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(Notices)

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COURT OF JUSTICE OF THE EUROPEAN UNION

(2012/C 98/01)

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

OJ C 89, 24.3.2012

Past publications

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These texts are available on:

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

V

(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Judgment of the Court (Third Chamber) of 16 February 2012 — Council of the European Union (C-191/09 P), European Commission (C-200/09 P) v Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT

(Joined Cases C-191/09 P and C-200/09 P) [1]

(Appeals — Anti-dumping duties — Regulation (EC) No 954/2006 — Imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine — Regulation (EC) No 384/96 — Article 2(10)(i), Article 3(2), (3) and (5) to (7), Article 18(3) and Article 19(3) — Calculation of the normal value and of the injury — 'Single economic entity' — Rights of the defence — No statement of reasons)

(2012/C 98/02)

Language of the case: English

Parties

Appellants: Council of the European Union (represented by: J.-P. Hix and B. Driessen, Agents, and G. Berrisch, Rechtsanwalt), European Commission (represented by: H.van Vliet and C. Clyne, Agents)

Other parties to the proceedings: Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT), formerly Nikopolsky Seamless Tubes Plant 'Niko Tube' ZAT, Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT), formerly Nizhnedneprovsky Tube-Rolling Plant VAT, European Commission (represented by: P. Vander Schueren, avocat, N. Mizulin, Solicitor)

Re:

Appeal against the judgment of the Court of First Instance (Second Chamber) of 10 March 2009 in Case T-249/06 *Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT)* v *Council of the European Union*, annulling Article 1 of Council Regulation (EC) No 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, and repealing Regulations (EC) No 2320/97 and (EC) No 348/2000 (OJ 2006 L 175, p. 4)

Operative part of the judgment

The Court:

1. *Dismisses the main appeal of the Council of the European Union;*
2. *Dismisses the main appeal of the European Commission;*
3. *Dismisses the cross-appeal of Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT);*
4. *Orders the parties to bear their own costs.*

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[1] OJ C 193, 15.8.2009.

Judgment of the Court (Grand Chamber) of 14 February 2012 (reference for a preliminary ruling from the Bundesverwaltungsgericht — Germany) — Flachglas Torgau GmbH v Federal Republic of Germany

(Case C-204/09) [1]

(Reference for a preliminary ruling — Aarhus Convention — Directive 2003/4/EC — Access to environmental information — Bodies or institutions acting in a legislative capacity — Confidentiality of the proceedings of public authorities — Condition that the confidentiality must be provided for by law)

(2012/C 98/03)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Applicant: Flachglas Torgau GmbH

Defendant: Federal Republic of Germany

Re:

Reference for a preliminary ruling — Bundesverwaltungsgericht — Interpretation of the second sentence of Article 2(2) and indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) — National legislation exempting the supreme federal authorities from the obligation to provide information where they act in the context of the legislative process and providing generally that a request for information must be refused where disclosure of the information will adversely affect the confidentiality of proceedings — Limits of the power of the Member States to exclude bodies acting in a legislative capacity from the definition of 'public authority' under Directive 2003/4/EC — Conditions of application of the exception for the confidentiality of proceedings

Operative part of the judgment

1. *The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and that option is not subject to the conditions set out in the second sentence of the second subparagraph of Article 2(2) of that directive.*

2. *The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended.*

3. *Indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine.*

([1]) OJ C 193, 15.8.2009.

Judgment of the Court (Grand Chamber) of 14 February 2012 (reference for a preliminary ruling from the Krajský soud v Brně — Czech Republic) — Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže

(Case C-17/10) ([1])

(Competition — Cartel, in the territory of a Member State, which commenced before the accession of that State to the European Union — Cartel of international scope having effects in the territory of the Union and the European Economic Area — Article 81 EC and Article 53 of the EEA Agreement — Prosecution and sanction of the infringement for the period prior to the date of accession and the period following that date — Fines — Delimitation of the powers of the Commission and those of the national competition authorities — Imposition of fines by the Commission and by the national competition authority — Ne bis in idem principle — Regulation (EC) No 1/2003 — Articles 3(1) and 11(6) — Consequences of the accession of a new Member State to the Union)

(2012/C 98/04)

Language of the case: Czech

Referring court

Krajský soud v Brně

Parties to the main proceedings

Applicants: Toshiba Corporation,T&D Holding, formerly Areva T&D Holding SA, Alstom Grid SAS, formerly Areva T&D SAS, Alstom Grid AG, formerly Areva T&D AG, Mitsubishi Electric Corp., Alstom, Fuji Electric Holdings Co. Ltd, Fuji Electric Systems Co. Ltd, Siemens Transmission & Distribution SA, Siemens AG Österreich, VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens AG, Hitachi Ltd, Hitachi Europe Ltd, Japan AE Power Systems Corp., Nuova Magrini Galileo SpA

Defendant: Úřad pro ochranu hospodářské soutěže

Re:

Reference for a preliminary ruling — Krajský soud v Brně — Interpretation of Article 81 EC, of Article 50 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1), of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), and in particular Arts. 3(1) and 11(6) thereof, and of point 51 of the of the Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) — Cartel in the territory of a Member State, which commenced before that State's accession to the European Union and ended after that event — Imposition of fines by the Commission and by the national competition authority — Competence of the national authority to sanction the same conduct with regard to the period before the accession — *Non bis in idem* principle

Operative part of the judgment

1. *The provisions of Article 81 EC and Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects, in the territory of a Member State which acceded to the Union on 1 May 2004, during periods prior to that date.*

2. *The opening by the European Commission of a proceeding against a cartel under Chapter III of Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the European Union.*

   The ne bis in idem principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects.

([1]) OJ C 100, 17.4.2010.

Judgment of the Court (Fourth Chamber) of 16 February 2012 (references for a preliminary ruling from the Corte Suprema di Cassazione — Italy) — Criminal proceedings against Marcello Costa (C-72/10), Ugo Cifone (C-77/10)

(Joined Cases C-72/10 and C-77/10) ([1])

(Freedom of establishment — Freedom to provide services — Betting and gaming — Collection of bets on sporting events — Licensing requirement — Consequences of an infringement of European Union law in the awarding of licences — Award of 16 300 additional licences — Principle of equal treatment and the obligation of transparency — Principle of legal certainty — Protection of holders of earlier licences — National legislation — Mandatory minimum distances between betting outlets — Whether permissible — Cross-border activities analogous to those engaged in under the licence — Prohibition under national legislation — Whether permissible)

(2012/C 98/05)

Language of the case: Italian

Referring court

Corte Suprema di Cassazione

Parties to the main proceedings

Marcello Costa (C-72/10), Ugo Cifone (C-77/10)

Re:

Reference for a preliminary ruling — Corte Suprema di Cassazione — Freedom of movement of persons — Freedom of establishment — Freedom to provide services — Activity consisting in the collection of bets — National legislation making the exercise of that activity conditional upon police authorisation and a licence — Protection accorded to persons who obtained authorisation and licences under award procedures which unlawfully excluded other operators from the same sector — Whether compatible with Articles 43 EC and 49 EC

Operative part of the judgment

1. *Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of European Union law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.*

2. *Articles 43 EC and 49 EC must be interpreted as precluding the imposition of penalties for engaging in the organised activity of collecting bets without a licence or police authorisation on persons who are linked to an operator which was excluded, in breach of European Union law, from an earlier tendering procedure, even following the new tendering procedure intended to remedy that breach of European Union law, in so far as that tendering procedure and the subsequent award of new licences have not in fact remedied the exclusion of that operator from the earlier tendering procedure.*

3. *It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court and, in particular, the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(2)(a) and (3) of the model contract, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.*

([1]) OJ C 100, 17.4.2010.

Judgment of the Court (Fourth Chamber) of 16 February 2012 (reference for a preliminary ruling from the Cour constitutionnelle (formerly Cour d'arbitrage) (Belgium)) — Marie-Noëlle Solvay and Others v Région wallonne

(Case C-182/10) [1]

(Assessment of the effects of projects on the environment — Concept of legislative act — Force and effect of the guidance in the Aarhus Convention Implementation Guide — Consent for a project given without an appropriate assessment of its effects on the environment — Access to justice in environmental matters — Extent of the right to a review procedure — Habitats Directive — Plan or project affecting the integrity of the site — Imperative reason of overriding public interest)

(2012/C 98/06)

Language of the case: French

Referring court

Cour constitutionnelle (formerly Cour d'arbitrage)

Parties to the main proceedings

Applicants: Marie-Noëlle Solvay, Le Poumon vert de la Hulpe ASBL, Jean-Marie Solvay de la Hulpe, Alix Walsh, Association des Riverains et Habitants des Communes Proches de l'Aéroport B.S.C.A. (Brussels South Charleroi Airport) ASBL — A.R.A.Ch, Grégoire Stassin, André Gilliard, Paul Fastrez, Henriette Fastrez, Gouvernement flamand, Inter-Environnement Wallonie ASBL, Nicole Laloux, François Gevers, Annabelle Denoël-Gevers, Marc Traversin, Joseph Melard, Chantal Michiels, Thierry Regout, René Canfin, Georges Lahaye, Jeanine Postelmans, Christophe Dehousse, Christine Lahaye, Jean-Marc Lesoinne, Jacques Teheux, Anne-Marie Larock, Bernadette Mestdag, Jean-François Seraffin, Françoise Mahoux, Ferdinand Wallraf, Mariel Jeanne, Agnès Fortemps, Georges Seraffin, Jeannine Melen, Groupement Cerexhe-Heuseux/Beaufays ASBL, Action et Défense de l'Environnement de la vallée de la Senne et de ses affluents ASBL, Réserves naturelles RNOB ASBL, Stéphane Banneux, Zénon Darquenne, Philippe Daras, Bernard Croiselet, Bernard Page, Intercommunale du Brabant Wallon SCRL, Les amis de la Forêt de Soignes ASBL, Jacques Solvay de la Hulpe, La Hulpe, Notre village ASBL, André Philips, Charleroi South Air Pur ASBL, Pierre Grymonprez, Sartau SA, Philippe Grisard de la Rochette, Antoine Boxus, Pierre Deneye, Jean-Pierre Olivier, Paul Thiry, Willy Roua, Guido Durlet, Agrebois SA, Yves de la Court

