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(Information)

COURT OF JUSTICE

COURT OF JUSTICE

JUDGMENT OF THE COURT

(Fifth Chamber)

of 7 January 2004

in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P: Aalborg Portland A/S and Others v Commission of the European Communities [1]

(Appeal — Competition — Cement market — Article 85(1) of the EC Treaty (now Article 81(1) EC) — Jurisdiction of the Court of First Instance — Rights of the defence — Access to the file — Single and continuous infringement — Liability for an infringement — Evidence of participation in the general agreement and measures of implementation — Fine — Determination of the amount)

(2004/C 59/01)

(Languages of the cases: Danish, English, French, Italian)

In Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S, established in Aalborg (Denmark), represented by K. Dyekjær-Hansen and K. Høegh, advokaterne (C-204/00 P), Irish Cement Ltd, established in Dublin (Ireland), represented by P. Sreenan SC, instructed by J. Glackin, Solicitor, with an address for service in Luxembourg (C-205/00 P), Ciments français SA, established in Paris (France), represented by A. Winckler, avocat, with an address for service in Luxembourg (C-211/00 P), Italcementi — Fabbriche Riunite Cemento SpA, established in Bergamo (Italy), represented by A. Predieri, M. Siragusa, M. Beretta, C. Lanciani and F. Moretti, avvocati, with an address for service in Luxembourg (C-213/00 P), Buzzi Unicem SpA, formerly Unicem SpA, established in Casale Monferrato (Italy), represented by C. Osti and A. Prastaro, avvocati, with an address for service in Luxembourg (C-217/00 P), and Cementir — Cementerie del Tirreno SpA, established in Rome (Italy), represented by G.M. Roberti and P. Criscuolo Gaito, avvocati (C-219/00 P): APPEAL against the judgment of the Court of First Instance of the European Communities in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission [2000] ECR II-491, seeking to have that judgment set aside in part, the other party to the proceedings being: Commission of the European Communities, represented in Case C-204/00 P by R. Lyal and by H.P. Hartvig, acting as Agents, and in the other cases by R. Lyal, and also by N. Coutrelis, avocat (C-211/00 P) and by A. Dal Ferro, avvocato (C-213/00 P, C-217/00 P and C-219/00 P), with an address for service in Luxembourg, the Court (Fifth Chamber), composed of: P. Jann, acting for the President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and A. La Pergola, Judges; D. Ruiz-Jarabo Colomer, Advocate General; H. von Holstein, Deputy Registrar, and H.A. Rühl, Principal Administrator, has given a judgment on 7 January 2004, in which it:

1. *Sets aside paragraph 12, seventh indent, of the operative part of the judgment of the Court of First Instance of the European Communities of 15 March 2000 in Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-66/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95;*

2. *Sets the amount of the fine imposed on Ciments français SA for the infringement found in Article 1 of Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) at EUR 9 620 000;*

3. *Dismisses the appeals for the remainder;*

4. *Orders Aalborg Portland A/S, Irish Cement Ltd, Italcementi-Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir-Cementerie del Tirreno SpA to pay the costs in Cases C-204/00 P, C-205/00 P, C-213/00 P, C-217/00 P and C-219/00 P;*

5. *Orders Ciments français SA and the Commission of the European Communities to bear their own costs in Case C-211/00 P.*

([1]) OJ C 247 of 26.08.2000.

JUDGMENT OF THE COURT

of 6 January 2004

in Joined Cases C-2/01 P and C-3/01 P: Bundesverband der Arzneimittel-Importeure eV against Commission of the European Communities ([1])

(Appeals — Competition — Parallel imports — Article 85(1) of the EC Treaty (now Article 81(1) EC) — Meaning of agreement between undertakings — Proof of the existence of an agreement — Market in pharmaceutical products)

(2004/C 59/02)

(Language of the case: German)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Joined Cases C-2/01 P and C-3/01 P: Bundesverband der Arzneimittel-Importeure eV, established in Mülheim an der Ruhr (Germany), (Agnets: U. Zinsmeister and W.A. Rehmann), with an address for service in Luxembourg, supported by European Association of Euro Pharmaceutical Companies (EAEPC), established in Brussels (Belgium), (Agents: M. Epping and M. Lienemeyer), with an address for service in Luxembourg, against Commission of the European Communities (Agents: K. Wiedner and W. Wils, assisted by H.-J. Freund), with an address for service in Luxembourg, supported by Kingdom of Sweden (Agent: A. Kruse), and by European Association of Euro Pharmaceutical Companies (EAEPC): two Appeals against the judgment of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) of 26 October 2000 in Case T-41/96 Bayer v Commission [2000] ECR II-3383, seeking to have that judgment set aside, the other parties to the proceedings being: Bayer AG, established in Leverkusen (Germany), (Agent: J. Sedemund) with an address for service in Luxembourg, and European Federation of Pharmaceutical Industries' Associations, established in Geneva (Switzerland), (Agent: A. Woodgate), the Court, composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward (Rapporteur), A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges; A. Tizzano, Advocate General; H.A. Rühl, Principal Administrator, for the Registrar, has given a judgment on 6 January 2004, in which it:

1. *Dismisses the appeals;*

2. *Orders the Bundesverband der Arzneimittel-Importeure eV, Bayer AG and the European Federation of Pharmaceutical Industries' Associations to bear their own costs in relation to Case C-2/01 P;*

3. *Orders the Commission of the European Communities to pay the costs in relation to Case C-3/01 P;*

4. *Orders the Kingdom of Sweden to bear its own costs.*

([1]) OJ C 79 of 10.03.2001.

ORDER OF THE COURT

of 11 November 2003

in Case C-488/01 P: Jean-Claude Martinez ([1])

(Appeal — Statement of formation of a group under Rule 29(1) of the Rules of Procedure of the European Parliament — Lack of political affinities — Retroactive dissolution of the TDI Group — Appeal manifestly inadmissible in part and manifestly unfounded in part)

(2004/C 59/03)

(Language of the case: French)

(Provisional translation; the definitive translation will be published in the European Court Reports)

In Case C-488/01 P, Jean-Claude Martinez, a member of the European Parliament, residing in Montpellier (France), represented by F. Wagner and V. de Poulpiquet de Brescanvel, avocats: Appeal against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) in Joined Cases T-222/99, T-327/99 and T-329/99 Martinez and Others v Parliament [2001] ECR II-2823, seeking to have that judgment set aside, the other parties to the proceedings being: European Parliament (Agents: G. Garzón Clariana, J. Schoo and H. Krück), defendant at first instance, Charles de Gaulle, a member of the European Parliament, residing in Paris (France), applicant at first instance, the Court, composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), C. Gulmann, J.N. Cunha Rodrigues and A. Rosas, Presidents of Chambers, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges; D. Ruiz-Jarabo Colomer, Advocate General; R. Grass, Registrar, has made an order on 11 November 2003, the operative part of which is as follows:

1. *The appeal is dismissed.*

2. *Mr Martinez is ordered to pay the costs of the present proceedings.*

3. *Mr Martinez is also ordered to pay the Parliament's costs in connection with the application for interim measures in Case C-488/01 P-R.*

([1]) OJ C 84 of 6.4.2002.

