Official Journal of the European Union

C 46

English edition

Information and Notices

Volume 60

13 February 2017

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(2017/C 046/01)

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(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Judgment of the Court (Second Chamber) of 29 September 2016 (request for a preliminary ruling from the Nederlandstalige rechtbank van eerste aanleg te Brussel — Belgium) — Essent Belgium NV v Vlaams Gewest, Inter-Energa and Others

(Case C-492/14) ([1])

(Reference for a preliminary ruling — Regional legislation requiring the distribution, through the systems located in the region concerned, of electricity produced from renewable energy sources to be free of charge — Different treatment depending on the origin of the green electricity — Articles 28 EC and 30 EC — Free movement of goods — Directive 2001/77/EC — Articles 3 and 4 — National support mechanisms for the production of green energy — Directive 2003/54/EC — Articles 3 and 20 — Directive 96/92/EC — Articles 3 and 16 — Internal market in electricity — Access to distribution systems on non-discriminatory tariff conditions — Public service obligations — Lack of proportionality)

(2017/C 046/02)

Language of the case: Dutch

Referring court

Nederlandstalige rechtbank van eerste aanleg te Brussel

Parties to the main proceedings

Applicant: Essent Belgium NV

Defendants: Vlaams Gewest, Inter-Energa, IVEG, Infrax West, Provinciale Brabantse Energiemaatschappij CVBA (PBE), Vlaamse Regulator van de Elektriciteits- en Gasmarkt (VREG)

Interveners: Intercommunale Maatschappij voor Energievoorziening Antwerpen (IMEA), Intercommunale Maatschappij voor Energievoorziening in West- en Oost-Vlaanderen (IMEWO), Intercommunale Vereniging voor Energielevering in Midden-Vlaanderen (Intergem), Intercommunale Vereniging voor de Energiedistributie in de Kempen en het Antwerpse (IVEKA), Iverlek, Gaselwest CVBA, Sibelgas CVBA

Operative part of the judgment

The provisions of Articles 28 EC and 30 EC, and of Article 3(2) and (8) and Article 20(1) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Article 3(2) and (3) and Article 16 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, and Articles 3 and 4 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, read together, must be interpreted as precluding legislation such as the besluit van de Vlaamse regering tot wijziging van het besluit van de Vlaamse regering van 28 september 2001 (Decision of the Flemish Government amending the Decision of the Flemish Government of 28 September 2001) of 4 April 2003, and the besluit van de Vlaamse regering inzake de bevordering van elektriciteitsopwekking uit hernieuwbare energiebronnen (Decision of the Flemish Government promoting the production of electricity

from renewable energy sources) of 5 March 2004, which imposes a scheme for the free distribution of green electricity through the distribution systems in the region concerned, while limiting the benefit of that scheme, in the case of the first decision, solely to green electricity fed directly into those distribution systems by the generating installations and, in the case of the second decision, solely to green electricity fed directly by such installations into the distribution systems in the Member State to which that region belongs.

([1]) OJ C 34, 2.2.2015.

Judgment of the Court (Fourth Chamber) of 14 December 2016 (request for a preliminary ruling from the Hoge Raad der Nederlanden — Netherlands) — Connexxion Taxi Services BV v Staat der Nederlanden, Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV, Zorgvervoercentrale Nederland BV

(Case C-171/15) ([1])

(Reference for a preliminary ruling — Public service contracts — Directive 2004/18/EC — Article 45 (2) — Personal situation of the candidate or tenderer — Optional grounds of exclusion — Grave professional misconduct — National legislation providing for a case-by-case assessment in accordance with the principle of proportionality — Decisions of the contracting authorities — Directive 89/665/EEC — Judicial review)

(2017/C 046/03)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applicant: Connexxion Taxi Services BV

Defendants: Staat der Nederlanden, Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV, Zorgvervoercentrale Nederland BV

Operative part of the judgment

1. *EU law, in particular Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not preclude national legislation, such as that at issue in the main proceedings, which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct.*

2. *The provisions of Directive 2004/18, in particular those of Article 2 of and Annex VII A, point 17, thereto, read in the light of the principle of equal treatment and the obligation of transparency which derives from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.*

([1]) OJ C 213, 29.6.2015.

Judgment of the Court (Second Chamber) of 14 December 2016 (request for a preliminary ruling from the Tribunal administratif — Luxembourg) — Maria Do Céu Bragança Linares Verruga, Jacinto Manuel Sousa Verruga, André Angelo Linares Verruga v Ministre de l'Enseignement supérieur et de la Recherche

(Case C-238/15) ([1])

(Reference for a preliminary ruling — Freedom of movement of persons — Equal treatment — Social advantages — Regulation (EU) No 492/2011 — Article 7(2) — Financial aid for higher education studies — Students not residing in the territory of the Member State concerned subject to the condition that they be the children of workers who have been employed or who have pursued their professional activity in that Member State for a continuous period of at least five years — Indirect discrimination — Justification — Objective of increasing the proportion of residents with a higher education degree — Whether appropriate — Proportionality)

(2017/C 046/04)

Language of the case: French

Referring court

Tribunal administratif

Parties to the main proceedings

Applicants: Maria Do Céu Bragança Linares Verruga, Jacinto Manuel Sousa Verruga, André Angelo Linares Verruga

Defendant: Ministre de l'Enseignement supérieur et de la Recherche

Operative part of the judgment

Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, with the aim of encouraging an increase in the proportion of residents with a higher education degree, makes the grant of financial aid for higher education studies to a non-resident student conditional on at least one of that student's parents having worked in that Member State for a minimum and continuous period of five years at the time the application for financial aid is made, but which does not lay down such a condition in respect of a student residing in the territory of that Member State.

([1]) OJ C 254, 3.8.2015.

Judgment of the Court (Fifth Chamber) of 15 December 2016 (request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije — Slovenia) — Drago Nemec v Republika Slovenija

(Case C-256/15) ([1])

(Reference for a preliminary ruling — Directive 2000/35/EC — Combating late payment — Jurisdiction of the Court — Transaction concluded before the accession of the Republic of Slovenia to the European Union — Scope — Concept of 'commercial transaction' — Concept of 'undertaking' — Maximum amount of interest for late payment)

(2017/C 046/05)

Language of the case: Slovenian

Referring court

Vrhovno sodišče Republike Slovenije

Parties to the main proceedings

Applicant: Drago Nemec

Defendant: Republika Slovenija

Operative part of the judgment

1. *Article 2(1) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions must be interpreted as meaning that a natural person holding a licence to carry on an activity as a self-employed craftsman must be regarded as an 'undertaking' within the meaning of that provision, and a transaction concluded by him as a 'commercial transaction' within the meaning of that provision, where that transaction, although not part of the activities covered by the licence, forms part of the exercise of an independent economic or professional activity that is structured and stable, which is for the referring court to ascertain in the light of all the circumstances of the case.*

2. *Directive 2000/35 must be interpreted as not precluding national legislation, such as Article 376 of the Obligacijski zakonik (Code of obligations), under which interest for late payment accrued but not paid ceases to run when the amount of the interest equals the principal amount.*

([1]) OJ C 302, 14.9.2015.

