/11) [1]

(2012/C 80/45)

Language of the case: English

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

[1] OJ C 238, 13.8.2011.

Order of the General Court of 18 January 2012 — Otto v OHIM — Nalsani (TOTTO)

(Case T-300/11) [1]

(2012/C 80/46)

Language of the case: Spanish

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

[1] OJ C 238, 13.8.2011.

Order of the General Court of 18 January 2012 — Stichting Greenpeace Nederland and PAN Europe v Commission

(Case T-362/11) [1]

(2012/C 80/47)

Language of the case: English

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

[1] OJ C 252, 27.8.2011.

Order of the General Court of 26 January 2012 — Symfiliosi v FRA

(Case T-397/11) [1]

(2012/C 80/48)

Language of the case: English

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

[1] OJ C 282, 24.9.2011.

EN

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