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by order of that Court of 5 December 2003 in the case of the State of the Netherlands (Ministry of Agriculture, Nature Management and Fisheries) against 1. Ten Kate Holding Musselkanaal BV, 2. Ten Kate Europrodukten BV, and 3. Ten Kate Produktie Maatschappij BV

(Case C-511/03)

(2004/C 59/04)

Reference has been made to the Court of Justice of the European Communities by order of the Hoge Raad der Nederlanden of 5 December 2003, received at the Court Registry on 8 December 2003, for a preliminary ruling in the case of the State of the Netherlands (Ministry of Agriculture, Nature Management and Fisheries) against 1. Ten Kate Holding Musselkanaal BV, 2. Ten Kate Europrodukten BV, and 3. Ten Kate Produktie Maatschappij BV on the following questions:

1. Must the question whether, in a case such as this, the State has an obligation towards a citizen who has an interest in it, such as Ten Kate, to make use of the legal remedies available to it under Article 175 of the EC Treaty (Article 232 EC) or Article 173 of the EC Treaty (Article 230 EC) and, in the event of failure to comply with such an obligation, to pay compensation for the damage sustained as a consequence by the citizen concerned, be answered by reference to rules of Netherlands national law or by reference to rules of Community law?

2. If the question referred to in Question 1 must be answered wholly or partly by reference to rules of Community law:

   (a) Are there circumstances in which Community law can entail an obligation and liability as referred to in that question?

   (b) If the answer to Question 2(a) is in the affirmative, which rules of Community law must be used as the criterion when answering the question referred to

   in Question 1 in a specific case such as this?

3. Must Article 1(2) of Decision 94/381/EC, read as far as necessary in conjunction with the provisions of Article 17 of Directive 90/425/EEC and Article 17 of Directive 89/662/EEC, be interpreted as giving rise to an obligation for the Commission or the Council to grant an authorisation as referred to therein if the system which the requesting Member State applies or intends to apply is in fact suitable for distinguishing between protein from ruminant and non-ruminant species?

4. To what extent does the answer to Question 3 entail a restriction of the right, or of the State's obligation referred to in Question 1, to challenge a failure to grant an authorisation such as that at issue in this case under Article 175 of the EC Treaty (Article 232 EC), or to challenge a refusal to grant such an authorisation under Article 173 of the EC Treaty (Article 230 EC)?

   (Question 3 is relevant whether the question referred to in Question 1 must be answered according to Netherlands national law or whether that answer must be determined according to Community law, in the latter case unless the answer to Question 2(a) is in the negative. Question 4 is relevant only in the light of an answer to Question 2(b).)

Reference for a preliminary ruling by the Finanzgericht Hamburg by order of that Court of 12 November 2003 in the case of Eichsfelder Schlachtbetrieb GmbH against Hauptzollamt Hamburg-Jonas

(Case C-515/03)

(2004/C 59/05)

Reference has been made to the Court of Justice of the European Communities by order of the Finanzgericht Hamburg (Hamburg Finance Court) of 12 November 2003, received at the Court Registry on 9 December 2003, for a preliminary ruling in the case of Eichsfelder Schlachtbetrieb GmbH against Hauptzollamt Hamburg-Jonas on the following question:

Is Article 17(3) of Regulation (EEC) No 3665/87 ([1]) as amended by Regulation (EC) No 1384/95 ([2]) to be interpreted as meaning that a product is considered to have been imported if, after its release for free circulation in a non-member country, it undergoes substantial processing or working within the meaning of Article 24 of Regulation (EC) No 2913/92 ([3]) and then is brought back into the Community upon drawback and payment of the normal import duties?

([1]) OJ L 351, p. 1.
([2]) OJ L 134, p. 14.
([3]) OJ L 302, p. 1.

Action brought on 9 December 2003 by the Commission of the European Communities against the Italian Republic

(Case C-516/03)

(2004/C 59/06)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 9 December 2003 by the Commission of the European Communities, represented by M. Konstantinidis, member of its Legal Service, and R. Amorosi, judge of the District Court on secondment to that Service, acting as Agent.

The applicant claims that the Court should:

— Declare that, by not adopting the measures necessary to ensure that waste generated in Campolungo (Ascoli Piceno) is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and, by not taking the measures necessary to ensure that any holder of waste so generated has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B of the directive, or recovers or disposes of it himself, the Italian Republic has failed to fulfil its obligations under Articles 4 and 8 of Directive 75/442/EEC on waste as amended by Directive 91/156/EEC;

— Order the Italian Republic to pay the costs.

Pleas in law and main arguments

According to the Commission, the Italian Republic has adopted no measures to ensure that the waste discharged in Campolungo is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The Italian authorities submit merely that the progressive mineralisation of waste raises questions about the production of 35 m^3 of lechate per day, without giving any clear observations on the merits, and before expressly admitting that 'the production and therefore diffusion of lechate may continue indefinitely'.

The Commission further points out that, according to Article 175(4) of the EC Treaty, the Member States are responsible for financing and implementing the environment policy so that the lack of sufficient financial resources cannot be used as a justification for the failure to take specific measures to make good the site. It must therefore be concluded that the Italian Republic has failed to fulfil its obligations under Article 4 of the directive. Furthermore, the Italian Republic has failed to adopt the measures necessary to ensure that any holder of waste so generated has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B of the directive. It follows that the Italian Republic has also failed to fulfil its obligations under Article 8 of the directive.

Reference for a preliminary ruling by the Sala de lo Social del Tribunal Superior de Justicia de la Comunidad Valenciana by order of that Court of 27 November 2003 in the case of José Vincente Olaso Valero against Fondo de Garantía Salarial

(Case C-520/03)

(2004/C 59/07)

Reference has been made to the Court of Justice of the European Communities by order of the Sala de lo Social del Tribunal Superior de Justicia de la Comunidad Valenciana (Chamber for Social and Labour Matters of the High Court of Justice of the Community of Valencia) of 27 November 2003, received at the Court Registry on 12 December 2003, for a preliminary ruling in the case of José Vincente Olaso Valero against Fondo de Garantía Salarial on the following questions:

A) Does the compensation claimed for unfair dismissal fall within the scope of Directive 80/987/EEC of 20 October 1980 [1] in its version prior to that as amended by Directive 2000/74/EC [2]?