Judgment of the Court (Third Chamber) of 14 December 2016 (request for a preliminary ruling from the Commissione Tributaria Regionale di Roma — Italy) — Mercedes Benz Italia SpA v Agenzia delle Entrate Direzione Provinciale Roma 3

(Case C-378/15) ([1])

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 77/388/EEC — Article 17 (5), third subparagraph, point (d) — Scope — Application of a deductible proportion to the value added tax charged on the acquisition of all goods and services used by a taxable person — Incidental transactions — Use of turnover as an indicator)

(2017/C 046/06)

Language of the case: Italian

Referring court

Commissione tributaria regionale di Roma

Parties to the main proceedings

Applicant: Mercedes Benz Italia SpA

Defendant: Agenzia delle Entrate Direzione Provinciale Roma 3

Operative part of the judgment

Point (d) of the third subparagraph of Article 17(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 not precluding national rules and practice, such as those at issue in the main proceedings, which require a taxable person:

— *to apply to all goods and services which he has acquired a deductible proportion based on turnover, without providing for a method of calculation which is based on the nature and actual destination of each of the goods and services acquired and which objectively reflects the portion of the expenditure actually to be attributed to each of the taxed and untaxed activities; and*

— *to refer to the composition of his turnover in order to identify transactions which may be classified as 'incidental', in so far as the assessment carried out for that purpose also takes account of the relationship between those transactions and the taxable activities of that taxable person and, as the case may be, of the use which they entail of the goods and services which are subject to value added tax.*

([1]) OJ C 337, 12.10.2015.

Judgment of the Court (Second Chamber) of 15 December 2016 (request for a preliminary ruling from the Cour administrative — Luxembourg) — Noémie Depesme (C-401/15), Saïd Kerrou (C-401/15), Adrien Kauffmann (C-402/15), Maxime Lefort (C-403/15) v Ministre de l'Enseignement supérieur et de la Recherche

(Joined Cases C-401/15 to C-403/15) ([1])

(Reference for a preliminary ruling — Freedom of movement of persons — Worker's rights — Equal treatment — Social advantages — Financial aid for the pursuit of higher education studies — Requirement of a parent-child relationship — Concept of 'child' — Child of a spouse or registered partner — Contribution towards the maintenance of that child)

(2017/C 046/07)

Language of the case: French

Referring court

Cour administrative

Parties to the main proceedings

Applicants: Noémie Depesme (C-401/15), Saïd Kerrou (C-401/15), Adrien Kauffmann (C-402/15), Maxime Lefort (C-403/15)

Defendant: Ministre de l'Enseignement supérieur et de la Recherche

Operative part of the judgment

Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as meaning that a child of a frontier worker, who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker supports that child. The latter requirement is the result of a factual situation, which it is for the national authorities and, if appropriate, the national courts, to assess, and it is not necessary for them to determine the reasons for that contribution or make a precise estimation of its amount.

([1]) OJ C 302, 14.9.2015, p. 27.

Judgment of the Court (Sixth Chamber) of 15 December 2016 (request for a preliminary ruling from the Tribunal da Relação do Porto — Portugal) — Alberto José Vieira Azevedo and Others v CED Portugal Unipessoal Lda, Instituto de Seguros de Portugal — Fundo de Garantia Automóvel

(Case C-558/15) ([1])

(Reference for a preliminary ruling — Insurance against civil liability in respect of the use of motor vehicles and enforcement of the obligation to insure against such liability — Directive 2000/26/EC — Article 4(5) — Insurance undertaking — Claims representative — Sufficient powers of representation — Notifications of proceedings before the courts)

(2017/C 046/08)

Language of the case: Portuguese

Referring court

Tribunal da Relação do Porto

Parties to the main proceedings

Applicants: Alberto José Vieira Azevedo, Maria da Conceição Ferreira da Silva, Carlos Manuel Ferreira Alves, Rui Dinis Ferreira Alves, Vítor José Ferreira Alves

Defendants: CED Portugal Unipessoal Lda, Instituto de Seguros de Portugal — Fundo de Garantia Automóvel

Intervening parties: Instituto de Seguros de Portugal — Fundo de Acidentes de Trabalho

Operative part of the judgment

Article 4 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive), as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005, must be interpreted as not requiring Member States to provide that the claims representative appointed pursuant to that article may itself be sued, instead of the insurance undertaking which it represents, in the national court before which an action for damages was brought by an injured party falling within the scope of Article 1 of Directive 2000/26, as amended by Directive 2005/14.

([1]) OJ C 16, 18.1.2016.

Judgment of the Court (First Chamber) of 14 December 2016 — SV Capital OÜ v European Banking Authority (EBA), European Commission

(Case C-577/15 P) ([1])

(Appeal — Application to initiate an investigation into the Estonian and Finnish supervisory authorities — Decision of the European Banking Authority (EBA) — Board of Appeal decision of the European Supervisory Authorities — Regulation (EU) No 1093/2010 — Articles 17 and 60 — Board of Appeal — Period allowed for commencing proceedings — Excusable error)

(2017/C 046/09)

Language of the case: English

Parties

Appellant: SV Capital OÜ (represented by: M. Greinoman, vandeadvokaat)

Other parties to the proceedings: European Banking Authority (EBA) (represented by: J. Overett Somnier and Z. Giotaki, acting as Agents, and F. Tuytschaever, advocaat), European Commission (represented by: W. Mölls and K.-P. Wojcik, acting as Agents)

Operative part of the judgment

The Court:

1. *Dismisses the appeal;*

2. *Orders SV Capital OÜ to bear its own costs and, in addition, to pay the costs incurred by the European Banking Authority (EBA);*

3. *Orders the European Commission to bear its own costs.*

([1]) OJ C 16, 18.1.2016.

Judgment of the Court (Seventh Chamber) of 15 December 2016 — Hungary v Commission

(Case C-644/15 P) ([1])

(Appeal — Regulation (EC) No 1234/2007 — Common organisation of agricultural markets — Fruit and vegetable sector — Article 103e — National financial assistance granted to producer organisations in the fruit and vegetable sector — Regulation (EC) No 1580/2007 — Article 97 — Commission decision concerning the reimbursement by the European Union of the national financial assistance granted by Hungary to producer organisations)

(2017/C 046/10)

Language of the case: Hungarian

Parties

Appellant: Hungary (represented by: M.Z. Fehér and E.E. Sebestyén, Agents)

Other party to the proceedings: European Commission (represented by: A Lewis and B. Béres, Agents)

Operative part of the judgment

The Court:

1. *Dismisses the appeal;*

2. *Orders Hungary to pay the costs.*

([1]) OJ C 27, 25.1.2016.

Judgment of the Court (Sixth Chamber) of 15 December 2016 (request for a preliminary ruling from the Hof van beroep te Antwerpen — Belgium) — Loterie Nationale — Nationale Loterij NV van publiek recht v Paul Adriaensen, Werner De Kesel, The Right Frequency VZW

(Case C-667/15) ([1])

(Reference for a preliminary ruling — Directive 2005/29/EC — Unfair business-to-consumer commercial practices — Misleading commercial practice — Pyramid promotional scheme — Contributions paid by new members and compensation received by existing members — Indirect financial link)

(2017/C 046/11)

Language of the case: Dutch

Referring court

Hof van beroep te Antwerpen

Parties to the main proceedings

Applicant: Loterie Nationale — Nationale Loterij NV van publiek recht

Defendants: Paul Adriaensen, Werner De Kesel, The Right Frequency VZW

Operative part of the judgment

Point 14 of Annex I to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as allowing a commercial practice to be classified as a 'pyramid promotional scheme' even if there is only an indirect link between the contributions paid by new members of the scheme and the compensation paid to existing members.