Defendant: Région wallonne

Intervening parties: Infrabel SA, Codic Belgique SA, Federal Express European Services Inc. (FEDEX), Société wallonne des aéroports (Sowaer), Société régionale wallonne du transport (SRWT), Société Intercommunale du Brabant wallon (IBW)

Re:

Reference for a preliminary ruling — Cour constitutionnelle (formerly Cour d'arbitrage) — Interpretation of Articles 2(2), 3(9), 6(9) and 9(2), (3) and (4) of the Aarhus Convention on access to information, public participation in the decision-making process and access to justice in environmental matters concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) — Interpretation of Articles 1(5), 9(1) and 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) — Interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) — Concept of 'public authority' — Value and scope of the guidance given in the Aarhus Convention Implementation Guide — Whether legislative acts such as town-planning or environmental consents granted by means of decree by a regional legislature are outside the scope of the Aarhus Convention — Whether a procedure leading to the granting of consents which can be challenged only by an action brought before the Cour constitutionnelle and the ordinary courts is compatible with the Convention and with Community law — Project authorised without an appropriate environmental impact assessment

Operative part of the judgment

1. *For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention.*

2. *Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.*

3. *Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:*

   — *when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and*

   — *if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.*

4. *Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.*

5. *Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.*

6. *Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.*

(1) OJ C 179, 3.7.2010.

Judgment of the Court (Third Chamber) of 16 February 2012 (reference for a preliminary ruling from the Rechtbank van eerste aanleg te Brussel — Belgium) — Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) v Netlog NV

(Case C-360/10) (1)

(Information society — Copyright — Internet — Hosting service provider — Processing of information stored on an online social networking platform — Introducing a system for filtering that information in order to prevent files being made available which infringe copyright — No general obligation to monitor stored information)

(2012/C 98/07)

Language of the case: Dutch

Referring court

Rechtbank van eerste aanleg te Brussel

Parties to the main proceedings

Applicant: Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)

Defendant: Netlog NV

Re:

Reference for a preliminary ruling — Rechtbank van eerste aanleg te Brussel — Interpretation of Directives: — 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), — 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45), — 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), — 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1), — 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), — Processing of data conveyed over the Internet — Introduction by an online hosting service provider of a system for filtering electronic communications, *in abstracto* and as a preventive measure, in order to identify consumers deemed to use files infringing a copyright or related right — Application of its own motion by the national court of the principle of proportionality — European Convention for the Protection of Human Rights and Fundamental Freedoms — Right to respect for private life — Right to freedom of expression

Operative part of the judgment

Directives:

— *2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);*

— *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; and*

— *2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,*

read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:

— *information which is stored on its servers by its service users;*

— *which applies indiscriminately to all of those users;*

— *as a preventative measure;*

— *exclusively at its expense; and*

— *for an unlimited period,*

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

(1) OJ C 288, 23.10.2010.

Judgment of the Court (Fourth Chamber) of 16 February 2012 (reference for a preliminary ruling from the Naczelny Sąd Administracyjny — Poland) — Pak-Holdco sp. z o.o. v Dyrektor Izby Skarbowej w Poznaniu,

(Case C-372/10) (1)

(Taxation — Indirect taxes on the raising of capital — Capital duty levied on capital companies — Obligation on a Member State to take account of directives which were no longer in force at the time of that State's accession — Exclusion, from the amount on which capital duty is charged, of the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty)

(2012/C 98/08)

Language of the case: Polish

Referring court

Naczelny Sąd Administracyjny

Parties to the main proceedings

Appellant: Pak-Holdco sp. z o.o.

Respondent: Dyrektor Izby Skarbowej w Poznaniu,

Re:

Reference for a preliminary ruling — Naczelny Sąd Administracyjny — Interpretation of Articles 5(3), first indent, and 7(1) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412) and of Council Directive 73/79/EEC of 9 April 1973 (OJ 1973 L 103, p. 13) and Council Directive 73/80/EEC of 9 April 1973 (OJ 1973 L 103, p. 15) amending Directive 69/335/EEC — Capital duty levied on capital companies — Obligation on a Member State to take account of directives which were no longer in force at the time of that State's accession

Operative part of the judgment

1. *In the case of a State such as the Republic of Poland, which acceded to the European Union on 1 May 2004, in the absence of derogating provisions in the Act of Accession of that State to the European Union or in any other European Union document, Article 7(1) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted to mean that the mandatory exemption provided for in that provision applies only to those transactions coming within the scope of that directive, as amended, which, on 1 July 1984, were exempted, in that State, from capital duty or were subject to that duty at a reduced rate of 0,50% or less.*

2. *The first indent of Article 5(3) of Directive 69/335, which excludes 'the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty' from the amount on which duty is charged, must be interpreted to mean that it applies irrespective of whether the assets in question are assets of the company which has had an increase in capital or assets coming from another company which have increased that capital.*

([1]) OJ C 288, 23.10.2010.

Judgment of the Court (First Chamber) of 16 February 2012 (reference for a preliminary ruling from the Juzgado de lo Mercantil No 1 de Alicante — Spain) — Celaya Emparanza y Galdos Internacional SA v Proyectos Integrales de Balizamientos SL

(Case C-488/10) ([1])

(Regulation (EC) No 6/2002 — Article 19(1) — Community designs — Infringement or threatened infringement — Definition of 'third parties')

(2012/C 98/09)

Language of the case: Spanish

Referring court

Juzgado de lo Mercantil No 1 de Alicante

Parties to the main proceedings

Applicant: Celaya Emparanza y Galdos Internacional SA

Defendant: Proyectos Integrales de Balizamiento SL

Re:

Reference for a preliminary ruling — Juzgado de lo Mercantil No 1 de Alicante — Interpretation of Article 19(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) — Infringement or threatened infringement — Concept of third parties

Operative part of the judgment

1. *Article 19(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted as meaning that, in a dispute relating to infringement of the exclusive right conferred by a registered Community design, the right to prevent use by third parties of the design extends to any third party who uses a design that does not produce on informed users a different overall impression, including the third party holder of a later registered Community design.*

2. *The answer to the first question is unconnected with the intention or conduct of the third party.*

([1]) OJ C 346, 18.12.2010.

Judgment of the Court (Third Chamber) of 16 February 2012 (reference for a preliminary ruling from the Hoge Raad der Nederlanden — Netherlands) — T.G. van Laarhoven v Staatssecretaris van Financiën

(Case C-594/10) ([1])

(Sixth VAT Directive — Right to deduct input tax — Limitation — Use of goods forming part of the assets of a business for the private use of the taxable person — Fiscal treatment of private use of goods that are assets of the business)

(2012/C 98/10)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applicant: T.G. van Laarhoven

Defendant: Staatssecretaris van Financiën

Re:

Reference for a preliminary ruling — Hoge Raad der Nederlanden — Interpretation of Article 17(6) of Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) — Deduction of input tax — Exclusion of the right to deduct — National rules limiting deduction of VAT for vehicles used by a businessman for both private and professional purposes

Operative part of the judgment

Article 6(2)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, read together with Article 11A(1)(c) of the same directive, must be interpreted as precluding national fiscal legislation which initially authorises a taxable person whose passenger vehicles are used for both business and private purposes to deduct input value added tax immediately and in full, but which subsequently provides, as regards private use of those vehicles, for annual taxation based — for determining the taxable amount of value added tax owed in a given financial year — on a flat-rate method of calculating expenses relating to such use which does not take account on a proportional basis of the actual extent of that private use.

([1]) OJ C 80, 12.3.2011.

Judgment of the Court (Eighth Chamber) of 16 February 2012 (reference for a preliminary ruling from the Supremo Tribunal Administrativo — Portugal) — Varzim Sol — Turismo, Jogo e Animação SA v Fazenda Pública

(Case C-25/11) ([1])

(Taxation — Sixth VAT Directive — Deduction of input tax — Article 17(2) and (5) and Article 19 — 'Subsidies' used for the purchase of goods and services — Restriction of the right to deduct)

(2012/C 98/11)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Applicant: Varzim Sol — Turismo, Jogo e Animação SA

Defendant: Fazenda Pública

Re:

Reference for a preliminary ruling — Supremo Tribunal Administrativo — Interpretation of Article 17(2) and (5) and Article 19 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) — Deduction of input tax — Restriction of the right to deduct

Operative part of the judgment

Article 17(2) and (5) and Article 19 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, must be interpreted as precluding a Member State, where it authorises mixed taxable persons to make the deduction provided for in those provisions on the basis of the use of all or part of the goods and services, from calculating the deductible amount, for sectors in which such taxable persons carry out taxable transactions only, by including untaxed 'subsidies' in the denominator of the fraction used to determine the deductible proportion.