B) In the context of respect for the principles of equality and non-discrimination, can the rules set out in Article 33(2) of the consolidated text of the Ley de Estatuto de los Trabajadores, inasmuch as they require a ruling or an administrative decision in order for Fogasa to pay the appropriate compensation, be considered objectively unreasonable and, accordingly, inapplicable?

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[1] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 283 of 28.10.1980, p. 23).

[2] Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Text with EEA relevance) (OJ L 270 of 8.10.2002, p. 10).

Appeal brought on 15 December 2003 by Internationaler Hilfsfonds e.V. against the order made on 15 October 2003 by the Fifth Chamber of the Court of First Instance of the European Communities in case T-372/02 between Internationaler Hilfsfonds e.V. and the Commission of the European Communities

(Case C-521/03 P)

(2004/C 59/08)

An appeal against the order made on 15 October 2003 by the Fifth Chamber of the Court of First Instance of the European Communities in case T-372/02 [1] between Internationaler Hilfsfonds e.V. and the Commission of the European Communities, was brought before the Court of Justice of the European Communities on 15 December 2003 by Internationaler Hilfsfonds e.V., (hereinafter 'IH'), established in Rosbach (Germany), represented by H. Kaltenecker, lawyer.

The Appellant claims that the Court should:

— quash the order of the Court of First Instance of 15 October 2003;

— order the Respondent to bear the cost of the procedure.

Pleas in law and main arguments

The Appellant submits that the Court of First Instance has been guilty of a serious breach of procedure in not organising an oral procedure, thus preventing the Appellant from presenting in detail its views on the question of the admissibility of its action. The Court was not correct in considering that there existed any absolute bar to proceeding with the action. Also, the Court ignored the fact that the Defendant had not applied for a decision on admissiblity by separate document.

The Court of First Instance has, on the contrary, based its deliberations on a letter from the Defendant of 19 July 2001 which was, however, nothing more than a reply to ongoing discussions between ECHO and the Appellant in the course of that year. IH was not able to recognise it as a 'decision'. The contested decision (letter of 22 October 2002, signed on behalf of the responsible member of the Commission to whom the Appellant had addressed a request for decision on 27 August 2002) was, indeed, the final decision which closed the debate between the parties. The Court of First Instance has misinterpreted both the content and the significance of these letters and, thus, made a judicial error creating negative legal consequences for the Appellant. The Court did not apply the rule of Article 48 of the Rules of Procedure, that consideration of the admissibility of the plea shall be reserved for final judgment.

The Court of First Instance committed a further procedural error by not accepting the final observations of the Appellant of 14 October 2002 as part of the file of pleadings. According to Article 48 of the Rules of Procedure, new evidence may be intoduced if based on matters of law or fact which come to light during the course of the procedure. The Appellant has confirmed that the ECHO message was only discovered recently. The Court had not informed the Appellant that the written procedure had been closed.

The Court of First Instance has, furthermore, to be held responsible for not having organised an inquiry, in accordance with normal procedural practice, into the question of why ECHO did not reopen the file of the Applicant after it had received the positive (although late) reaction of the German Foreign Office with regard to the situation of the Applicant.

The Court of First Instance, by including in its deliberations matters of substance, has erroneously based its considerations on Regulation (EC) No 1257/96 [2] although that Regulation entered into force after the application by IH for signing the first FPA.

The Court has not addressed in its deliberations the 'suspension' of the treatment of IH's application, which had been defined as an illegal measure by the European Ombudsman. The Court has ignored the fact that neither the earlier rules on cooperation with ECHO nor the new Regulation (EC) No 1257/96 include any reference to the need for consultation of national authorities.

The Court of First Instance has not given any weight to the decisions of the European Ombudsman (1702/2001/GG) who had declared ECHO guilty of four acts of maladministration and pronounced a certain number of critical remarks.

With regard to another matter of substance, the Court has, according to the terms of its order, disregarded the rules applicable to audits which the ECHO-staff wanted to undertake at the IH-office. In particular, it has not checked the question of the application of the principle of subsidiarity. Nor has the

Court taken into account that neither the former rules nor the new Regulations include a reference to audits. The audit proposed by ECHO had a discriminatory character in so far as there was no justification given for undertaking such an audit once the German Foreign Office had confirmed the legal status of IH as a charitable organisation.

(1) OJ C 31, 8.2.2003, p. 21.
(2) of the Council, of 20 June 1996, concerning humanitarian aid (OJ L 163, 2.7.1996, p. 1).

Action brought on 15 December 2003 by the Commission of the European Communities against Biotrast AE, Anonimi Eteria Tekhnologion Aikhmis

(Case C-523/03)

(2004/C 59/09)

An action against Biotrast AE, Anonomi Eteria Tekhnologion Aikhmis, was brought before the Court of Justice of the European Communities on 15 December 2003 by the Commission of the European Communities, represented by Dimitris Triantafillou, of its Legal Service, and by Nikolaos Koroyiannakis, of the Athens Bar, with an address for service in Luxembourg. The applicant claims that the Court should:

order the defendant:

(a) to pay the amount of EUR 730 726,81, representing a capital sum of EUR 661 838,82 and daily interest of EUR 68 887,99, from the date on which the debit note fell due with interest at 4,77 % until 31.12.2002 and 6,77 % from 11.2003;

(b) to pay interest in the amount of EUR 122,75 per day from 31.10.2003 until the debt is repaid in full;

(c) to pay the costs.

Pleas in law and main arguments

(a) There is an obligation to repay the amount unduly paid by the Commission.

(b) The date on which interest became payable.

Action brought on 16 December 2003 by the Commission of the European Communities against G. & E. Gianniotis EPE, trading as 'Nosokomio Agia Eleni'

(Case C-524/03)

(2004/C 59/10)

An action against G. &. E. Gianniotis EPE, trading as 'Nosokomio Agia Eleni' was brought before the Court of Justice of the European Communities on 16 December 2003 by the Commission of the European Communities, represented by Dimitri Triandafilou of its Legal Service, assisted by Nicolao Korogiannakis, of the Athens Bar, with an address for service in Luxembourg.

The applicant claims that the Court should order the defendant:

(a) to pay the amount of EUR 236 977,73, comprising the principal sum of EUR 212 010,17 and daily interest of EUR 24 697,76 from the date of each debit note until 31 October 2003;

(b) to pay interest in the amount of EUR 42,16 per day as from 31 October 2003 until payment in full of the debt;

(c) to pay the costs.

Pleas in law and main arguments

(a) Liability to repay the amount unduly paid by the Commission;

(b) Date on which interest became payable.