([1]) OJ C 106, 21.3.2016.

Judgment of the Court (Sixth Chamber) of 15 December 2016 (request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije — Slovenia) — LEK farmacevtska družba d.d. v Republika Slovenija

(Case C-700/15) ([1])

(Reference for a preliminary ruling — Combined Nomenclature — Classification of goods — Food supplements falling under heading 2106 — Active ingredient as the essential component — Possible classification in Chapter 30 of the Combined Nomenclature — Goods presented and marketed as medicinal products)

(2017/C 046/12)

Language of the case: Slovenian

Referring court

Vrhovno sodišče Republike Slovenije

Parties to the main proceedings

Applicant: LEK Farmacevtska Družba d.d.

Defendant: Republika Slovenija

Operative part of the judgment

1. *Heading 3004 of the Combined Nomenclature of the Common Customs Tariff set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EU) No 1006/2011 of 27 September 2011, must be interpreted as meaning that goods which fall within the definition of 'medicinal product', within the meaning of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011, are not automatically required to be classified under that heading.*

2. *The Combined Nomenclature of the Common Customs Tariff set out in Annex I to Council Regulation No 2658/87, as amended by Regulation No 1006/2011, must be interpreted as meaning that goods, such as those at issue in the main proceedings, which have beneficial effects on health and in which the essential component is an active ingredient that is found in food supplements classified under tariff heading 2106 of the CN, although they are presented by their manufacturer as medicinal products and are marketed and sold as such, fall under that heading.*

([1]) OJ C 111, 29.3.2016.

Appeal brought on 27 July 2016 by Ice Mountain, Ibiza, SL against the judgment of the General Court (Third Chamber) delivered on 25 May 2016 in Case T-5/15 Ice Mountain Ibiza v EUIPO — Marbella Atlantic Ocean Club (ocean beach club ibiza)

(Case C-412/16 P)

(2017/C 046/13)

Language of the case: Spanish

Parties

Appellant: Ice Mountain Ibiza, SL (represented by: J. L. Gracia Albero and F. Miazzetto, abogados)

Other party to the proceedings: European Union Intellectual Property Office (EUIPO)

Form of order sought

The appellant claims that the Court should:

— Set aside in its entirety the judgment of the General Court of 25 May 2016, Ice Mountain Ibiza v EUIPO — Marbella Atlantic Ocean Club (ocean beach club ibiza) (T-5/15, not published, EU:T:2016:311);

— Give judgment upholding in their entirety the appellant's claims made in the proceedings before the General Court;

— Order the European Union Intellectual Property Office to pay the costs, including those incurred to date before the First Board of Appeal of EUIPO, and before the General Court of the European Union.

Pleas in law and main arguments

The appeal alleges misapplication of Article 8(1)(b) of Regulation No 207/2009 ([1]) and is based, in particular, on the following pleas in law and arguments.

1. **In the judgment under appeal, the General Court erred in finding that the element 'OCEAN' was distinctive**

The General Court misinterpreted the evidence adduced in the case and assessed it illogically.

In addition, the General Court failed to apply the relevant case-law, namely, the case-law of the Court of Justice of the European Union in the judgments in Case C-479/12 ([2]) (the General Court assessed the evidence adduced too strictly in the light of the difficulty in discharging the burden of proof) and C-24/05 P ([3]) (it disregarded the impression of the relevant consumer).

2. **In the judgment under appeal, the General Court erred in finding the dominant character of the various elements**

Distortion of the facts. Inconsistency in the reasoning in the judgment under appeal in order to substantiate the dominant character of the word elements.

Failure to apply the case-law of the Court of Justice in the judgments in C-251/95 ([4]) and C-342/97 ([5]) (the General Court used a completely distorted example of a relevant consumer).

Misapplication of the case-law of the General Court in the judgment in T-134/06 ([6]) (inconsistent application of the definition given of 'dominant element).

Failure to apply the case-law of the General Court in Joined Cases T-83/11 and T-84/11. ([7]) In the judgment under appeal, the General Court disregarded the existing case-law, which applies where a particular market is saturated.

3. **In the judgment under appeal, the General Court erred in finding that the marks were similar, by not taking into account the relevant circumstances for the purpose of that analysis**

Failure to apply the case-law of the Court of Justice developed in the judgment in Case C-251/95 together with the judgments of the Court in Cases C-361/04 P ([8]) and C-342/97. ([9])

4. **In the judgment under appeal, the General Court erred in concluding that there was a likelihood of confusion.**

([1]) Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).
([2]) Judgment of 13 February 2014, *H. Gautzsch Großhandel*, C-479/12, EU:C:2014:75.
([3]) Judgment of 22 June 2006, *Storck* v *OHIM*, C-24/05 P, EU:C:2006:421.
([4]) Judgment of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528.
([5]) Judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323.
([6]) Judgment of 13 December 2007, *Xentral v OHIM — Pages jaunes (PAGESJAUNES.COM)*, T-134/06, EU:T:2007:387.
([7]) Judgment of 13 November 2012, *Antrax It v OHIM — THC (Radiateurs de chauffage)*, T-83/11 and T-84/11, EU:T:2012:592.
([8]) Judgment of 12 January 2006, *Ruiz-Picasso and Others v OHIM*, C-361/04 P, EU:C:2006:25.
([9]) Judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323.

Appeal brought on 27 July 2016 by Ice Mountain, Ibiza, SL against the judgment of the General Court (Third Chamber) delivered on 25 May 2016 in Case T-6/15 Ice Mountain Ibiza v EUIPO — Marbella Atlantic Ocean Club (ocean ibiza)

(Case C-413/16 P)

(2017/C 046/14)

Language of the case: Spanish

Parties

Appellant: Ice Mountain Ibiza, SL (represented by: J. L. Gracia Albero and F. Miazzetto, abogados)

Other party to the proceedings: European Union Intellectual Property Office (EUIPO)

Form of order sought

The appellant claims that the Court should:

— Set aside in its entirety the judgment of the General Court of 25 May 2016, Ice Mountain Ibiza v EUIPO — Marbella Atlantic Ocean Club (ocean ibiza) (T-6/15, not published, EU:T:2016:310);

— Give judgment upholding in their entirety the appellant's claims made in the proceedings before the General Court;

— Order the European Union Intellectual Property Office to pay the costs, including those incurred to date before the First Board of Appeal of EUIPO, and before the General Court of the European Union.

Pleas in law and main arguments

The appeal alleges misapplication of Article 8(1)(b) of Regulation No 207/2009 ([1]) and is based, in particular, on the following pleas in law and arguments.

1. **In the judgment under appeal, the General Court erred in finding that the element 'OCEAN' was distinctive**

The General Court misinterpreted the evidence adduced in the case and assessed it illogically.

In addition, the General Court failed to apply the relevant case-law, namely, the case-law of the Court of Justice of the European Union in the judgments in Case C-479/12 ([2]) (the General Court assessed the evidence adduced too strictly in the light of the difficulty in discharging the burden of proof) and C-24/05 P ([3]) (it disregarded the impression of the relevant consumer).