([1]) OJ C 103, 2.4.2011.

Judgment of the Court (Second Chamber) of 16 February 2012 (reference for a preliminary ruling from the Administrativen sad Varna (Bulgaria)) — Eon Aset Menidjmunt v Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

(Case C-118/11) ([1])

(VAT — Directive 2006/112/EC — Articles 168 and 176 — Right of deduction — Condition relating to use of goods and services for the purposes of taxed transactions — Origin of the right to deduct — Motor vehicle leasing contract — Financial leasing contract — Vehicle used by employer to transport free of charge an employee between his home and his workplace)

(2012/C 98/12)

Language of the case: Bulgarian

Referring court

Administrativen sad Varna

Parties to the main proceedings

Applicant: Eon Aset Menidjmunt

Defendant: Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

Re:

Reference for a preliminary ruling — Administrativen sad Varna — Interpretation of Articles 168, 173 and 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) — Restrictions on the right to deduct VAT — National legislation laying down, as a mandatory condition for recognition of the right to deduct VAT, that goods or services be used for the purposes of an independent economic activity and not providing for a rectification method for cases in which the goods or services are not initially included in the turnover but, subsequent to their acquisition, they are used for the purposes of taxable supplies

Operative part of the judgment

1. *Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that:*

   — *a leased motor vehicle is to be regarded as used for the purposes of the taxable person's taxed transactions if there is a direct and immediate link between the use of that vehicle and the taxable person's economic activity and the time when the right to deduct arises and when it is necessary to take into account the existence of such a link is on the expiry of the period to which each payment relates;*

— *a motor vehicle leased under a financial leasing contract and placed in the category of capital goods is to be regarded as used for the purposes of taxed transactions if the taxable person acting as such acquires that vehicle and allocates it entirely to the assets of his undertaking, input value added tax payable being fully and immediately deductible, and any use of that vehicle for the taxable person's private purposes or for those of his staff or for purposes other than those of his undertaking being treated as a supply of services carried out for consideration.*

2. *Articles 168 and 176 of Directive 2006/112 must be interpreted as not precluding national legislation which provides for the exclusion from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity, provided that goods categorised as capital goods are not allocated to the assets of the undertaking.*

([1]) OJ C 145, 14.5.2011.

Judgment of the Court (Fifth Chamber) of 16 February 2012 (reference for a preliminary ruling from the Landgericht Hamburg (Germany)) — Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG

(Case C-134/11) ([1])

(Directive 90/314/EEC — Package travel, package holidays and package tours — Article 7 — Protection against the risk of insolvency or bankruptcy on the part of the package organiser — Scope — Insolvency of the organiser on account of its fraudulent use of the funds transferred by consumers)

(2012/C 98/13)

Language of the case: German

Referring court

Landgericht Hamburg

Parties to the main proceedings

Applicant: Jürgen Blödel-Pawlik

Defendant: HanseMerkur Reiseversicherung AG

Re:

Reference for a preliminary ruling — Landgericht Hamburg — Interpretation of Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59) — Protection against the risk of insolvency or bankruptcy of the organiser — Insolvency of the organiser on account of misappropriation of the funds transferred by consumers — Applicability of Directive 90/314/EEC

Operative part of the judgment

Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its own fraudulent conduct.

([1]) OJ C 179, 18.6.2011.

Reference for a preliminary ruling from the Landgericht München I (Germany) lodged on 9 December 2011 — Karl Berger v Freistaat Bayern

(Case C-636/11)

(2012/C 98/14)

Language of the case: German

Referring court

Landgericht München I

Parties to the main proceedings

Applicant: Karl Berger

Defendant: Freistaat Bayern

Questions referred

1. Does Article 10 of Regulation (EC) No 178/2002 of the European Parliament and of the Council ([1]) preclude rules of national law under which the public may be informed, and may be given the name of the food or animal feed product and of the food or animal feed business under the name or corporate name of which the food or animal feed product was produced or handled or placed on the market, if food that is not injurious to health but is unfit for consumption, particularly food that is nauseating, is or has been placed on the market in significant quantities or if, because of its particular nature, such food has been placed on the market only in small quantities but over a lengthy period of time?

2. If Question 1 is answered in the affirmative: Would the answer to Question 1 be different if the situation at issue arose prior to 1 January 2007, but at a time at which national law had already been brought into line with Regulation No 178/2002?

([1]) Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 3 January 2012 — Trianon Productie BV, other party: Revillon Chocolatier SAS

(Case C-2/12)

(2012/C 98/15)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden (Netherlands)

Parties to the main proceedings

Appellant: Trianon Productie BV

Respondent: Revillon Chocolatier SAS

Questions referred

1. As regards the grounds for refusal or invalidity in Article 3(1)(e)(iii) of Directive 89/104/EEC, [1] as codified in Directive 2008/95 [2] — according to which (shape) marks cannot consist exclusively of a shape which gives a substantial value to the goods — do these concern the reason (or reasons) for the purchasing decision of the relevant public?

2. Is a shape a 'shape which gives substantial value to the goods' within the meaning of the provision referred to above

   (a) only if that shape must be regarded as the main or overriding value in comparison with other values (such as, in the case of foods, their taste or substance); or

   (b) also where the goods have other values, which must be regarded as equally substantial, in addition to that main or overriding value?

3. Is the answer to Question 2 to be determined on the basis of the view of the majority of the target public, or can the courts rule that the view of just part of that public is sufficient for the value concerned to be deemed 'substantial' within the meaning of the provision referred to above?

4. In so far as the answer to Question 3 falls to be answered as indicated in the latter part of that question, what requirement is to be applied as regards the size of the relevant part of the public?

[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).

[2] OJ 2008 L 299, p. 25.

Reference for a preliminary ruling from the Juzgado de lo Social de Lleida (Spain) lodged on 3 January 2012 — Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)

(Case C-5/12)

(2012/C 98/16)

Language of the case: Spanish

Referring court

Juzgado de lo Social de Lleida

Parties to the main proceedings

Applicant: Marc Betriu Montull

Defendant: Instituto Nacional de la Seguridad Social (INSS)

Questions referred

1. Does a national law, specifically Article 48(4) of the Estatuto de los Trabajadores, which, in the case of childbirth, recognises employed mothers as holders of a primary and separate right to maternity leave once the six week period following the birth has elapsed, except in cases where the mother's health is at risk, and employed fathers as holders of a secondary right, which can be enjoyed only where the mother also has the status of an employed person and elects for the father to take a designated part of that leave, contravene Council Directive 76/207/EEC [1] and Council Directive 96/34/EC? [2]

2. Does a national law, specifically Article 48(4) of the Estatuto de los Trabajadores, which, in the case of childbirth, recognises the primary right of mothers, but not of fathers, to suspend their contract of employment and to return to the same job, paid for by the social security system, even once the six week period following the birth has elapsed, except in cases where the mother's health is at risk, so that the taking of leave by a male employee is dependent on the child's mother also having the status of an employed person, contravene the principle of equal treatment, which prohibits discrimination on grounds of sex?

3. Does a national law, specifically Article 48(4) of the Estatuto de los Trabajadores, which recognises employed fathers as holders of a primary right to suspend their contract of employment and to return to the same job, paid for by the social security system, when they adopt a child but, by contrast, when they have a child by birth, does not give employed fathers their own separate right, independent of that of the mother, to suspend the contract, recognising only a right deriving from that of the mother, contravene the principle of equal treatment, which prohibits discrimination?

[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 1976 L 39, p. 40) (Spanish special edition: Chapter 5, Volume 2 p. 70).

[2] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4).

Reference for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Netherlands), lodged on 4 January 2012 — Maatschap L.A. and Others v Staatssecretaris van Economische Zaken, Landbouw en Innovatie

(Case C-11/12)

(2012/C 98/17)

Language of the case: Dutch

Referring court

College van Beroep voor het bedrijfsleven

Parties to the main proceedings

Applicants: Maatschap L.A., D.A.B. Langestraat, P. Langestraat-Troost

Defendant: Staatssecretaris van Economische Zaken, Landbouw en Innovatie

Question referred

Must Article 23(1) of Regulation (EC) No 73/2009 [1] be interpreted as imposing a reduction or an exclusion on the farmer who has submitted an aid application, such as that which would be imposed, in respect of established non-compliance, on the actual offender, to whom or by whom the land was transferred, if that offender had himself submitted the application? Or does the provision mean solely that the established non-compliance is to be attributed to the person submitting the aid application, but that, in the determination of the (level of the) reduction or exclusion, it is still necessary to establish the extent to which there has been negligence, fault or intent on the part of the farmer himself?

[1] Council Regulation of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16).

Reference for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal) lodged on 16 January 2012 — TVI Televisão Independente SA v Fazenda Pública

(Case C-17/12)

(2012/C 98/18)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Applicant: TVI Televisão Independente SA

Defendant: Fazenda Pública

Questions referred

1. Does the screening tax charged by the appellant to the advertisers in its capacity as tax substitute, in accordance with Article 50(1) of Decree-Law 227/2006, come within the concept of VAT taxable amount, within the meaning of Article 11(A)(1)(a) of Directive 77/388/EEC [1] (now Article 79(c) of Council Directive 2006/112/EEC [2] of 28 November 2006) as it constitutes 'the consideration which has been or is to be obtained by the supplier for such supplies'?