Action brought on 16 December 2003 by the Commission of the European Communities against the Italian Republic

(Case C-525/03)

(2004/C 59/11)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 16 December 2003 by the Commission of the European Communities, represented by Klaus Wiedner and Claudio Loggi, acting as Agents.

The applicant claims that the Court should:

— Declare that, by adopting Article 1, second subparagraph and first, second and third subparagraphs of Article 2 of Order No 3231 of the President of the Council of Ministers of 24 July 2002, which allow for private negotiations by way of derogation from the provisions of the Community directives on public supply and service contracts, and in particular, from the common rules on advertising and participation laid down by Titles III and IV of Directive 93/36/EEC [1] and III and V of Directive 92/50/EEC [2], for the acquisition of aircraft to combat forest fires and for the acquisition of firefighting services and which similarly allow for such negotiations for the acquisition of technical and computer equipment and two-way radios, without any of the lawful conditions for derogation from those common rules being satisfied and, in any event, without ensuring any form of direct advertising such as to permit a competitive comparison between potential tenderers, the Italian Republic has failed to fulfil its obligations under Council Directive 93/36/EEC of 18 June 1992 and Articles 43 and 49 of the EC Treaty;

— Order the Italian Republic to pay the costs.

Pleas in law and main arguments

Contracts for the supply of aircraft fall within the scope of Directive 93/36/EEC which governs the award procedure for public supply contracts.

Pursuant to Article 6 of the directive, the contracting authorities are to award supply contracts by the open or restricted procedures. Recourse to the negotiated procedure is permitted only in the cases expressly provided for in paragraphs 2 and 3 of that article. Article 6(3) includes, amongst the cases in which the negotiated procedure is permitted, that where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities, and for which those authorities are not responsible, the time limits laid down for the competitive procedures with prior publication cannot be observed.

The Commission points out that, in the present case, none of the conditions laid down by Article 6 of Directive 93/36/EEC for derogation from the provisions of that directive appears to apply and that, in particular, there do not appear to be reasons of urgency such as to permit the contracting authority to avail itself of the derogation under Article 6(3)(d) of the directive.

The Commission further points out that the contested order lays down numerous other possibilities for resorting to private negotiations, namely for the acquisition of the material necessary to equip the Department of Civil Protection with technical and computer systems, for the acquisition by the State Forest Department of two-way radio equipment for communication with firefighting aircraft and for the acquisition and/or implementation, again on behalf of that Department, of air services for fighting forest fires, in the last case providing, in terms similar to the provision in respect of the acquisition of firefighting aircraft, that the relevant contracts may also be entered into in derogation from the legislation transposing the Community directives on public contracts and, in particular, Directives 92/50/EEC and 93/36/EEC.

The Commission further considers that, in those cases, recourse cannot be had to private negotiations and that, in any case, no evidence of the existence of the conditions required for recourse to such negotiations was provided by the Italian authorities. In particular, none of the conditions under Article 6(2) and (3) of Directive 93/36/EEC and Article 11(2) and (3) of Directive 92/50/EEC is satisfied.

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[1] OJ L 199 of 9.8.1993, p. 1.
[2] OJ L 209 of 24.7.1992, p. 1.

Action brought on 15 December 2003 by the Commission of the European Communities against the Kingdom of the Netherlands

(Case C-527/03)

(2004/C 59/12)

An action against the Kingdom of the Netherlands was brought before the Court of Justice of the European Communities on 15 December 2003 by the Commission of the European Communities, represented by K. Simonsson and W. Wils, acting as Agents.

The applicant claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2000/59/EC [1] of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, or, in any event, by failing to notify the Commission of those measures, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;

2. order the Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

The period for implementation of the Directive expired on 28 December 2002.

([1]) OJ 2000 L 332, p. 81.

Action brought on 15 December 2003 by the Commission of the European Communities against the Kingdom of the Netherlands

(Case C-528/03)

(2004/C 59/13)

An action against the Kingdom of the Netherlands was brought before the Court of Justice of the European Communities on 15 December 2003 by the Commission of the European Communities, represented by K. Simonsson and W. Wils, acting as Agents.

The applicant claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Commission Directive 2002/35/EC ([1]) of 25 April 2002 concerning the setting up of a harmonised safety regime for fishing vessels of 24 metres in length and over, or, in any event, by failing to notify the Commission of those measures, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;

2. order the Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

The period for implementation of the Directive expired on 1 January 2003.

([1]) OJ 2002 L 112, p. 21.

Action brought on 18 December 2003 by the Commission of the European Communities against the Federal Republic of Germany

(Case C-531/03)

(2004/C 59/14)

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 18 December 2003 by the Commission of the European Communities, represented by Josef Christian Schieferer, of the Legal Service of the Commission of the European Communities, and Florence Simonetti, a national civil servant on secondment to the Legal Service of the Commission, acting as Agents, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. Declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 4, in conjunction with point 7(b) and (c) of Annex I and point 10(e) of Annex II, of Council Directive 85/337/EEC ([1])of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC ([2]) of 3 March 1997,

   — in so far as that directive has, in particular, not yet been transposed for purposes of road construction projects in the federal Land of Rhineland-Palatinate and

   — in so far as it is possible for road construction projects in the federal Land of North Rhine-Westphalia to be granted development consent without an environmental impact assessment being carried out;

2. Order the Federal Republic of Germany to pay the costs of the proceedings.

Pleas in law and main arguments

The period for transposition of Directive 97/11/EC amending Directive 85/337/EEC expired on 14 March 1999 without the federal Land of Rhineland-Palatinate having adopted the necessary measures to implement it, in particular in relation to road construction projects.

Furthermore, there are no legal measures in place in the federal Land of North Rhine-Westphalia for ensuring that an environmental impact assessment will be carried out if, under the law of that Land, it is to be anticipated that a road construction project will have a significant impact on the environment.

(1) OJ 1985 L 175, p. 40.
(2) OJ 1997 L 73, p. 5.

Action brought on 19 December 2003 by the Commission of the European Communities against the Council of the European Union

(Case C-533/03)

(2004/C 59/15)

An action against the Counci of the European Union was brought before the Court of Justice of the European Communities on 19 December 2003 by the Commission of the European Communities, represented by R. Lyal, acting as agent, with an address for service in Luxembourg.

The Applicant claims that the Court should:

1. declare that Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (1) and Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (2) are void;

2. maintain the effects of these measures until the entry into force of legislation adopted on the correct legal basis;

3. order the Council of the European Union to pay the costs.

Pleas in law and main arguments

The issue in this case is whether Articles 93 and 94 on the one hand or Article 95 EC on the other is the correct legal basis for the adoption of a measure such as Regulation 1798/2003 and Directive 2003/93.