2. **In the judgment under appeal, the General Court erred in finding the dominant character of the various elements**

   Distortion of the facts. Inconsistency in the reasoning in the judgment under appeal in order to substantiate the dominant character of the word elements.

   Failure to apply the case-law of the Court of Justice in the judgments in C-251/95 ([4]) and C-342/97 ([5]) (the General Court used a completely distorted example of a relevant consumer).

   Misapplication of the case-law of the General Court in the judgment in T-134/06 ([6]) (inconsistent application of the definition given of 'dominant element').

   Failure to apply the case-law of the General Court in Joined Cases T-83/11 and T-84/11. ([7]) In the judgment under appeal, the General Court disregarded the existing case-law, which applies where a particular market is saturated.

3. **In the judgment under appeal, the General Court erred in finding that the marks were similar, by not taking into account the relevant circumstances for the purpose of that analysis**

   Failure to apply the case-law of the Court of Justice developed in the judgment in Case C-251/95 together with the judgments of the Court in Cases C-361/04 P ([8]) and C-342/97. ([9])

4. **In the judgment under appeal, the General Court erred in concluding that there was a likelihood of confusion.**

([1]) Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).
([2]) Judgment of 13 February 2014, *H. Gautzsch Großhandel,* C-479/12, EU:C:2014:75.
([3]) Judgment of 22 June 2006, *Storck* v *OHIM,* C-24/05 P, EU:C:2006:421.
([4]) Judgment of 11 November 1997, *SABEL,* C-251/95, EU:C:1997:528.
([5]) Judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer,* C-342/97, EU:C:1999:323.
([6]) Judgment of 13 December 2007, *Xentral* v *OHIM — Pages jaunes (PAGESJAUNES.COM),* T-134/06, EU:T:2007:387.
([7]) Judgment of 13 November 2012, *Antrax It* v *OHIM — THC (Radiateurs de chauffage),* T-83/11 and T-84/11, EU:T:2012:592.
([8]) Judgment of 12 January 2006, *Ruiz-Picasso and Others* v *OHIM,* C-361/04 P, EU:C:2006:25.
([9]) Judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer,* C-342/97, EU:C:1999:323.

Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 31 October 2016 — EP Agrarhandel GmbH v Bundesminister für Land-, Forst-,Umwelt und Wasserwirtschaft

(Case C-554/16)

(2017/C 046/15)

Language of the case: German

Referring court

Verwaltungsgerichtshof

Parties to the main proceedings

Appellant on a point of law: EP Agrarhandel GmbH

Respondent authority: Bundesminister für Land-, Forst-, Umwelt und Wasserwirtschaft

Questions referred

1 Does Article 2(4) of Commission Decision 2001/672/EC ([1]) of 20 August 2001 laying down special rules applicable to movements of bovine animals when put out to summer grazing in mountain areas (hereinafter: 'the Commission decision'), as amended by Commission Decision 2010/300/EU ([2]) of 25 May 2010, preclude a provision of national law, such as Paragraph 6(6) of the Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft über die Kennzeichnung und Registrierung von Rindern (Order of the Federal Minister for Agriculture, Forestry, the Environment and Water Management on the identification and registration of bovine animals) ('2008 Bovine Animal Identification Order')), BGBl II No 201/2008, which, as regards compliance with all the time-limits covered by that provision — and thus also that relating to notification of movement to summer pasture — regards receipt of the relevant notification as the determining factor?

2 What effect does the second paragraph of Article 117 of Council Regulation (EC) No 73/2009 ([3]) 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 have on the eligibility for a premium of bovine animals whose movement to summer pasture was notified late within the meaning of Article 2(4) of the Commission decision?

3. If the late notification of movement to summer pasture under the second paragraph of Article 117 of Regulation No 73/2009 does not result in the loss of eligibility for a premium, are penalties to be imposed for such late notification?

([1]) OJ 2001 L 235, p. 23.
([2]) OJ 2010 L 127, p. 19.
([3]) OJ 2009 L 30, p. 16.

Request for a preliminary ruling from the Amtsgericht Hannover (Germany) lodged on 7 November 2016 — Peter Roßnagel, Alexandre Schröter v TUIfly GmbH

(Case C-562/16)

(2017/C 046/16)

Language of the case: German

Referring court

Amtsgericht Hannover

Parties to the main proceedings

Applicants: Peter Roßnagel, Alexandre Schröter

Defendant: TUIfly GmbH

Questions referred

1. Does a change in reservation to another flight constitute a situation covered by Article 4(3) of Regulation (EC) No 261/2004? ([1])

2. If the first question is to be answered in the affirmative:

Must that provision also be applied to a change in reservation which was not instigated by the air carrier, but by the tour operator alone?

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

Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 18 November 2016 — Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite

(Case C-585/16)

(2017/C 046/17)

Language of the case: Bulgarian

Referring court

Administrativen sad Sofia-grad

Parties to the main proceedings

Applicant: Serin Alheto

Defendant: Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite

Questions referred

1. Does it follow from Article 12(1)(a) of Directive 2011/95 ([1]) in conjunction with Article 10(2) of Directive 2013/32 ([2]) and Article 78(2)(a) of the Treaty on the Functioning of the European Union that:

   A) it is permissible for an application for international protection made by a stateless person of Palestinian origin who is registered as a refugee with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and, before making that application, was resident in that agency's area of operations (the Gaza Strip) to be examined as an application under Article 1(A) of the 1951 Geneva Convention rather than as an application for international protection under the second sentence of Article 1(D) of that convention, on condition that responsibility for examining the application was assumed on a basis other than compassionate or humanitarian grounds and the examination of the application is governed by Directive 2011/95?

   B) it is permissible for such an application not to be examined in the light of the conditions laid down in Article 12(1)(a) of Directive 2011/95, with the result that the interpretation of that provision by the Court of Justice of the European Union is not applied?

2. Is Article 12(1)(a) of Directive 2011/95 in conjunction with Article 5 thereof to be interpreted as precluding provisions of national law such as those at issue in the main proceedings, contained in Article 12(1)(4) of the Zakon za ubezhishteto i bezhantsite (Law on asylum and refugees, 'ZUB'), which, in the version applicable at the relevant time, do not contain an express clause on *ipso facto* protection for Palestinian refugees and do not lay down the condition that the assistance must have ceased for any reason, and as meaning that Article 12(1)(a) of Directive 2011/95, being sufficiently precise and unconditional and therefore directly effective, is applicable even if the person seeking international protection does not expressly rely on it, where the application is to be examined as an application under the second sentence of Article 1(D) of the Geneva Convention?

3. Does it follow from Article 46(3) of Directive 2013/32 in conjunction with Article 12(1)(a) of Directive 2011/95 that, in an appeal before a court or tribunal against a decision refusing international protection which was adopted in accordance with Article 10(2) of Directive 2013/32, it is permissible for the court or tribunal of first instance, taking into account the facts of the main proceedings, to treat the application for international protection as an application under the second sentence of Article 1(D) of the Geneva Convention and to carry out the assessment provided for in Article 12(1)(a) of Directive 2011/95, where an application for international protection has been made by a stateless person of Palestinian origin who is registered as a refugee with the UNRWA and, before making that application, was resident within that agency's area of operations (the Gaza Strip), and, in the decision refusing international protection, that application was not examined in the light of the aforementioned provisions?