2. Does the advertising tax charged by the appellant to the advertisers, in its capacity as tax substitute, and which is recorded in its accounts in a third party account, constitute an amount 'received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which [is] entered in his books in a suspense account' within the meaning of Article 11(A)(3)(c) of Directive 77/388/EEC (now Article 79(c) of Council Directive 2006/112/EEC of 28 November 2006?

3. Consequently, should these amounts charged by the appellant in respect of screening tax be included in the taxable base for the purposes of VAT?

[1] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment — OJ 1977 L 145, p. 1.

[2] 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 Nejvyšší správní soud (Czech Republic) lodged on 16 January 2012 — Město Žamberk v Finanční ředitelství v Hradci Králové

(Case C-18/12)

(2012/C 98/19)

Language of the case: Czech

Referring court

Nejvyšší správní soud

Parties to the main proceedings

Applicant: Město Žamberk

Defendant: Finanční ředitelství v Hradci Králové

Questions referred

1. May non-organised, unsystematic and recreational sporting activities which can be carried on in that manner in an open-air swimming-pool complex (for instance, recreational swimming, recreational playing of ball games, etc.) be regarded as the exercise of sport or physical education within the meaning of Article 132(1)(m) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax? [1]

2. In the event of an affirmative answer to Question 1, is the supply for consideration of access to such an open-air swimming-pool complex, which offers its visitors the above-mentioned opportunity of exercising sporting activities, although alongside other kinds of amusement or recreation, to be regarded as a service closely linked to sport or physical education supplied to persons taking part in sporting or physical education activities within the meaning of that provision of Directive 2006/112/EC, and hence as a service exempted from value added tax in so far as it is supplied by a non-profit-making organisation and the other conditions under that directive are satisfied?

[1] OJ 2006 L 347, p. 1.

Reference for a preliminary ruling from the Tribunal administratif (Luxembourg) lodged on 16 January 2012 — Elodie Giersch, Benjamin Marco Stemper, Julien Taminiaux, Xavier Renaud Hodin and Joëlle Hodin v State of the Grand Duchy of Luxembourg

(Case C-20/12)

(2012/C 98/20)

Language of the case: French

Referring court

Tribunal administratif

Parties to the main proceedings

Applicants: Elodie Giersch, Benjamin Marco Stemper, Julien Taminiaux, Xavier Renaud Hodin and Joëlle Hodin

Defendant: State of the Grand Duchy of Luxembourg

Question referred

In the light of the Community principle of equal treatment set out in Article 7 of Regulation No 1612/68, [1] do the considerations relating to education policy and budgetary policy put forward by the State of Luxembourg, namely seeking to encourage an increase in the proportion of people with a higher education degree, which is currently inadequate compared with other countries as far as the resident population of Luxembourg is concerned, considerations which would be seriously threatened if the State of Luxembourg had to give financial aid for higher education studies to every student, without any connection with the society of the Grand Duchy, to carry out their higher education studies in any country in the world, which would lead to an unreasonable burden on the budget of the State of Luxembourg, constitute considerations, in terms of the Community case-law cited above, which are capable of justifying the difference in treatment resulting from the residence requirement imposed both on Luxembourg nationals and on nationals of other Member States in order to obtain aid for higher education studies?

[1] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. English Special Edition 1968(II), p. 475.

Appeal brought on 16 January 2012 by Abbott Laboratories against the judgment of the General Court (Sixth Chamber) delivered on 15 November 2011 in Case T-363/10 *Abbott Laboratories v Office for Harmonisation in the Internal Market (Trade Marks and Designs)*

(Case C-21/12 P)

(2012/C 98/21)

Language of the case: German

Parties

Appellant: Abbott Laboratories (represented by: R. Niebel and C. Steuer, Rechtsanwälte)

Other party to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

— Set aside the judgment of the General Court of the European Union of 15 November 2011 in Case T-363/10;

— annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 9 June 2010 (Case R 1560/2009-1) relating to application for Community trade mark No 008 448 251 RESTORE;

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

Pleas in law and main arguments

The grounds of the appeal against the decision of the General Court at issue are, in essence, as follows:

1. First, the appellant complains of the General Court's distortion of the facts or of the evidence. The General Court erroneously proceeded on the assumption that it is common knowledge that the word 'restore' has a direct medical meaning. What was undisputed in the proceedings was merely the fact that 'restore' is translated [into German] as '*wiederherstellen*'. A medical connection cannot, however, be detected in that. The fact that the General Court's view is based on the dictionary excerpts produced represents a distortion of the evidence. Those excerpts show that 'restore' does not have any medical meaning *per se*, but that it is a multifaceted concept that can be understood in a variety of ways, depending on the context. That meaning cannot therefore be regarded as a matter of common knowledge and thus as a fact that, exceptionally, does not need to be proved.

2. Second, the appellant alleges infringement of Article 7(1)(c) of Regulation No 207/2009. The General Court erred in law in classifying the trade mark RESTORE as a purely descriptive indication. In order for Article 7(1)(c) of Regulation No 207/2009 to be applied, the sign applied for must be able to serve, in trade, 'to designate' the kind etc. of goods. According to the case-law of the Court of Justice, the descriptive statement must be obvious from the sign applied for and the word itself must be descriptive. That is the case in this instance.

   The verb 'restore' does not in itself provide any indication of the kind, quality or intended purpose of the goods in respect of which registration is sought. The verb 'restore' acquires a descriptive function only in constructions that include one or more nouns (for example, 'restore one's health'). In so far as the assumption is made that a medical connection arises from the circumstances, that is insufficient, according to the case-law of the Court of Justice, as that would require a transfer on the part of the public, in the sense of an effort of interpretation. A meaning associated with medicine can arise only if words such as 'health' are added, which are precisely what are missing in this case. Instead of examining the trade mark applied for (RESTORE) both the Board of Appeal and the General Court examined a trade mark RESTORE SOMEONE'S HEALTH.

3. Third, the appellant alleges infringement of Article 7(1)(b) of Regulation No 207/2009. The Board of Appeal classified the trade mark RESTORE as a sign devoid of any distinctive character, in disregard of the appropriate legal criterion, and thus erred in law by refusing to register the trade mark. According to the appellant, the Board of Appeal and the General Court also took the view that the RESTORE trade mark applied for was devoid of any distinctive character on the grounds of its allegedly descriptive nature. This has already been countered in the submissions made in relation to the second ground of appeal.

   Nor can the judgment be justified on the alternative grounds that concern the lack of any distinctive character (paragraphs 52 to 54 of the judgment). The considerations are a tautological reiteration of the argument that a descriptive trade mark is always devoid of distinctive character. The fact that the public does not expect to find a functional description — even in the form of a single word — on a medical product also suggests the absence of any descriptive character.

4. Fourth, the appellant alleges infringement of the second sentence of Article 75 of Regulation No 207/2009. The Board of Appeal's decision was based, in essence, on dictionary excerpts to which the appellant did not have access and in respect of which the appellant consequently could not be heard. That represents an infringement of the right to a fair hearing, since, according to the case-law of the Court of Justice, a decision may be based only on matters on which the parties have had an opportunity to present their comments. However, according to the case-law of the Court of Justice, the Board of Appeal is under an obligation to communicate, for the purposes of the presentation of comments, those facts which it has assembled of its own motion and which it intends to use as a basis for its decision. In that regard the Board of Appeal failed in one essential respect as far as the proceedings were concerned to produce the dictionary excerpts it had obtained, and thus infringed the right to a fair hearing.

5. Fifth, the appellant alleges breach of the principle of equal treatment. The Board of Appeal disregarded the case-law of the Court of Justice in failing to take into account the existence of earlier registrations and thus its own practice in relation to registration. The appellant does not deny in that regard that that principle is subject to the principle of legality. The mere reference to that principle is not, however, sufficient to override the principle of equal treatment. Instead, it should have been specifically explained why it should be assumed that those earlier registrations were unlawful *per se*.

Reference for a preliminary ruling from the Krajský súd v Prešove (Slovakia) lodged on 17 January 2012 — Katarína Hassová v Rastislav Petrík, Blanka Holingová

(Case C-22/12)

(2012/C 98/22)

Language of the case: Slovak

Referring court

Krajský súd v Prešove

Parties to the main proceedings

Applicant: Katarína Hassová

Defendants: Rastislav Petrík, Blanka Holingová

Questions referred

1. Must Article 1(1) of Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, [1] in combination with Article 3(1) of Directive 72/166/EC, [2] be interpreted as precluding a provision of national law (such as § 4 of Law No 381/2001 on compulsory contractual insurance against liability for damage caused by the use of a motor vehicle, or § 6 of Law No 168/1999 [of the Czech Republic] on the same subject) according to which civil liability arising from the use of a motor vehicle does not cover non-material damage, expressed in financial form, caused to the survivors of the victims of a road accident caused by the use of a motor vehicle?

2. If the answer to the first question is that the above-mentioned rule of national law does not conflict with Community law, must the provisions of § 4(1), (2) and (4) of the said Law No 381/2001 and § 6 of the said Law No 168/1999 [of the Czech Republic] be interpreted as not precluding the national court, in conformity with Article 1(1) of Council Directive 90/232/EEC. in combination with Article 3(1) of Directive 72/166/EEC, from allowing a claim for non-material damage caused to the survivors of the victims of a road accident caused by the use of a motor vehicle, in the capacity of injured parties and in financial form?