According to the second paragraph of Article 95 EC, the derogation from Article 94 contained in Article 95, paragraph 1, shall not apply to fiscal provisions. In the view of the Commission, the expression 'fiscal provisions' is to be understood as including rules on taxable persons, taxable events, basis of taxation, rates and exemptions, along with the detailed rules on assessment and enforcement. Conversely, the Commission submits that that logic does not extend to mutual assistance in tax matters. Measures of cooperation, verification and information whose purpose is to facilitate the elimination of frontiers without affecting the substance of Member States' own tax rules do not impinge on the tax jurisdiction of Member States.

The Commission submits that the provisions of Regulation 1798/2003 cannot properly be regarded as effecting a harmonisation or approximation of national tax rules. Regulation 1798/2003 is concerned solely with the exchange of information in relation to transactions which take place across frontiers within the Community, in order to enable national tax authorities to cooperate with each other and with the Commission to ensure compliance with the law on VAT in the absence of frontier controls. It does not affect any rules which are properly to be regarded as 'fiscal provisions' within the meaning of Article 95(2) EC or 'legislation concerning turnover taxes' within the meaning of Article 93 EC.

For its part, Directive 2003/93 amends Directive 77/799 solely by the deletion of value added tax and the insertion of taxes on insurance premiums. It does not affect the nature of that directive, which concerns the exchange of information and thus does not constitute the harmonisation of 'fiscal provisions' within the meaning of Article 95(2) EC.

It must therefore be concluded that the object of the legislation in question is the completion of the internal market. It does not constitute a set of measures harmonising tax provisions. The correct legal base is thus Article 95 EC.

The Commission accordingly submits that Council Regulaton (EC) No 1798/2003 and Council Directive 2003/93/EC were adopted on an incorrect legal basis, in disregard of the prerogatives of the Parliament.

(1) OJ L 264, 15.10.2003, p. 1.
(2) OJ L 264, 15.10.2003, p. 23.

Action brought on 15 December 2003 by the Commission of the European Communities against the Kingdom of Belgium

(Case C-534/03)

(2004/C 59/16)

An action against the Kingdom of Belgium was brought before the Court of Justice of the European Communities on 15 December 2003 by the Commission of the European Communities, represented by K. Simonsson and W. Wils, acting as Agents.

The applicant claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Commission Directive 2002/35/EC [1] of 25 April 2002 concerning the setting up of a harmonised safety regime for fishing vessels of 24 metres in length and over, or, in any event, by failing to notify the Commission of those measures, the Kingdom of Belgium has failed to fulfil its obligations under that directive;

2. order the Kingdom of Belgium to pay the costs.

Pleas in law and main arguments

The period for implementation of the Directive expired on 1 January 2003.

[1] OJ 2002 L 112, p. 21.

Reference for a preliminary ruling by the [copy and paste] by order of that Court of 19 December 2003 in the case brought by Katja Susanne Candolin, Jari-Antero Viljaniemi, Veli-Matti Paananen, Vahinkovakuutusosakeyhtiö Pohjola, and Jarno Kalervo Ruokoranta

(Case C-537/03)

(2004/C 59/17)

Reference has been made to the Court of Justice of the European Communities by order of the [copy and paste] of 19 December 2003, received at the Court Registry on 22 December 2003, for a preliminary ruling in the case brought by Katja Susanne Candolin, Jari-Antero Viljaniemi, Veli-Matti Paananen, Vahinkovakuutusosakeyhtiö Pohjola, and Jarno Kalervo Ruokoranta on the following questions:

1. Does the requirement in Article 1 of the Third Directive 90/232/EEC [1], under which all passengers other than the driver are to be compensated from insurance for personal injuries arising out of the use of a vehicle, or any other provision or principle of Community law lay down restrictions in assessing the significance of the passenger's own contributory fault under national law, in connection with his right to compensation payable from compulsory motor vehicle insurance?

2. Is it consistent with Community law, in any situation other than the cases mentioned in the second subparagraph of Article 2(1) of the Second Directive 84/5/EEC [2], to exclude or limit, on the basis of the conduct of a passenger in a vehicle, his right to obtain compensation from compulsory motor vehicle insurance for road accident damage? May that come into question, for example, when a person has entered a vehicle as a passenger although he could have seen that the danger of an accident and of his suffering injury was greater than normal?

3. Does Community law preclude the driver's intoxication, which influences his capability of driving the vehicle safely, from being regarded as such a factor to be taken into account?

4. Does Community law preclude the right of a car owner who is a passenger in the car to compensation for personal injury payable from compulsory motor vehicle insurance from being assessed more severely than that of other passengers on the ground that he permitted an intoxicated person to drive his car?

[1] Third 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 (OJ L 129 of 19.5.1990, p. 33).

[2] Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L 8 of 11.1.1984, p. 17).

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by order of that Court of 19 December 2003 in the case of 1. ROCHE NEDERLAND B.V., 2. ROCHE DIAGNOSTIC SYSTEMS INC., 3. N.V. ROCHE S.A., 4. HOFFMANN-LA ROCHE ACTIEN-GESELLSCHAFT, 5. PRODUITS ROCHE S.A., 6. ROCHE PRODUCTS LIMITED, 7. F. HOFFMANN-LA ROCHE A.G., 8. HOFFMANN-LA ROCHE WIEN GMBH, and 9. ROCHE AB against Dr. Frederick James PRIMUS, 2. Dr. Milton David GOLDENBERG

(Case C-539/03)

(2004/C 59/18)

Reference has been made to the Court of Justice of the European Communities by order of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 19 December 2003, received at the Court Registry on 22 December 2003, for a preliminary ruling in the case of 1. ROCHE NEDERLAND B.V., 2. ROCHE DIAGNOSTIC SYSTEMS INC., 3. N.V. ROCHE S.A., 4. HOFFMANN-LA ROCHE ACTIEN-GESELLSCHAFT, 5. PRODUITS ROCHE S.A., 6. ROCHE PRODUCTS LIMITED, 7. F. HOFFMANN-LA ROCHE A.G., 8. HOFFMANN-LA ROCHE WIEN GMBH, and 9. ROCHE AB against Dr. Frederick James PRIMUS, 2. Dr. Milton David GOLDENBERG on the following questions:

A. Is there a connection, as required for the application of point 1 of Article 6 of the Brussels Convention, between a patent infringement action brought by a holder of a European patent against a defendant having its registered office in the State of the court in which the proceedings are brought, on the one hand, and against various defendants having their registered offices in Contracting States other than that of the State of the court in which the proceedings are brought, on the other hand, who, according to the patent holder, are infringing that patent in one or more other Contracting States?

B. If the answer to Question A is not or not unreservedly in the affirmative, in what circumstances is such a connection deemed to exist, and is it relevant in this context whether, for example,

— the defendants form part of one and the same group of companies?