4. Does it follow from the provisions of Article 46(3) of Directive 2013/32, concerning the right to an effective remedy incorporating the requirement of a 'full and *ex nunc* examination of both facts and points of law', interpreted in conjunction with Articles 33, 34 and the second paragraph of Article 35 of that directive and Article 21(1) of Directive 2011/95, in conjunction with Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union, that, in an appeal before a court or tribunal against a decision refusing international protection which was adopted in accordance with Article 10(2) of Directive 2013/32, they allow the court or tribunal of first instance:

   A) to decide for the first time on the admissibility of the application for international protection and on the refoulement of the stateless person to the country in which he was resident before making the application for international protection, after requiring the asylum authority to produce the evidence necessary for that purpose and giving the person in question the opportunity to present his views on the admissibility of the application; or

   B) to annul the decision for breach of an essential procedural requirement and to require the asylum authority, taking into account the instructions on the interpretation and application of the law, to reconsider the application for international protection, inter alia by conducting the admissibility interview provided for in Article 34 of Directive 2013/32 and deciding whether it is possible to return the stateless person to the country in which he was resident before making the application for international protection;

   C) to assess the security status of the country in which the person was resident at the time of the hearing or, if the situation has been the subject of fundamental changes which must be taken into account in the person's favour in the decision to be taken, at the time when the judgment is given?

5. Does the assistance granted by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) constitute otherwise sufficient protection, within the meaning of point (b) of the first paragraph of Article 35 of Directive 2013/32, in the relevant country within the relief agency's area of operations, where that country applies the principle of non-refoulement, within the meaning of the 1951 Geneva Convention, in relation to persons supported by the relief agency?

6. Does it follow from Article 46(3) of Directive 2013/32 in conjunction with Article 47 of the Charter of Fundamental Rights that the right to an effective remedy incorporating the requirement, 'where applicable, [of] an examination of the international protection needs pursuant to Directive 2011/95' compels the court or tribunal of first instance, in an appeal against the decision examining the substance of an application for international protection and refusing to grant that protection, to give a judgment:

   A) which has the force of *res judicata* in relation not only to the question of the lawfulness of the refusal but also to the applicant's need for international protection pursuant to Directive 2011/95, including in cases where, under the national law of the Member State concerned, international protection may be granted only by decision of an administrative authority;

   B) on the necessity to grant international protection, by carrying out a proper examination of the application for international protection, notwithstanding the breaches of procedural requirements committed by the asylum authority when assessing the application?

([1]) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

([2]) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

Appeal brought on 25 November 2016 by the European Commission against the judgment of the General Court (Eighth Chamber) in Joined Cases T-353/14 and T-17/15, Italy v Commission)

(Case C-621/16 P)

(2017/C 046/18)

Language of the case: Italian

Parties

Appellant: European Commission (represented by: L. Pignataro-Nolin and G. Gattinara, acting as Agents)

Other parties to the proceedings: Italian Republic, Republic of Lithuania

Forms of order

The Commission claims that the Court of Justice should:

— set aside the judgment under appeal;

— if the Court considers that the state of the proceedings so permits, dismiss the action at first instance as unfounded;

— order the Italian Republic to pay the cost of the present proceedings and those at first instance;

— order the Republic of Lithuania to bear its own costs.

Grounds of appeal and main arguments

In support of its appeal, the Commission puts forward the following grounds: (1) an error of law in the interpretation of the legal nature of the 'General Provisions' applicable to competitions and an error of law in the interpretation of Article 7(1) of Annex III to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), resulting in erroneous reasoning; (2) error of law and breach of the obligation to state reasons in interpreting Article 1d of the Staff Regulations; (3) errors of law in the interpretation (which is, moreover, contradictory) of Article 28f of the Staff Regulations and in the interpretation of the criteria for judicial review by the General Court; (4) error of law in interpreting Article 2 of Regulation No 1/58 (OJ English Special Edition, 1952-58, p. 59).

1. The first ground is divided into four parts. In the first part, the Commission submits that the General Court erred in of law in the interpretation of the legal nature of the 'General Provisions' applicable to general competitions (OJ 2014 C 60 A/1), since, according to the Commission, those provisions laid down specific new obligations in respect of the conduct of the competition procedure, obligations that the contested competition notices did not reflect. By the second part of the first ground, the Commission maintains that the General Court erred in law in interpreting Article 7(1) of Annex III to the Staff Regulations, in so far as it found that EPSO does not have the regulatory power to lay down general and abstract rules in respect of the language regime of the competitions which it organises. According to the Commission, EPSO has such a power. In that regard, the Commission also alleges breach of the obligation to state reasons, in so far as, at the end in paragraph 57 of the judgment under appeal, the General Court contradicts itself, by stating that EPSO still has the power to assess the needs, including linguistic needs, of the individual institutions when organising various competitions. By the third part of the first ground, the Commission contends that the General Court was wrong to consider that those provisions were simply measures laying down the criteria for the choice of the second language in competition procedures organised by EPSO, since those provisions established, on the contrary, with binding effect, the criteria justify that choice. Lastly, by the fourth part of the first ground, the Commission submits that the General Court misinterpreted the nature and content of the contested notices in finding that, in respect of the language regime, the notices constituted sources of new specific obligations, thereby also acting in breach of its duty to state reasons when rejecting the plea of inadmissibility submitted by the Commission; in that regard, according to the Commission, the contested notices merely confirmed what is stated in the General Provisions.

2. The second ground is divided into two parts. In the first part of the second ground, the Commission alleges an error of law in interpreting Article 1d of the Staff Regulations, according to which a limitation in the choice of a second language does not necessarily constitute discrimination, and may be justified in the light of a general objective, such as the interest of the service relation to staff policy. In the second part of the second ground, the Commission maintains that the General Court acted in breach of its obligation to state reasons, on the ground that, in searching for a justification for the limitation of the choice of second language, the General Court, in the judgment under appeal, confined itself to examining notices of competition solely, whereas it should have taken into consideration the General Provisions and their content.

3. The third ground is divided into three parts. In the first part of the third ground, the Commission submits that the General Court could not consider, without erring in its interpretation of Article 28f of the Staff Regulations, that the requirements relating to linguistic ability do not form part of a candidate's competences to which Article 27 of the Staff Regulations refers. In the second part of the third ground, the Commission claims that the General Court incorrectly defined the parameters of its powers of review, which should have been limited to ascertaining whether there had been a manifest error of assessment or arbitrary treatment. By the third part of the third ground, the Commission argues that the General Court overstepped the bounds of its powers of review, by carrying out an assessment of the merits of the decision not to include, in addition to the three languages mentioned in the competition notices (English, German and French), other languages; the General Court thereby exercised the power reserved to the administration.

4. By the fourth ground of appeal, the Commission submits that the General Court erred in law in its interpretation of Article 2 of Regulation No 1/58 by considering that communications between EPSO and the candidates came within the scope of that provision, thus excluding any possibility of restricting the choice of second language. In fact, the possibility of imposing such a restriction is derived, according to the Commission, from Article 1d(5) and (6) of the Staff Regulations, to which candidates in a competition procedure are also subject.