[1] OJ 1990 L 129, p. 33.

[2] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability — OJ 1972 L 103, p. 1.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 18 January 2012 — X BV, other party: Staatssecretaris van Financiën

(Case C-24/12)

(2012/C 98/23)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden (Netherlands)

Parties to the main proceedings

Appellant: X BV

Respondent: Staatssecretaris van Financiën

Questions referred

1. For the purposes of Article 56 EC (now Article 63 TFEU), can an own OCT be regarded as a third State, in which case it would be possible to rely on Article 56 EC in respect of the movement of capital between a Member State and the own OCT?

2. (a) If question 1 is answered in the affirmative, is it necessary in order to determine whether, for the purposes of Article 57(1) EC (now Article 64(1) TFEU), there has been an increase, for account to be taken in the present case — in which the withholding tax on participation dividends paid by a subsidiary company established in the Netherlands to its holding company established in the Netherlands Antilles was increased from the 1993 rate of 7,5 or 5 % to 8,3% as from 1 January 2002 — exclusively of the increase in the Netherlands withholding tax, or must account also be taken of the fact that, as from 1 January 2002, the Netherlands Antillean authorities have — in conjunction with the increase in the Netherlands withholding tax — granted an exemption in respect of participation dividends received from a subsidiary company established in the Netherlands, whereas previously those dividends formed part of profits taxed at a rate of 2,4 to 3 % or 5 %?

   (b) If account must also be taken of the tax reduction in the Netherlands Antilles effected by the introduction of the participation exemption referred to in question 2(a) above, should Netherlands Antillean implementation arrangements (in the present case: Netherlands Antillean rulings practice), the result of which may have been that prior to 1 January 2002 — including in 1993 — the actual tax liability in respect of dividends received from the/a subsidiary company established in the Netherlands was substantially lower than 8,3%, also be taken into consideration?

Reference for a preliminary ruling from the Gerechtshof te Leeuwarden (Netherlands), lodged on 18 January 2012 — fiscale eenheid PPG Holdings BV c.s. v Inspecteur van de Belastingdienst/Noord/kantoor Groningen

(Case C-26/12)

(2012/C 98/24)

Language of the case: Dutch

Referring court

Gerechtshof te Leeuwarden (Netherlands)

Parties to the main proceedings

Appellant: fiscale eenheid PPG Holdings BV c.s.

Respondent: Inspecteur van de Belastingdienst/Noord/kantoor Groningen

Questions referred

1. Can a taxable person who, pursuant to national pensions legislation, has established a separate pension fund for the purpose of safeguarding the pension rights of his employees and former employees, as participants in the fund, deduct the tax which he [has paid] on the basis of services supplied to him in respect of the implementation of the pension provision and the operation of the pension fund, pursuant to Article 17 of Directive 77/388/EEC ([1]) (Articles 168 and 169 of Directive 2006/112/EC ([2]))?

2. Can a pension fund, established with the objective of providing a pension for the participants in the pension fund at the lowest possible cost, where assets are brought to and invested in the pension fund by or on behalf of the participants, and where the resulting proceeds are shared, be classified as a 'special investment fund' within the terms of Article 13B[(d)].6 of Directive 77/388/EEC (Article 135(1)(g) of Directive 2006/112/EC)?

([1]) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

([2]) 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 Hoge Raad der Nederlanden (Netherlands) lodged on 19 January 2012 — TBG Limited, other party: Staatssecretaris van Financiën

(Case C-27/12)

(2012/C 98/25)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden (Netherlands)

Parties to the main proceedings

Appellant: TBG Limited

Respondent: Staatssecretaris van Financiën

Questions referred

1. For the purposes of Article 56 EC (now Article 63 TFEU), can an own OCT be regarded as a third State, in which case it would be possible to rely on Article 56 EC in respect of the movement of capital between a Member State and the own OCT?

2. (a) If question 1 is answered in the affirmative, is it necessary in order to determine whether, for the purposes of Article 57(1) EC (now Article 64(1) TFEU), there has been an increase, for account to be taken in the present case — in which the withholding tax on participation dividends paid by a subsidiary company established in the Netherlands to its holding company established in the Netherlands Antilles was increased from the 1993 rate of 7,5 or 5 % to 8,3% as from 1 January 2002 — exclusively of the increase in the Netherlands withholding tax, or must account also be taken of the fact that, as from 1 January 2002, the Netherlands Antillean authorities have — in conjunction with the increase in the Netherlands withholding tax — granted an exemption in respect of participation dividends received from a subsidiary company established in the Netherlands, whereas previously those dividends formed part of profits taxed at a rate of 2,4 to 3 % or 5 %?

   (b) If account must also be taken of the tax reduction in the Netherlands Antilles effected by the introduction of the participation exemption referred to in question 2(a) above, should Netherlands Antillean implementation arrangements (in the present case: Netherlands Antillean rulings practice), the result of which may have been that prior to 1 January 2002 — including in 1993 — the actual tax liability in respect of dividends received from the/a subsidiary company established in the Netherlands was substantially lower than 8,3%, also be taken into consideration?

Action brought on 20 January 2012 — European Commission v Federal Republic of Germany

(Case C-29/12)

(2012/C 98/26)

Language of the case: German

Parties

Applicant: European Commission (represented by: H. Støvlbæk and M. Noll-Ehlers, acting as Agents)

Defendant: Federal Republic of Germany

Form of order sought

The applicant claims that the Court should:

— declare that, by failing fully to adopt the laws, regulations and administrative provisions necessary to transpose Commission Directive 2009/131/EC of 16 October 2009 amending Annex VII to Directive 2008/57/EC of the European Parliament and of the Council on the interoperability of the rail system within the Community ([1]) or fully to communicate such measures to the Commission, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

— order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The time-limit for the transposition of the directive expired on 19 July 2010.

([1]) OJ 2009 L 273, p. 12.

Reference for a preliminary ruling from the Okresný súd Prešov (Slovakia) lodged on 23 January 2012 — Valeria Marcinová v Pohotovosť, s.r.o.

(Case C-30/12)

(2012/C 98/27)

Language of the case: Slovak

Referring court

Okresný súd Prešov

Parties to the main proceedings

Applicant: Valeria Marcinová

Defendant: Pohotovosť, s.r.o.

Question referred

Do Articles 38 and 17 of the Charter of Fundamental Rights of the European Union in conjunction with Article 169 TFEU preclude the application of national legislation under which, on the basis of an agreement on deductions from salary, such deductions are made from the consumer in the absence of any judicial control of unfair clauses and according to which the consumer has no direct possibility of annulling those deductions?

Reference for a preliminary ruling from the Juzgado de Primera Instancia (Badajoz, Spain) lodged on 23 January 2012 — Soledad Duarte Hueros v Autociba S.A., Automóviles Citroen España S.A.

(Case C-32/12)

(2012/C 98/28)

Language of the case: Spanish

Referring court

Juzgado de Primera Instancia, Badajoz

Parties to the main proceedings

Applicant: Soledad Duarte Hueros

Defendant: Autociba S.A., Automóviles Citroen-2 España S.A.

Question referred

If a consumer, after failing to have the product brought into conformity — because, despite repeated requests, repair has not been carried out — seeks in legal proceedings only rescission of the contract, and such rescission is not available because the lack of conformity is minor, may the court of its own motion grant the consumer an appropriate price reduction?

Appeal brought on 27 January 2012 by Václav Hrbek against the judgment of the General Court (Sixth Chamber) delivered on 15 November 2011 in Case T-434/10: Václav Hrbek v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-42/12 P)

(2012/C 98/29)

Language of the case: English

Parties

Appellant: Václav Hrbek (represented by: M. Sabatier, Advocate)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Outdoor Group Ltd (The)

Form of order sought

The appellant claims that the Court should:

— Uphold the appeal and, accordingly, set aside the Judgment of the General Court, in case T-434/10, in its entirety, in accordance with Article 61 of the Statute of the Court of Justice and Article 113 or the Rules of Procedure;

— Give final judgment — if the state of the proceedings so permits — by annulling the Decision of the OHIM Opposition Division, rendered on 29.09.2009, ruling on Opposition No B 1 276 692, and the decision of the Second Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of July 8, 2010, in case R 1441/2009-2, and order the defendants to bear the costs of the proceedings before the General Court and the Court of Justice, as well as those of the OHIM opposition proceedings, according to article 122 of the Rules of Procedure;

— Alternatively, if the state of the proceedings does not so permit, refer the case back to the General Court for judgment in accordance with the binding criteria established by the Court of Justice.

Pleas in law and main arguments

In support of his appeal, the Appellant considers that the judgement under appeal is vitiated by misinterpretation and misapplication of Article 8(1)(b) of Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trade mark (hereinafter 'CTMR') ([1]), as amended (replaced by Council Regulation (EC) No 207/2009 of February 26, 2009 ([2]), which entered into force on April 13, 2009).

The Appellant complains that the General Court did not examine the marks at issue on the basis of the criteria of 'global assessment' or 'overall impression'.

The General Court failed to give effect the above-mentioned principle, basing its assessment exclusively on the fact that they share the common element 'ALPINE'. It limited itself to holding that the two marks under comparison are similar, sharing the word component 'ALPINE', without examining the signs as whole, and ***without explaining*** why the other word and figurative elements, as a whole, are not sufficient to exclude a risk of confusion.