— the defendants are acting together on the basis of a common policy, and if so is the place from which that policy originates relevant?

— the alleged infringing acts of the various defendants are the same or virtually the same?

Reference for a preliminary ruling by the Oberster Gerichtshof of the Republic of Austria by order of that court of 18 November 2003 in the case of Lambert Roodbeen against the Republic of Austria

(Case C-541/03)

(2004/C 59/19)

Reference has been made to the Court of Justice of the European Communities by order of the Oberster Gerichtshof (Supreme Court) of the Republic of Austria of 18 November 2003, received at the Court Registry on 23 December 2003, for a preliminary ruling in case of Lambert Roodbeen against the Republic of Austria on the following question:

Are Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health ('the directive') [1] to be interpreted as meaning that the administrative authorities — notwithstanding an internal appeal facility — may not, save in cases of urgency, take a decision ordering expulsion from the territory without obtaining an opinion from a competent authority within the meaning of Article 9(1) of the directive (for which no provision is made in the Austrian legal system), where appeals against their decisions may be lodged with the courts of public law only subject to the limitations that:

(a) such appeals have no suspensory effect from the outset;

(b) those courts are barred from taking decisions on appropriateness and are able merely to annul (quash) contested decisions;

(c) one of those courts (the Verwaltungsgerichtshof — the Higher Administrative Court) is limited, as regards findings of fact, to an examination of whether the conclusions based on the facts are warranted; and

(d) the other of those courts (the Verfassungsgerichtshof — the Constitutional Court), in addition to being limited, as regards the facts, to an examination of whether the conclusions based on the facts are warranted, is limited to an examination of the infringement of rights guaranteed by the constitution?

[1] OJ, English Special Edition 1963-1964, p. 117.

Reference for a preliminary ruling by the Bundesfinanzhof by order of that court of 18 November 2003 in the case of Hauptzollamt Hamburg-Jonas against Milupa GmbH & Co KG

(Case C-542/03)

(2004/C 59/20)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesfinanzhof (Federal Finance Court, Germany) of 18 November 2003, received at the Court Registry on 23 December 2003, for a preliminary ruling in the case of Hauptzollamt Hamburg-Jonas against Milupa GmbH & Co KG on the following question:

Are the second sentence of the first subparagraph of Article 7(1), the first subparagraph of Article 7(2) and Article 7(5) of Regulation (EC) No 1222/94, as amended by Regulation (EC) 229/96, [1] to be interpreted as meaning that the party concerned is not entitled to grant of an export refund if, in the production of the exported goods, it was not the product declared by him, which under the first indent of Article 1(2)(c) of Regulation (EC) No 1222/94 [2] is assimilated to skimmed milk powder of the type described in Annex A (PG 2), that was used but another product which, in respect of the non-fat part of its dry matter content, is also assimilated to skimmed milk powder of the type described in Annex A (PG 2) by virtue of the first indent of Article 1(2)(f) of Regulation (EC) No 1222/94?

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[1] OJ 1996 L 30, p. 24.
[2] OJ 1994 L 136, p. 5.

Action brought on 23 December 2003 by the Commission of the European Communities against the Kingdom of Spain

(Case C-546/03)

(2004/C 59/21)

An action against the Kingdom of Spain was brought before the Court of Justice of the European Communities on 23 December 2003 by the Commission of the European Communities, represented by M. Díaz-Llanos La Roche and G. Wilms, acting as Agents, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. declare that, by failing to observe the mandatory time-limits for entry in the accounts laid down by Article 220(1) of the Community Customs Code [1] (and by Article 5 of Regulation No 1854/89 [2]) the Kingdom of Spain has failed to fulfil its obligations under those provisions of Community law;

2. declare, furthermore, that inasmuch as late establishment caused delays to the making available of own resources, by not paying default interest in accordance with Article 11 of Regulation 1552/89 [3] up until 31 May 2000 and in accordance with Article 11 of Regulation No 1150/2000 [4] from 31 May 2000, the Kingdom of Spain has failed to fulfil its obligations under the relevant provision of Community law;

3. order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The Community rules on own resources are clear in that they refer to the time when the Spanish authorities are obliged to establish such resources: that moment is when the national authorities are in a position to calculate the amount due and to notify the chargeable person that all the relevant Community provisions have been complied with. In the event of a failure to enter duties deriving from a customs debt in the accounts, those rules do not allow the national administration to apply time-limits provided for in their national legislation, which are different from the compulsory time-limits laid down by Community law. Such time-limits must be observed once the debtor is identified and the amount of the debt can be calculated.

The time at which establishment of own resources must take place is independent of notification to the debtor or of a definitive decision adopted by the national authorities. Those circumstances are relevant only to the relationship between the national authorities and the debtor, whereas the relationship between the Member State and the Community, as regards own resources, is governed exclusively by compliance with objective conditions concerning entry in the accounts. The obligation to establish own resources and subsequently the obligation to make them available is independent of the additional time-limits provided for by the national legislation in order to allow the debtor to submit his observations. Therefore, the practice followed by the Spanish authorities does not comply with Community rules.

As a result of its failure to fulfil those obligations, Spain must pay default interest, in accordance with Community rules on own resources. According to settled case-law, there is an indissoluble link between the obligation to establish the Community' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and, finally, the obligation to pay default interest, which is owed for the whole period of delay and is payable regardless of the reason for the delay in making the entry in the Commission's account. Consequently, the reference made by the Spanish authorities to their internal procedures, has no influence as regards its obligation to pay default interest. In order to enable the Commission to calculate the default interest, Spain must communicate to it all the information necessary on the periods which elapsed between the entry in the accounts, as the relevant time for the establishment of own resources, according to the provisions of Community law on the collection of those resources, and the practice followed by the Spanish authorities. The Kingdom of Spain has failed to fulfil that obligation.

(1) Council Regulation (EEC) No 2913 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).
(2) Council Regulation (EEC) No 1854/89 of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of import duties or export duties resulting from a customs debt (OJ 1989 L 186, p. 1).
(3) Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities own resources (OJ 1989 L 155, p. 1).
(4) Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities own resources (OJ 2000 L 130, p. 1).

Action brought on 23 December 2003 by the Commission of the European Communities against the Hellenic Republic

(Case C-550/03)

(2004/C 59/22)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 23 December 2003 by the Commission of the European Communities, represented by Georgios Zavvos and Wouter Wils, of its Legal Service.

The applicant claims that the Court should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directives:

  — 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways (1);

  — 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (2);

  — 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (3);

  and in any event by failing to notify the provisions in question to the Commission, the Hellenic Republic has failed to fulfil its obligations under those directives.

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The period prescribed for transposing the directives into national law expired on 15 March 2003.