Request for a preliminary ruling from the Sø- og Handelsretten (Denmark) lodged on 7 December 2016 — Ernst & Young P/S v Konkurrencerådet

(Case C-633/16)

(2017/C 046/19)

Language of the case: Danish

Referring court

Sø- og Handelsretten

Parties to the main proceedings

Applicant: Ernst & Young P/S

Defendant: Konkurrencerådet

Questions referred

1. What criteria are to be applied in assessing whether the conduct or actions of an undertaking are covered by the prohibition in Article 7(1) of Council Regulation No 139/2004 ([1]) on the control of concentrations between undertakings (the prohibition of advance implementation), and does implementing action within the meaning of Article 7(1) presuppose that the action, wholly or in part, factually or legally, forms part of the actual change of control or merging of the continuing activities of the participating undertakings which — provided the quantitative thresholds are met — gives rise to the obligation of notification?

2. Can the termination of a cooperation agreement, as in the present case, which is announced under circumstances corresponding to those described in the order for reference constitute an implementing action covered by the prohibition in Article 7(1) of Council Regulation No 139/2004, and what criteria are then to be applied in making a decision?

3. Does it make any difference in answering Question 2 whether the termination has actually given rise to market effects relevant to competition law?

4. If the answer to Question 3 is in the affirmative, clarification is requested as to what criteria and what degree of probability should be applied in deciding in the particular case whether the termination has given rise to such market effects, including the significance of the possibility that those effects could be attributed to other causes.

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

Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 1 of Pamplona lodged on 9 December 2016 — Wilber López Pastuzano v Delegación del Gobierno de Navarra

(Case C-636/16)

(2017/C 046/20)

Language of the case: Spanish

Referring court

Juzgado de lo Contencioso-Administrativo of Pamplona

Parties to the main proceedings

Applicant: Wilber López Pastuzano

Defendant: Delegación del Gobierno de Navarra

Question referred

Must Article 12 of Council Directive 2003/109/EC (1) of 25 November [2003] concerning the status of third-country nationals who are long-term residents be interpreted as precluding national legislation, such as that issue in the main proceedings, and the case-law interpreting it, which does not provide for the application of the requirements of protection against the expulsion of a long-term resident foreign national to all administrative expulsion decisions regardless of the legal nature or type thereof, but instead restricts the application of those requirements to a specific type of expulsion?

(1) OJ 2004 L 16, p. 44.

GENERAL COURT

Judgment of the General Court of 13 December 2016 — IPSO v ECB

(Case T-713/14) ([1])

(ECB — ECB staff — Interim employees — Restriction on the maximum length of service of an interim employee — Action for annulment — Act open to challenge — Directly and individually affected — Locus standi — Time limit for bringing proceedings — Admissibility — Failure to inform and consult the applicant union — Non-contractual liability)

(2017/C 046/21)

Language of the case: French

Parties

Applicant: International and European Public Services Organisation (IPSO) (Frankfurt-am-Main, Germany) (represented by: L. Levi, lawyer)

Defendant: European Central Bank (represented initially by: B. Ehlers, I. Köpfer and M. López Torres, and subsequently by: B. Ehlers, P. Pfeifhofer and F. Malfrère, acting as Agents, and B. Wägenbaur, lawyer)

Re:

Action on the basis of Article 263 TFEU seeking the annulment of an act of the Executive Board of the ECB of 20 May 2014 restricting to two years the maximum period for which the ECB may avail itself of the services of any interim employee for administrative and secretarial tasks and, in addition, an action on the basis of Article 268 TFEU seeking compensation for the non-pecuniary loss suffered.

Operative part of the judgment

The Court:

1. *Annuls the decision of the Executive Board of the ECB of 20 May 2014 restricting to two years the maximum period for which the ECB may avail itself of the services of any interim employee for administrative and secretarial tasks;*

2. *Dismisses the remainder of the action;*

3. *Orders the ECB to bear its own costs and to pay three-quarters of the costs incurred by the International and European Public Services Organisation (IPSO). Orders IPSO to bear a quarter of its own costs.*

([1]) OJ C 431, 1.12.2014.

Action brought on 28 November 2016 — Karp v Parliament

(Case T-833/16)

(2017/C 046/22)

Language of the case: English

Parties

Applicant: Kevin Karp (Brussels, Belgium) (represented by: N. Lambers, and R. Ben Ammar, lawyers)

Defendant: European Parliament

Form of order sought

The applicant claims that the Court should:

— annul the decision of the authority authorised to conclude contracts of employment for the EFDD Group within the European Parliament which classified the applicant in function group I within the scope of the accredited parliamentary assistant (APA) contract signed on 25 February 2015 and in function group II within the scope of the contract of employment signed on 12 May 2016;

— order the defendant to compensate the applicant for the material and non-material damage suffered, estimated provisionally to be EUR 40 888,68 and EUR 63 323,20, respectively;

— order the defendant to bear its own costs and to pay the costs incurred by the applicant.

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 a violation of Article 80 of the CESO Staff Regulations

— The applicant was given a salary grade corresponding to function group I for his first contract and at the bottom of function group II for the second employment contract he was offered. The function group II involves 'Clerical and secretarial tasks, office management and other equivalent tasks, performed under the supervision of officials or temporary staff' while the vast majority of tasks entrusted to the applicant within the scope of his first and his second employment contracts were administrative and advisory tasks as demonstrated in the annexes to the application.

2. Second plea in law, alleging a violation of Article 82 of the CEOS Staff Regulations

— Article 82 of the CEOS staff regulations states that a contract staff member shall be recruited in function group IV if he can demonstrate a level of education which corresponds to completed university studies of at least three years attested by a diploma or professional training of an equivalent level. The applicant has five years of university studies attested by two diplomas and, in addition, regarding the second contract he was offered, has a previous work experience for the European Parliament involving tasks equivalent to the tasks he ended up performing.

Action brought on 6 December 2016 — Dow Corning and Dow Corning Europe v Commission

(Case T-858/16)

(2017/C 046/23)

Language of the case: English

Parties

Applicants: Dow Corning Corporation (Midland, Michigan, United States) and Dow Corning Europe (Seneffe, Belgium) (represented by: S. Verschuur, M. Stroungi and L. Mélia, lawyers)

Defendant: European Commission

Form of order sought

The applicants claim that the Court should:

— annul Articles 1-4 of the Commission's decision of 11 January 2016 on State Aid SA.37667 (2015/C) (ex 2015/NN) on the Excess Profit Exemption State aid Scheme implemented by Belgium ('the contested decision') ([1]);

— in the alternative, annul Article 2(1) of the contested decision;

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

Pleas in law and main arguments

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

1. First plea in law, alleging that the Commission violated Article 1(d) of Regulation 2015/1589 ([2]) by incorrectly qualifying the excess profit rulings as a scheme, thereby committing various manifest errors of law, fact and assessment and also giving an inadequate statement of reasons.

2. Second plea in law, alleging that the Commission violated Article 107(1) TFEU by committing a material error of law and a manifest error of assessment when interpreting and applying the reference system for purposes of assessing whether the excess profit rulings conferred a selective advantage.

3. Third plea in law, alleging that the Commission violated Article 107(1) TFEU by incorrectly establishing that the excess profit rulings conferred a selective advantage, thereby committing various manifest errors of fact and assessment, failing to conduct a diligent and impartial examination and giving an inadequate statement of reasons.

4. Fourth plea in law, alleging that the Commission violated Article 16 of Regulation 2015/1589 and various principles of EU law by committing a material error of law and a manifest error of assessment and giving an inadequate statement of reasons when establishing the methodology to quantify the alleged aid.