The Appellant complains that, in the judgment under appeal, the General Court failed to consider some extremely important and pertinent factors, on the one hand, and did not properly apply some very important criteria, on the other hand, in particular the lack of distinctiveness and the descriptive character of the word element 'ALPINE'.

The General Court did not conclude on the meaning of the term 'alpine' for all the languages of the European Union. Moreover, the General Court did not draw the legal conclusions from its owns findings concerning the clear meaning of the term 'alpine' and did not clearly conclude on the lack of distinctiveness and the descriptive characters of the word 'alpine', considering that the alleged weak distinctive character, or descriptive character, of the element 'alpine' cannot preclude a likelihood of confusion. The General Court held that 'ALPINE' would be the dominant element in both signs, without taking into consideration the lack, or at least, the very low level of, distinctiveness of the earlier mark ALPINE. The reasoning of the Judgement under appeal is vitiated by a contradiction which led the General Court wrongly to decide that the marks at issue were conceptually similar without taking into consideration the lack, or at least, the low level of, distinctiveness of the earlier mark ALPINE. A conceptual comparison of the word element 'ALPINE' is irrelevant, because of the lack of distinctiveness.

The Appellants complains, that the judgment under appeal, the General Court failed to draw the correct legal conclusions from its owns findings concerning the degree of attention of the relevant public.

The General Court could not, without contradicting itself, maintain, in respect of skiwear, ski footwear, headgear, as well as backpacks and rucksacks, that part of the relevant public is composed of well-informed and particularly attentive consumers and confirm that the marks and goods were similar.

The Appellant complains that the judgment under appeal is vitiated by a distortion of the facts, and by a violation of the duty to provide reasons, concerning the comparison of the goods.

The General Court maintained that the appellant did not put forward specific arguments capable of challenging the conclusions of the Board of Appeal. As regards the assessment of the degree of similarity of the goods and services in question, what does not follow from evidence or is not well known cannot be taken into account. The onus for proving that the goods and services are similar rests on the Appellant for opposition, and not on the owner of the CTM applied for. The General Court must give legal basis for its decision, and must provide reasons for it. The General Court did not establish that the relevant goods are identical, similar or complementary, in the marketplace, but proceeded by assertion, without giving any reasons or examples for its presumption.

([1]) OJ L 11, p. 1
([2]) OJ L 78, p. 1

Action brought on 30 January 2012 — European Commission v European Parliament and Council of the European Union

(Case C-43/12)

(2012/C 98/30)

Language of the case: French

Parties

Applicant: European Commission (represented by: T. van Rijn and R. Troosters, Agents)

Defendant: European Parliament, Council of the European Union

Form of order sought

— annul Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences; ([1])

— declare that the effects of Directive 2011/82/EU are to be regarded as definitive;

— order the European Parliament and the Council of the European Union to pay the costs.

Pleas in law and main arguments

This application seeks to bring an action for annulment against Directive 2011/82/EU. The Commission disputes the legal basis chosen. It claims that Article 87(2) TFEU is not the appropriate legal basis, as the directive seeks to introduce a mechanism for the exchange of information between Member States that covers road traffic offences, regardless of their administrative or criminal nature. Article 87 refers only to police cooperation between the competent authorities in relation to the prevention, detection and investigation of *criminal offences*. In the opinion of the Commission, the proper legal basis is Article 91(1) TFEU. The purpose of the directive is to improve road safety, which is one of the common transport policy areas expressly provided for in Article 91(1)(c).

([1]) OJ 2011 L 288, p. 1.

Reference for a preliminary ruling from the Finanzgericht Köln (Germany) lodged on 31 January 2012 — Kronos International Inc. v Finanzamt Leverkusen

(Case C-47/12)

(2012/C 98/31)

Language of the case: German

Referring court

Finanzgericht Köln

Parties to the main proceedings

Applicant: Kronos International Inc., Leverkusen

Defendant: Finanzamt Leverkusen

Questions referred

1. Is the exclusion of the set-off of corporation tax as a consequence of the tax exemption of dividend distributions by capital companies in third countries to German capital companies, for which the German legislation only requires the capital company receiving the dividends to have a holding of not less than 10 % in the distributing company, subject only to the freedom of establishment within the meaning of Article 49 in conjunction with Article 54 TFEU or also to the free movement of capital within the meaning of Articles 63 to 65 TFEU, if the actual holding of the capital company receiving the dividends is 100 %?

2. Are the provisions concerning the freedom of establishment (now Article 49 TFEU) and, as the case may be, also concerning the free movement of capital (Article 67 EEC/EC until 1993, now Articles 63 to 65 TFEU) to be interpreted as meaning that they preclude a provision which, where the dividends of foreign subsidiary companies are exempt from tax, excludes the set-off and payment of corporation tax on those dividend distributions even where the parent company makes a loss, if, for distributions by German subsidiary companies, there is provision for relief by setting off corporation tax?

3. Are the provisions concerning the freedom of establishment (now Article 49 TFEU) and, as the case may be, also concerning the free movement of capital (Article 67 EEC/EC until 1993, now Articles 63 to 65 TFEU) to be interpreted as meaning that they preclude a provision which excludes the set-off and payment of corporation tax on dividends of second and third-tier subsidiaries which are exempted from tax in the country of the subsidiary and which are (re)distributed to the German parent company and likewise exempted from tax in Germany, but in the case of purely domestic situations, as the case may be by means of the set-off of corporation tax on the second-tier subsidiary's dividends in the hands of the subsidiary company and the set-off of corporation tax on the subsidiary's dividends in the hands of the parent company, enables repayment in the event of a loss by the parent company?

4. If the provisions on the free movement of capital are also applicable, a further question, depending on the reply to question 2, arises with regard to the Canadian dividends:

   Is the present Article 64(1) TFEU to be understood as meaning that it permits the application by the Federal Republic of Germany of German legislation and DTC provisions which have remained unchanged in substance since 31 December 1993 and, therefore, that it permits the continuing exclusion of the offsetting of Canadian corporation tax on dividends exempted from tax in Germany?

Reference for a preliminary ruling from the Giudice di Pace di Revere (Italy) lodged on 2 February 2012 — Criminal proceedings against Xiamie Zhu and Others

(Case C-51/12)

(2012/C 98/32)

Language of the case: Italian

Referring court

Giudice di Pace di Revere

Parties to the main proceedings

Xiamie Zhu, Guo Huo Xia, Xie Fmr Ye, Jian Hui Luo, Ua Zh Th

Question(s) referred

1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115/EC [1] preclude the possibility that a third-country national illegally staying in a Member State may be liable to a fine, for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?

2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of Directive 2008/115/EC preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national illegally staying in that Member State may be liable to a fine, for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and rights of the foreign national laid down in the directive?

3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of a directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?

[1] OJ 2008 L 348, p. 98.

Reference for a preliminary ruling from the Giudice di Pace di Revere (Italy) lodged on 2 February 2012 — Criminal proceedings against Ion Beregovoi

(Case C-52/12)

(2012/C 98/33)

Language of the case: Italian

Referring court

Giudice di Pace di Revere

Party to the main proceedings

Ion Beregovoi

Question referred

1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115/EC [1] preclude the possibility that a third-country national illegally staying in a Member State may be liable to a fine, for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?

2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of Directive 2008/115/EC preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national illegally staying in that Member State may be liable to a fine, for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and rights of the foreign national laid down in the directive?

3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of a directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?

[1] OJ 2008 L 348, p. 98.

Reference for a preliminary ruling from the Giudice di Pace di Revere (Italy) lodged on 2 February 2012 — Criminal proceedings against Hai Feng Sun

(Case C-53/12)

(2012/C 98/34)

Language of the case: Italian

Referring court

Judge of Peace, Revere

Party to the main proceedings

Hai Feng Sun

Questions referred

1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115/EC [1] preclude the possibility that a third-country national illegally staying in a Member State may be liable to a fine, for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?

2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of Directive 2008/115/EC preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national illegally staying in that Member State may be liable to a fine, for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and rights of the foreign national laid down in the directive?

3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of a directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?

([1]) OJ 2008 L 348, p. 98.

Reference for a preliminary ruling from the Giudice di Pace di Revere (Italy) lodged on 2 February 2012 — Criminal proceedings against Liung Hong Yang

(Case C-54/12)

(2012/C 98/35)

Language of the case: Italian

Referring court

Giudice di Pace di Revere

Party to the main proceedings

Liung Hong Yang

Question(s) referred

1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115/EC ([1]) preclude the possibility that a third-country national illegally staying in a Member State may be liable to a fine, for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?

2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of Directive 2008/115/EC preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national illegally staying in that Member State may be liable to a fine, for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and rights of the foreign national laid down in the directive?

3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of a directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?

([1]) OJ 2008 L 348, p. 98.

GENERAL COURT

Action brought on 20 December 2011 — Commission v OHIM — Ten ewiv (TEN)

(Case T-658/11)

(2012/C 98/36)

Language in which the application was lodged: English

Parties

Applicant: European Commission (represented by: A. Berenboom, A. Joachimowicz and M. Isgour, lawyers, J. Samnadda and F. Wilman, Agents)

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

Other party to the proceedings before the Board of Appeal: Ten ewiv (Rösrath-Hoffnungstahl, Germany)

Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 11 October 2011 in case R 5/2011-4;

— Declare therefore invalid the Community trademark No 6750574 registered on 5 February 2009 by the other party to the proceedings before the Board of Appeal in classes 12, 37 and 39; and

— Order the defendant to pay the costs.