(1) OJ L 75 of 15.03.2001, p. 1.
(2) OJ L 75 of 15.03.2001, p. 26.
(3) OJ L 75 of 15.03.2001, p. 29.

Appeal brought on 29 December 2003 by Unilever Bestfoods (Ireland) Ltd, formerly HB Ice Cream Ltd, against the judgment delivered on 23 October 2003 by the Fifth Chamber of the Court of First Instance of the European Communities in case T-65/98 between Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd, and the Commission of the European Communities

(Case C-552/03 P)

(2004/C 59/23)

An appeal against the judgment delivered on 23 October 2003 by the Fifth Chamber of the Court of First Instance of the European Communities in case T-65/98 (1) between Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd, and the

Commission of the European Communities, was brought before the Court of Justice of the European Communities on 29 December 2003 by Unilever Bestfoods (Ireland) Ltd, formerly HB Ice Cream Ltd, established in Dublin (Ireland), represented by M. Nicholson, M. Rowe, M. Biesheuvel and M. de Grave, lawyers, with an address for service in Luxembourg.

The Appellant claims that the Court should:

(a) set aside — in its entirety or partially — the judgment of the Court of First Instance (Fifth Chamber) of 23 October 2003 in case T-65/98, excluding paragraph 3 of the operative part of the judgment; and

(b) annul — in its entirety or partially — the Commission Decision in Case Nos. IV/34.073, IV/34.395 and IV/35.946 relating to a proceeding under Articles 81 (formerly 85) and 82 (formerly 86) of the Treaty (Van den Bergh Foods Ltd) or, alternatively, refer the case back to the Court of First Instance; and

(c) order the Commission to pay the Applicant's costs at first instance and in this Application on appeal.

Pleas in law and main arguments

The Appellant submits that the Court of First Instance erred in law by concluding that the distribution agreements of Van den Bergh Foods Ltd (formerly HB Ice Cream Ltd) are liable to have an appreciable effect on competition for the purposes of Article 81(1) of the Treaty and contribute significantly to a foreclosure of the market.

The Appellant also submits that the Court of First Instance erred in law when applying Article 81(3) of the Treaty. It wrongly applied the relevant burden and standard of proof and, in so doing, rendered its judgment inadequatly reasoned.

Finally, it is submitted that the Court of First Instance erred in law in two respects when applying Article 82 of the Treaty:

— it drew legal inferences which were unwarranted and inadequately reasoned and cannot, therefore, support a conclusion as to the abusive nature of the inducement; and

— it failed to apply the legal principles advanced by the Court in Bronner or, in the alternative, failed to give adequate reasons as to why Bronner is not relevant to the present case.

([1]) OJ C 234, 25.07.1998, p. 28.

Appeal brought on 30 December 2003 by the Panhellenic Union of Cotton Ginners and Exporters against the judgment delivered on 16 October 2003 by the Fifth Chamber (Extended Composition) of the Court of First Instance of the European Communities in case T-148/00 ([1]) between the Panhellenic Union of Cotton Ginners and Exporters and the Commission of the European Communities, supported by the Hellenic Republic

(Case C-553/03 P)

(2004/C 59/24)

An appeal against the judgment delivered on 16 October 2003 by the Fifth Chamber (Extended Composition) of the Court of First Instance of the European Communities in case T-148/00 between the Panhellenic Union of Cotton Ginners and Exporters and the Commission of the European Communities, supported by the Hellenic Republic, was brought before the Court of Justice of the European Communities on 30 December 2003 by the Panhellenic Union of Cotton Ginners and Exporters, established in Thessaloniki (Greece), represented by K. Adamantopoulos and J. Gutiérrez Gisbert, lawyers, with an address for service in Luxembourg.

The Appellant claims that the Court should:

1. set aside the judgment of the Court of First Instance of 16 October 2003 in case T-148/00 which dismissed the original application of the Appellant before the Court of First Instance as inadmissible and ordered the Appellant to bear its own costs and those of the European Commission in relation to the action before the Court of First Instance;

2. as requested originally before the Court of First Instance, annul Article 1 of the Commission Decision (2000/206/EC) ([2]) on an aid scheme applied in Greece to cotton by the Greek Cotton Board, in so far as it only declares Article 30(3) of Law 2040/92 of 17/23.4.1992, and not Article 30(1) as well, incompatible with the common market; and

3. order that the costs of and occasioned by these proceedings, and those before the Court of First Instance, be borne by the European Commission.

Pleas in law and main arguments

The present appeal is based on the following two grounds of law:

(i) Manifest error in that the judgment of the Court of First Instance states that the Appellant's principal objection relates to the validity of the Commission's finding that the Compensatory levy is compatible with the common market organisation for cotton and therefore the original Application of the Appellant is inadmissible — should this finding be upheld it would inevitably result in an infringement of the rights to access to justice of the Appellant.

This is because the Appellant did not have any other option but to challenge the deficient finding of the operative part of Article 1 of the contested Decision, which implicitly refers to the last paragraph of Section IV of the contested Decision which states that the Compensatory levy of Article 30(1) of Law 2040/92 is 'consonant with the market organisation'. The contested Decision is deficient in that the Commission failed to fulfil its duty to analyse the activities of the Greek Cotton Board financed by the compensatory levy of Article 30(1) of Law 2040/92 under the EC State aid rules; and

(ii) The judgment of the Court of First Instance is erroneous in law and contrary to the case-law of the Court of Justice of the European Communities.

The Appellant submits that the judgment of the Court of First Instance is contrary to the case-law of the Court of Justice of the European Communities in that the judgment states that (i) 'it is obvious' that the Compensatory levy of Article 30(1) of Law 2040/92 neither constitutes State aid nor contains a State aid component — the reason being that in the Court of First Instance's opinion the Compensatory levy of Article 30(1) of Law 2040/92 is 'merely one of two State aid financing methods granted by the Greek Cotton Board'; and (ii) that it is erroneous to equate the Compensatory levy of Article 30(1) of Law 2040/92 'with State aid'. This is because the Compensatory levy of Article 30(1) of Law 2040/92 constitutes State aid within the meaning of the Enirisorse and Van Calster case-law.

(1) OJ C 259, 09.09.2000, p. 24.
(2) OJ 2000, L 63, p. 27.