([1]) Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (notified under document C(2015) 9837) (OJ L 260, 2016, p. 61)

([2]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 2015, p. 9)

Action brought on 5 December 2016 — Nomacorc v Commission

(Case T-867/16)

(2017/C 046/24)

Language of the case: English

Parties

Applicant: Nomacorc (Thimister-Clermont, Belgium) (represented by: S. Verschuur, M. Stroungi and L. Mélia, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul Articles 1-4 of the Commission's decision of 11 January 2016 on State Aid SA.37667 (2015/C) (ex 2015/NN) on the Excess Profit Exemption State aid Scheme implemented by Belgium ('the contested decision') ([1]);

— in the alternative, annul Article 2(1) of the contested decision;

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

Pleas in law and main arguments

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

1. First plea in law, alleging that the Commission violated Article 1(d) of Regulation 2015/1589 ([2]) by incorrectly qualifying the excess profit rulings as a scheme, thereby committing various manifest errors of law, fact and assessment and also giving an inadequate statement of reasons.

2. Second plea in law, alleging that the Commission violated Article 107(1) TFEU by committing a material error of law and a manifest error of assessment when interpreting and applying the reference system for purposes of assessing whether the excess profit rulings conferred a selective advantage.

3. Third plea in law, alleging that the Commission violated Article 107(1) TFEU by incorrectly establishing that the excess profit rulings conferred a selective advantage, thereby committing various manifest errors of fact and assessment, failing to conduct a diligent and impartial examination and giving an inadequate statement of reasons.

([1]) Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (notified under document C(2015) 9837) (OJ L 260, 2016, p. 61)

([2]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 2015, p. 9)

Action brought on 9 December 2016 — RA v Court of Auditors

(Case T-874/16)

(2017/C 046/25)

Language of the case: French

Parties

Applicant: RA (Luxembourg, Luxembourg) (represented by: S. Orlandi and T. Martin, lawyers)

Defendant: Court of Auditors of the European Union

Form of order sought

The applicant claims that the General Court should:

— annul the decision of 4 March 2016 failing to promote the applicant to grade AD 11;

— order the Court of Auditors to pay the costs.

Pleas in law and main arguments

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

1. First plea in law, by which the applicant raises a plea of illegality in respect of the promotion system in force at the Court of Auditors of the European Union, implemented by decision 53-2014 on promotions, in that it affects the appointing authority's ability to identify in a methodical way the disparities in the method of appraising officials as applied by the various reporting officers of the institution according to their own subjective viewpoint.

2. Second plea in law, alleging that the decision of 4 May 2016 failing to promote the applicant to grade AD 11 infringes Article 45 of the Staff Regulations of Officials of the European Union in so far as the appointing authority did not carry out a comparative examination of the applicant's merits on a basis of equality and objectivity, using comparable sources of information.

3. Third plea in law, alleging that the statement of reasons in the response dismissing the complaint shows that the contested decision is vitiated by several manifest errors of assessment.

Action brought on 12 December 2016 — Falcon Technologies International v Commission

(Case T-875/16)

(2017/C 046/26)

Language of the case: Italian

Parties

Applicant: Falcon Technologies International LLC (Ras Al Khaimah, United Arab Emirates) (represented by: R. Sciaudone and G. Arpea, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— order the Commission to produce the final report;

— annul the contested decision; and

— order the Commission to pay the costs.

Pleas in law and main arguments

The present action has been brought against the Commission's decision of 14 October 2016 by which the Commission rejected the applicant's confirmatory application for access to the document *'Final report of an assessment of ICIM (NB 0425), carried out in the framework of the joint assessment process for notified bodies (DG (SANTE) 2015-7552)'*.

In support of its action, the applicant relies on the three following pleas in law:

1. First plea in law, alleging infringement of the first indent of Article 4(2) of Regulation No 1049/2001 ([1])

   — In the first place, the applicant criticises the Commission's incorrect application of the concept of 'commercial interests' as referred to in the first indent of Article 4(2) of Regulation No 1049/2001. The decision arising from the final report, adopted at the end of a comprehensive administrative process regarding ICIM's compliance with the rules — Implementing Regulation (EU) No 920/2013 ([2]) — applicable to notified bodies, does not contain any information traditionally considered to be commercial. In any event, the alleged reputational damage resulting from disclosure of the final report would not in itself be sufficient to justify applying the derogation referred to in the first indent of Article 4(2) of Regulation No 1049/2001. In the second place, the contested decision does not show

clearly, analytically and unequivocally the elements which led the Commission to consider that it would be detrimental to ICIM for FTI to have access to the final report, let alone provide information of the outcome of the weighing of the alleged commercial interests of ICIM and the interests of its commercial partners — including the applicant — in knowing the reliability and credibility of the notified body.

2. Second plea in law, alleging incorrect exclusion of the overriding public interest and incorrect interpretation and application of the last part of Article 4(2) of Regulation No 1049/2001

— The contested decision must be annulled in so far as the Commission stated that there was no overriding public interest in disclosure and that there were no other public interests capable of taking precedence over the interests protected by the first indent of Article 4(2) of Regulation No 1049/2001. The applicant submits that, contrary to the case-law in *Commission* v *EnBW*, ([3]) the essential nature of the final report for the purposes of judicial protection before the national courts was neglected and was not regarded as an overriding public interest. In any event, the contested decision is also vitiated by the Commission's failure to regard the protection of competition and of public health as overriding public interests.

3. Third plea in law, alleging incorrect interpretation and application of Article 4(6) of Regulation No 1049/2001

— Lastly, the Commission, in breach of the principle of proportionality, did not properly examine the possibility of granting partial access to the final report. The administrative decision taken by the Commission could have been redacted in so far as it contained sensitive or objectively secret data. There was nothing to prevent the preparation of a non-confidential version of the final report which would provide FTI with sufficient understanding of the assessment of ICIM without thereby revealing any (albeit unlikely) commercial secrets which the latter might have.

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

([2]) Commission Implementing Regulation (EU) No 920/2013 of 24 September 2013 on the designation and the supervision of notified bodies under Council Directive 90/385/EEC on active implantable medical devices and Council Directive 93/42/EEC on medical devices (Text with EEA relevance).

([3]) See judgment of the Court of Justice of 27 February 2014, Case C-365/12 P, *Commission* v *EnBW*, paragraph 107.

Action brought on 14 December 2016 — HJ v EMA

(Case T-881/16)

(2017/C 046/27)

Language of the case: French

Parties

Applicant: HJ (London, United Kingdom) (represented by: L. Levi and A. Blot, lawyers)

Defendant: European Medicines Agency

Form of order sought

The applicant claims that the Court should:

— order the defendant to pay the applicant the symbolic sum of EUR 1 by way of compensation for the non-material harm suffered;

— order the defendant to withdraw the memorandum of 22 July 2015 and, consequently, the applicant's response of 23 July 2015, from the applicant's personal file;

— so far as necessary, annul the decision of the Authority Empowered to Conclude Contracts (AECE) of 21 March 2016 rejecting the applicant's claim for damages submitted on 26 November 2015 and annul the decision of the AECE dated 19 October 2016 rejecting the applicant's complaint of 20 June 2016 against the abovementioned decision;

— order the defendant to pay all the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on a single plea in law alleging that the conditions required for the European Union to be held non-contractually liable, namely that of the illegality of the allegedly wrongful conduct, actual harm and the existence of a causal link between the conduct and the harm alleged to have been suffered, are satisfied in the present case. According to the applicant, the documents in his personal file, which were made public and accessible to any member of staff of the European Medicines Agency for a period of time, were not processed fairly and lawfully but were processed for purposes other than those for which they were collected without that change in purpose having been expressly authorised by the applicant. The dissemination of that sensitive data consequently called into question the applicant's integrity, causing him real and certain non-material harm. In the applicant's opinion, that harm must be attributed in its entirety to the Agency's wrongful conduct.