Pleas in law and main arguments

Registered Community trade mark in respect of which a declaration of invalidity has been sought: The figurative mark 'TEN' in the colours 'blue, yellow, black', for goods and services in classes 12, 37 and 39 — Community trade mark registration No 6750574

Proprietor of the Community trade mark: The other party to the proceedings before the Board of Appeal

Applicant for the declaration of invalidity of the Community trade mark: The applicant

Grounds for the application for a declaration of invalidity: The party requesting the declaration of invalidity grounded its request on absolute grounds laid down in Article 52(1)(a) in conjunction with Article 7(1)(c) and (h) of Council Regulation (EC) No 207/2009

Decision of the Cancellation Division: Rejected the request for declaration of invalidity

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: The contested decision infringes Article 7(1)(h) of Council Regulation No 207/2009 in conjunction with Article 6 ter (1) of the Paris Convention in so far as the Community trade mark ('CTM') has been registered, although its registration falls within the scope of prohibition laid down in those provisions. The contested decision also violates Article 7(1)(g) in so far as such a registration would deceive the public by making them believe that the products and services for which the CTM is registered are approved or endorsed by the European Union or one of its institutions.

Action brought on 17 January 2012 — MAF v European Insurance and Occupational Pensions Authority

(Case T-23/12)

(2012/C 98/37)

Language of the case: French

Parties

Applicant: Mutuelle des Architectes Français assurances (MAF) (Paris, France) (represented by: S. Orlandi, A. Coolen, J.-N. Louis, E. Marchal and D. Abreu Caldas, lawyers)

Defendant: European Insurance and Occupational Pensions Authority

Form of order sought

The applicant claims that the Court should:

— annul the decisions to publish on the Authority's website all the information solely in English, including the public consultations launched on 7 and 8 November 2011 and 21 December 2011;

— to the extent necessary, annul the Authority's decision of 16 January 2012;

— order the Authority to pay the costs.

Pleas in law and main arguments

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

1. First plea in law, alleging infringement of Articles 8(1)(k) and 73 of Regulation No 1094/2010 [1] in that those provisions require the defendant to publish on its website information relating to its activities in all the official languages of the European Union (EU). The applicant alleges a manifest error of assessment and an error of law in so far as the defendant justifies the refusal to publish the public consultations at issue in the applicant's language, in particular on grounds of cost, whereas it is stated in Article 73(3) of Regulation No 1094/2010 that the translation services required for the functioning of the Authority are to be provided by the Translation Centre for the Bodies of the European Union.

2. Second plea in law, concerning the scope of the obligation to publish in the official languages of the European Union. The applicant submits that that obligation applies equally to the public consultations launched by the defendant and not only to the defendant's annual report, work programme and guidelines and recommendations.

(1) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ 2010 L 331, p. 48).

Action brought on 17 January 2012 — 3M Pumps v OHIM — 3M (3M Pumps)

(Case T-25/12)

(2012/C 98/38)

Language in which the application was lodged: Italian

Parties

Applicant: 3M Pumps Srl (Taglio di Po, Italy) (represented by: F. Misuraca, lawyer)

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

Other party to the proceedings before the Board of Appeal: 3M Company (St. Paul, United States)

Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 27 October 2011 in Case R 2406/2010-1.

— Order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: 3M Pumps Srl

Community trade mark concerned: Figurative mark containing the word element '3M Pumps', for goods and services in Classes 7, 16 and 38

Proprietor of the mark or sign cited in the opposition proceedings: 3M Company

Mark or sign cited in opposition: Figurative mark containing the word element '3M', for goods and services in Classes 7, 16 and 38

Decision of the Opposition Division: Opposition upheld

Decision of the Board of Appeal: Appeal dismissed

Pleas in law: Infringement of Article 8(1)(a) and (b) and (5) of Regulation No 207/2009.

Action brought on 1 February 2012 — Bateni v Council

(Case T-42/12)

(2012/C 98/39)

Language of the case: German

Parties

Applicant: Naser Bateni (Hamburg, Germany) (represented by: J. Kienzle and M. Schlingmann, lawyers)

Defendant: Council of the European Union

Form of order sought

— Annul Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (1) and Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Council Regulation (EU) No 961/2010 on restrictive measures against Iran; (2)

— Order the Council to pay the costs, including those of the applicant.

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 infringement of the applicant's rights of the defence

— The Council infringed the applicant's right to effective legal protection and in particular the duty to state reasons, by failing to provide an adequate justification for including the applicant in the annex to the contested decision and the contested regulation;

— The Council failed, although called upon expressly by the applicant to do so, to indicate reasons or factors and to supply relevant proof which would justify his inclusion in the annex to the contested decision and the contested regulation;

— The Council infringed the applicant's right to a hearing by not providing it with the opportunity, conferred by Article 23(3) and 23(4) of the contested decision and Article 36(3) and (4) of the contested regulation, to present observations on its inclusion in the sanctions list and thus to cause the Council to carry out a review.

2. Second plea in law, alleging that there was no basis for including the applicant in the sanctions lists

— The reasons given for including the applicant in the sanctions lists did not make it possible to identify the precise legal basis on which the Council acted;

— An activity carried out by the applicant until only March 2008 cannot justify his inclusion in the sanctions lists in December 2011;

— The applicant's activity as manager of the Hanseatic Trade Trust & Shipping (HTTS) GmbH does not justify his inclusion in the lists of sanctions, in particular because the General Court of the European Union annulled Regulation (EU) No 961/2010 ([3]) to the extent that it concerned HTTS GmbH;

— The mere fact that the applicant was manager of an English company which has since been dissolved cannot constitute a reason under Article 20(1) of Decision 2010/413/CFSP ([4]) and/or Article 16(2) of Regulation No 961/2010 for including the applicant in the sanctions lists.

3. Third plea in law, alleging infringement of the applicant's fundamental right to property

— The applicant's inclusion in the sanctions lists constitutes an unjustified interference with his fundamental right to property, since the applicant — because of the inadequate reasons given by the Council — is unable to understand the reasons why he was included in the list of persons affected by the sanctions;

— The applicant's inclusion in the sanctions lists is obviously inappropriate for the pursuit of the goals of Decision 2010/413/CFSP and Regulation No 961/2010 and also constitutes a disproportionate interference with his property rights.

([1]) Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2011 L 319, p. 71).

([2]) Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran (OJ 2011 L 319, p. 11).

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

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

Action brought on 27 January 2012 — United Kingdom v ECB

(Case T-45/12)

(2012/C 98/40)

Language of the case: English

Parties

Applicant: United Kingdom of Great Britain and Northern Ireland (represented by: K. Beal, Barrister and E. Jenkinson, agent)

Defendant: European Central Bank

Form of order sought

— Annul the European Central Bank's Statement of Standards published on 18 November 2011, in so far as it sets out a location policy for central counterparty clearing systems ('CCPs'); and

— Order that the defendant pay the costs of these proceedings.

Pleas in law and main arguments

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

1. First plea in law, alleging that the defendant lacked competence to publish the contested act, either at all or alternatively without recourse to the promulgation of a legislative instrument such as a Regulation, adopted either by the Council or alternatively by the European Central Bank ('ECB') itself.

2. Second plea in law, alleging that the contested act either *de jure* or *de facto* will impose a residence requirement on central counterparty clearing systems ('CCPs') that wish to undertake clearing or settlement operations in the Euro currency whose daily trades exceed a certain volume. The contested act infringes all or any of Articles 48, 56 and/or 63 TFEU, in that:

— CCPs established in non-Euro area Member States, such as the United Kingdom, will be obliged to relocate their centres of administration and control to Member States which are members of the Eurosystem. They will also be obliged to re-incorporate as legal persons recognised in the domestic law of another Member State;

— in the event that such CCPs do not relocate as required, they will be precluded from access to the financial markets in the Eurosystem Member States, either on the same terms as CCPs established in those territories, or at all;

— such non-resident CCPs will not be entitled to facilities offered by the ECB or the National Central Banks ('NCBs') of the Eurosystem, either on the same terms, or at all; and

— as a result, the ability of such CCPs to offer clearing or settlement services in the Euro currency to customers in the Union will be restricted or even prohibited in its entirety.

3. Third plea in law, alleging that the contested act infringes Articles 101 and/or 102 TFEU, read in conjunction with Article 106 TFEU and Article 13 TEU, since:

— it effectively requires all clearing operations proceeding in the Euro currency exceeding a certain level to be conducted by CCPs established in a Euro area Member State;

— it effectively directs Euro area NCBs not to supply Euro currency reserves to CCPs established in non-Euro area Member States if they exceed the thresholds set in the decision.

4. Fourth plea in law, alleging that the requirement for CCPs established in non-Euro area Member States to adopt a different corporate personality and domicile amounts to direct or indirect discrimination on grounds of nationality. It also offends the general EU principle of equality, since CCPs established in different Member States are subject to disparate treatment without any objective justification for the same.

5. Fifth plea in law, alleging that the contested act infringes all or any of Articles II, XI, XVI and XVII of the General Agreement on Trade and Services (GATS).

6. Sixth plea in law, alleging that without assuming the burden of establishing that a public interest justification for such restrictions is not available (the onus being on the ECB to advance its case for a derogation if it so chooses), the United Kingdom contends that any public policy justification advanced by the ECB would not satisfy the requirement of proportionality, since less restrictive means of ensuring control over financial institutions resident within the Union but outside the Euro area are available.