Action brought on 15 December 2016 — Sipral World v EUIPO — La Dolfina (DOLFINA)

(Case T-882/16)

(2017/C 046/28)

Language in which the application was lodged: English

Parties

Applicant: Sipral World, SL (Barcelona, Spain) (represented by: R. Almaraz Palmero, lawyer)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: La Dolfina, SA (Buenos Aires, Argentina)

Details of the proceedings before EUIPO

Proprietor of the trade mark at issue: Applicant

Trade mark at issue: EU word mark 'DOLFINA' — EU trade mark application No 3 701 828

Procedure before EUIPO: Proceedings for a declaration of invalidity

Contested decision: Decision of the Second Board of Appeal of EUIPO of 22 September 2016 in Case R 1897/2015-2

Form of order sought

The applicant claims that the Court should:

— annul the contested decision;

— order EUIPO and the intervening party, LA DOLFINA S.A., to pay all the costs of the dispute before the General Court, including those relating to the procedure before the Second Board of Appeal.

Plea in law

— Infringement of Articles 15, 42, 51, 75, 78 of Regulation No 207/2009 in conjunction with Rules 22 and 40 of Regulation No 2868/95.

Action brought on 19 December 2016 — Xiaomi v EUIPO — Apple (MI PAD)

(Case T-893/16)

(2017/C 046/29)

Language in which the application was lodged: English

Parties

Applicant: Xiaomi, Inc. (Beijing, China) (represented by: T. Raab and C. Tenkhoff, lawyers)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: Apple Inc. (Cupertino, California, United States)

Details of the proceedings before EUIPO

Applicant of the trade mark at issue: Applicant

Trade mark at issue: EU word mark 'MI PAD' — Application for registration No 12 780 987

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the First Board of Appeal of EUIPO of 22 September 2016 in Case R 363/2016-1

Form of order sought

The applicant claims that the Court should:

— annul the contested decision;

— order EUIPO and the other party to the proceedings before the Board of Appeal of EUIPO to pay the costs of the proceedings.

Plea in law

— Infringement of Article 8(1)(b) of Regulation No 207/2009.

Action brought on 19 December 2016 — Air France v Commission

(Case T-894/16)

(2017/C 046/30)

Language of the case: French

Parties

Applicant: Société Air France (Roissy-en-France, France) (represented by: R. Sermier, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the General Court should:

— annul Commission Decision (EU) 2016/1698 of 20 February 2014 concerning measures SA.22932 (11/C) (ex NN 37/07) implemented by France in favour of Marseille Provence Airport and airlines using the airport (notified under document C(2014) 870);

— order the European Commission to pay the costs in their entirety.

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 flaws in the contested decision as regards the aid from the *département* of Bouches-du-Rhône to the 'Marseille-Provence 2' (MP 2) terminal. In particular,

   — the measure does not meet clearly defined objectives of general interest. The Commission's assessment in the contested decision is vitiated by a failure to state reasons, an error of law and an error of assessment, as regards:

      — the objective of tackling an expected increase in air traffic;

      — the objective of boosting the region's economic development;

   — the aid is unnecessary.

2. Second plea in law, alleging flaws in the contested decision as regards the agreement to purchase advertising space with the company Airport Marketing Services.

3. Third plea in law, alleging flaws in the contested decision as regards the passenger charges for the terminal MP2.

Action brought on 13 December 2016 — Toontrack Music AB v EUIPO ('SUPERIOR DRUMMER')

(Case T-895/16)

(2017/C 046/31)

Language of the case: Swedish

Parties

Applicant: Toontrack Music AB (Umeå, Sweden) (represented by: L.E. Ström, lawyer)

Defendant: European Union Intellectual Property Office (EUIPO)

Details of the proceedings before EUIPO

Trade mark at issue: European Union word mark 'SUPERIOR DRUMMER' — Application for registration No 13 945 019

Contested decision: Decision of the Fifth Board of Appeal of EUIPO of 3 October 2016 in Case R 2438/2015-5

Form of order sought

The applicant claims that the Court should:

— annul the contested decision;

— order EUIPO to pay the costs incurred by the applicant in the proceedings and to bear its own costs.

Plea in law

— Infringement of Articles 7(1)(b), 7(1)(c) and 65 of No 207/2009.

Action brought on 20 December 2016 — Starbucks (HK) v EUIPO — Now Wireless (nowwireless)

(Case T-908/16)

(2017/C 046/32)

Language in which the application was lodged: English

Parties

Applicant: Starbucks (HK) Ltd (Hong Kong, China) (represented by: P. Kavanagh, Solicitor)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: Now Wireless Ltd (Whyteleafe, United Kingdom)

Details of the proceedings before EUIPO

Applicant: Other party to the proceedings before the Board of Appeal

Trade mark at issue: EU figurative mark containing the word elements 'nowwireless' — Application for registration No 6 782 569

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the Fourth Board of Appeal of EUIPO of 17 October 2016 in Case R 662/2016-4

Form of order sought

The applicant claims that the Court should:

— annul the contested decision, as well the decision given by the Opposition Division;

— order EUIPO to pay the costs.

Plea in law

— Infringement of Articles 8(1)(b) and 8(5) of Regulation No 207/2009.

Action brought on 28 December 2016 — Winkler v Commission

(Case T-916/16)

(2017/C 046/33)

Language of the case: German

Parties

Applicant: Bernd Winkler (Grange, Ireland) (represented by: A. Kässens, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

— annul the defendant's decision of 30 September 2016 on his complaint and order the defendant to adopt a decision on the calculation of capital value at the time of the registration of the applicant's claim on 14 September 2011;

— in the alternative, order the defendant to pay compensation amounting to EUR 19 920,39, payable to the applicant's pension account.

Pleas in law and main arguments

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

1. First plea in law: infringement of the principle that action must be taken within a reasonable period, infringement of the principles of legal certainty and of a fair trial, and infringement of the obligations regarding information and consultation

   The applicant submits that, by processing his claim in a slow manner, the defendant infringed all of the principles governing the proper conduct of an administrative procedure. The applicant was also not given the opportunity to set out his views orally before the measure adversely affecting him was adopted.

2. Second plea in law: infringement of the principles of equal treatment, non-discrimination and proportionality

   With regard to the second plea in law, the applicant states that similar claims of other colleagues, who were not older than him, were processed much more quickly, with no objective reason being provided to justify that difference in treatment.

3. Third plea in law: breach of the protection of legitimate expectations

   The applicant concludes by contesting the deduction of interest from his calculated capital value for the period between the lodging of his claim and the final transfer of the lump sum, about which the applicant had not previously been informed.

ISSN 1977-091X (electronic edition)
ISSN 1725-2423 (paper edition)

Publications Office of the European Union
2985 Luxembourg
LUXEMBOURG

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