Action brought on 1 February 2012 — Chrysamed Vertrieb v OHIM — Chrysal International (Chrysamed)

(Case T-46/12)

(2012/C 98/41)

Language in which the application was lodged: German

Parties

Applicant: Chrysamed Vertrieb GmbH (Salzburg, Austria) (represented by: T. Schneider, lawyer)

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

Other party to the proceedings before the Board of Appeal: Chrysal International B.V. (Naarden, Netherlands)

Form of order sought

The applicant claims that the Court should:

— uphold the action, annul the decision of the Board of Appeal of 22 November 2011 in Case R 0064/2011-1 and reject the opposition against the application for the Community trade mark;

— order OHIM or the potential intervener to pay the costs pursuant to Article 87(2) of the Rules of Procedure of the General Court.

Pleas in law and main arguments

Applicant for a Community trade mark: the applicant

Community trade mark concerned: the word mark 'Chrysamed' for goods in Class 5 (application No 6 387 071)

Proprietor of the mark or sign cited in the opposition proceedings: Chrysal International B.V.

Mark or sign cited in opposition: the international word mark 'CHRYSAL' for goods in Classes 1, 5 and 31 (trade mark No 645 337), the international word mark 'CHRYSAL' for goods in Class 1 (trade mark No 144 634) and the international figurative mark 'CHRYSAL' for goods in Classes 1, 3, 5 and 31 (trade mark No 877 785)

Decision of the Opposition Division: the opposition was upheld

Decision of the Board of Appeal: the appeal was dismissed

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

Action brought on 06 February 2012 — Western Digital and Western Digital Ireland v Commission

(Case T-60/12)

(2012/C 98/42)

Language of the case: English

Parties

Applicants: Western Digital Corp. (Dover, Delaware, United States) and Western Digital Ireland, Ltd (Grand Cayman, Cayman Islands) (represented by: F. González Díaz, lawyer, R. Patel, Solicitor and P. Stuart, Barrister)

Defendant: European Commission

Form of order sought

— Order the defendant to produce the questionnaires sent by it to third parties during the first phase and second phase of its investigation into the proposed acquisition by Seagate of the hard disk drive business of Samsung Electronics Co. Ltd;

— Order the defendant to grant access to its pre-notification and post-notification file in the Seagate/Samsung transaction, including, in particular, access to the non-confidential versions of any correspondence and records of contacts between Seagate, Samsung, and the Commission until the notification date, and any internal communications within the Commission — in both the Seagate/Samsung and Western Digital Ireland/Viviti Technologies cases — concerning the prioritization of the two transactions;

— Annul Articles 2 and 3 of the decision of the European Commission of 23 November 2011 in Case COMP/M.6203 — Western Digital Ireland/Viviti Technologies, relating to a proceeding under Council Regulation (EC) No 139/2004 [1] and, to the extent necessary, Article 1 of that decision; and

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

Pleas in law and main arguments

In support of the action, the applicants rely on four pleas in law.

1. First plea in law, alleging that the contested decision is vitiated by the adoption and/or application of the so-called 'priority rule', as:

   — The Commission lacked the power to adopt a priority rule based on the date of the notification;

   — The priority principle is unlawful and violates the general principles of fairness and good administration;

   — The Commission breached the applicants' legitimate expectation that the transaction would be assessed as a 5-to-4 merger;

   — The Commission, through disproportionate pre-notification requests for information, in breach of the principles of good administration, fairness, and non-discrimination, effectively deprived the applicants of the opportunity to be the first-notified transaction.

2. Second plea in law, alleging that the contested decision is vitiated by the fact that the applicants were precluded from exercising their right of defence, as:

   — The applicants were not afforded with an opportunity to rebut arguments, assertions, and assumptions that form part of the contested decision but did not form part of the Statement of Objections;

   — The applicants were not afforded with an opportunity to analyse relevant data and information available to the Commission.

3. Third plea in law, alleging that in the contested decision the defendant makes errors of law and relies on evidence that is factually inaccurate, unreliable, and not capable of substantiating the conclusions drawn from it, and is based on errors of law.

4. Fourth plea in law, alleging that the contested decision breaches a fundamental principle of EU law because it imposes disproportionate remedies.

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)

Action brought on 6 February 2012 — ABC-One v OHIM (SLIM BELLY)

(Case T-61/12)

(2012/C 98/43)

Language of the case: German

Parties

Applicant: ABC-One Produktions- und Vertriebs GmbH (Villach St. Magdalen, Austria) (represented by S. Merz, 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 First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 17 November 2011 in Case R 1077/2011-1 concerning the application for registration of the word sign 'SLIM BELLY' as a Community trade mark;

— order OHIM to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: the word mark 'SLIM BELLY' (application No 8 576 811) for goods and services in Classes 28, 41 and 44

Decision of the Examiner: Rejection of the application

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 7(1)(b) and (c) of Regulation No 207/2009 as the mark applied for has distinctive character and is not descriptive of the goods and services at issue

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Action brought on 13 February 2012 — Oil Turbo Compressor v Council

(Case T-63/12)

(2012/C 98/44)

Language of the case: German

Parties

Applicant: Oil Turbo Compressor Co. (Private Joint Stock) (Teheran, Iran) (represented by: K. Kleinschmidt, lawyer)

Defendant: Council of the European Union

Form of order sought

— Annul Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP on restrictive measures against Iran, ([1]) in so far as that legal act concerns the applicant;

— Prescribe a measure of organisation of procedure under Article 64 of the Rules of Procedure of the Court, asking the defendant to submit all the documents connected with the contested decision, in so far as they concern the applicant;

— Order the defendant to bear the costs.

Pleas in law and main arguments

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

1. First plea in law, alleging incorrect assessment of the facts said to underlie the decision

The applicant submits in this regard that the contested decision is factually incorrect. That is the case in particular with regard to the defendant's assumption in point 48 of Annex I to the contested decision that the applicant is affiliated to the EU-designated undertaking Sakhte Turbopomp va Kompressor (SATAK) (a.k.a. Turbo Compressor Manufacturer, TCMFG). The applicant is neither directly nor indirectly involved through a holding company in proliferation-sensitive nuclear activities and/or the development of nuclear weapon delivery systems or other weapons systems. There are therefore no facts which would justify the defendant's decision and the associated interference with the applicant's rights fundamental guaranteed under the Charter of Fundamental Rights of the European Union ('the Charter').

The applicant relies in this regard on interference with its freedom to conduct a business under Article 16 of the Charter and on the right to use and dispose of lawfully acquired property in the European Union under Article 17 of the Charter and the rights to equality and not to be discriminated against under Articles 20 and 21 of the Charter.

2. Second plea in law, alleging infringement of the applicant's right to have its case dealt with fairly and to effective legal protection

The applicant complains in this regard that the reasoning in point 48 of Annex I to the contested decision is general and does not on its own justify the major interference with fundamental rights. The defendant does not refer to the facts or evidence allegedly in its possession. The applicant is not aware of any facts or evidence which justify the contested decision.

3. Third plea in law, alleging infringement of the rule-of-law principle of proportionality

According to the applicant the contested decision also infringes the principle of proportionality because the inclusion of the applicant in Annex II to Decision 2010/413/CFSP bears no apparent relation to the objective of the decision, which is to prevent proliferation-sensitive nuclear activities, the trade in and/or development of nuclear weapon delivery systems or other weapons systems by the Islamic Republic of Iran. The defendant also fails to show that the applicant's exclusion from trade with the European Union is reasonable, in particular the least intrusive measure, in order to obtain the intended objective. The applicant further complains that the major interference with its fundamental rights was obviously not measured against the objective supposedly pursued by the defendant.

4. Fourth plea in law, alleging infringement of the right to the rule-of-law principle that everyone should have a fair hearing

   In this regard it is claimed that the defendant failed to provide sufficient reasons for including the applicant in the list in Annex II to Decision 2010/413/CFSP. The defendant thereby failed to comply with the legal obligation to indicate to the applicant what the specific reasons justifying its inclusion actually were. The contested decision was not served on the applicant nor was there any hearing. The applicant's application for access to the case-file has to date not been granted.

([1]) Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP on restrictive measures against Iran (OJ 2011 L 319, p. 71).

Action brought on 15 February 2012 — Henkel and Henkel France v Commission

(Case T-64/12)

(2012/C 98/45)

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 E. Paroche, lawyers)

Defendant: European Commission

Form of order sought

— Annul the Decision of the European Commission of 7 December 2011 in Case 'COMP/39579 — Consumer Detergents', pursuant to which the defendant has dismissed the applicants' request to transfer documents produced in case COMP/39579 to the French *Autorité de la Concurrence* with respect to its case 09/0007F concerning the French detergents sector;

— Order the defendant to allow the applicants to rely on the requested documents in the proceedings before the Paris Court of Appeals in which the applicants challenge the decision of the French *Autorité de la Concurrence* of 8 December 2011 (or in proceedings before the *Autorité de la Concurrence*, should the latter decide to reopen its case);

— Order the defendant to pay the applicants' legal and other costs and expenses in relation to this matter; and

— Take any other measures as the Court may consider appropriate.

Pleas in law and main arguments

In support of the action, the applicants rely on one plea in law, alleging that the defendant unlawfully dismissed the applicants' request to transmit the requested documents or to allow the applicants' use of the requested documents in the French proceedings, thereby infringing the applicants' fundamental rights of defence, as well as its own duties under Article 4(3) TUE.

General Court

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