Reference for a preliminary ruling by the Rechtbank Utrecht, Sector kanton, Locatie Utrecht, by order of that Court of 10 December 2003 in the case of POSEIDON CHARTERING B.V. against 1. V.O.F. Marianne Zeeschip, 2. ALBERT MOOIJ, 3. SJOERDTJE SIJSWERDA, 4. GERRIT DANIEL SCHRAM

(Case C-3/04)

(2004/C 59/25)

Reference has been made to the Court of Justice of the European Communities by order of the Rechtbank Utrecht, Sector kanton, Locatie Utrecht, of 10 December 2003, received at the Court Registry on 5 January 2004, for a preliminary ruling in the case of POSEIDON CHARTERING B.V. against 1. V.O.F. Marianne Zeeschip, 2. ALBERT MOOIJ, 3. SJOERDTJE SIJSWERDA, 4. GERRIT DANIEL SCHRAM on the following questions:

1. Is a self-employed intermediary, who has arranged (not several but) one contract (a charter for a ship) which is renewed every year and pursuant to which, in respect of the renewal of the charter, the annual freight negotiations (except, during the period from 1994 to 2000, in 1999) are conducted between the owner of the ship and a third party and the outcome of those negotiations is recorded by the intermediary in an addendum, to be regarded as a commercial agent within the meaning of Council Directive 86/653/EEC (1) of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents?

2. Does it make any difference to the answer to Question 1 that the intermediary works for two principals because the intermediary already knew the third party between 1987 and 1994 and transacted business in respect of the abovementioned charter for the same ship? If an agency contract must be held to exist, does it make any difference to the answer to Question 1 that an indemnity (commission) of 2,5 % of the charter has been paid over many years and/or that Article 7(1) of the Directive refers to 'commercial transactions concluded' and to the existence of an entitlement to (the) commission 'where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind'?

3. Does is make any difference to the answer to Question 1 that Article 17 of the Directive refers to 'customers' instead of customer?

(1) OJ L 382 of 31.12.1986, p. 17.

Action brought on 9 January 2004 by the Commission of the European Communities against the United Kingdom of Great Britain and Northern Ireland

(Case C-6/04)

(2004/C 59/26)

An action against the United Kingdom of Great Britain and Northern Ireland was brought before the Court of Justice of the European Communities on 9 January 2004 by the Commission of the European Communities, represented by L. Flynn and M. van Beek, acting as agents, with an address for service in Luxembourg.

The Applicant claims that the Court should:

— declare that, by failing to correctly transpose the requirements of Council Directive 92/43/EEC ([1]) on the conservation of natural habitats and of wild fauna and flora, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive; and

— order the United Kingdom to pay the costs.

Pleas in law and main arguments

Article 6(2)

Whilst the United Kingdom has adopted provisions implementing this provision with regard to controlling potentially disturbing operations, there are not provisions for all parts of the United Kingdom which enable the competent authority to take steps to avoid the deterioration of a site. The Commission considers that the United Kingdom has therefore failed to fully implement Article 6(2) of the Directive to protect a designated site from deterioration due to neglect or inactivity rather than a potentially damaging operation.

Article 6(3) and 6(4)

Article 6(3) of the Directive concerns plans or projects likely to have a significant effect on a site, for which a two-fold test is introduced. Such plans or projects must be assessed for adverse effects on the integrity of the site following public consultation. Article 6(4) then requires compensatory measures to be taken under certain circumstances. The Commission considers that the United Kingdom legislation does not properly transpose these provisions in three specific regards. National legislation is indequate with regard to water abstraction plans and projects, land use plans and, in respect of Gibraltar, the review of existing planning rights.

Articles 11 and 14(2)

Article 11 of the Directive imposes a requirement on Member States to undertake surveillance of the conservation status of priority habitats or priority species. The United Kingdom has not specifically transposed this obligation. Until this provision is transposed, and this duty is clearly assigned to the competent authorities, the Commission is unable to establish whether such surveillance is carried out. The same point arises in Article 14(2) of the Directive, which requires that where measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11 of the Directive.

Article 12(1)(d)

The transposing legislation for Great Britain and for Northern Ireland fails to provide for the obligation to take requisite measures to establish a system of strict protection prohibiting the deterioration of breeding sites or resting places as required by Article 12(1)(d) of the Directive.

Furthermore, with regard to Gibraltar, the enforcement powers foreseen in the NPO 1991 are inadequate to ensure the protection required by Article 12(1) of the Directive.

Article 12(4)

Article 12(4) requires the monitoring of incidental capture and killing. The United Kingdom's transposing measures contain no provisions requiring the establishment of such a monitoring system. In the absence of further information, the Commission is unable to establish whether such monitoring is carried out.

Article 13(1)

Article 13(1) of the Directive requires the prohibition of the keeping, transport and sales or exchange and offering for sale or exchange of specimens of plant species taken from the wild, except for those taken legally before this Directive was implemented. Once again, the Commission considers that the national measures transposing this prohibition fail to comply with the temporal limitation on that defence.

Article 15

Article 15 of the Directive, which requires the introduction of a general prohibition on indiscriminate capture and killing has been implemented by regulation 41 of the C(NH)R 1994, regulation 36(2) of the C(NH)R(NI)1995 and section 17V(2) of the NPO 1991. These provisions make it an offence to use any of the means of capture and killing listed in Annex VI(a) and Annex VI(b) of the Directive. The Commission considers that this transposition method fails to incorporate a general prohibition as is required by Article 15.

Article 16

Article 16(1) of the Directive permits derogations from the prohibitions under Articles 12, 13, 14 and 15(a) and (b) of the Directive in certain circumstances. Such derogations are subject to two pre-conditions in the opening paragraph of Article 16(1), namely that there is no satisfactory alternative and that the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. The Commission considers that the national measures providing for these derogations do not adequately transpose these pre-conditions.

Application of the Directive beyond territorial waters

The Commission considers that the Directive applies beyond the territorial waters. Specifically, the United Kingdom has failed to transpose the obligations to designate special areas of conservation under Article 4 of the Directive and to provide species protection under Article 12 of the Directive inasmuch as the transposing legislation does not apply beyond the United Kingdom's territorial waters.

([1]) of 21 May 1992 (OJ 1992 L 206, p. 7).

Reference for a preliminary ruling by the Gerechtshof Herzogenbusch by judgment of that Court of 8 January 2004 in the case of E. Bujura against Inspecteur van de Belastingdienst Limburg / Kantoor Buitenland, Heerlen

(Case C-8/04)

(2004/C 59/27)

Reference has been made to the Court of Justice of the European Communities by judgment of the Gerechtshof Herzogenbusch (s-Hertogenbosch Regional Court of Appeal) of 8 January 2004, received at the Court Registry on 12 January 2004, for a preliminary ruling in the case of E. Bujura against Inspecteur van de Belastingdienst Limburg / Kantoor Buitenland, Heerlen on the following question:

Does a foreign taxpayer resident in a Member State, such as Germany, who is not entitled to the benefits afforded by the Netherlands-Germany Tax Convention because he does not satisfy the condition, laid down in that regard, that he receive at least 90% of his income in the Netherlands, have the right, by virtue of EC law, to receive from the Netherlands the tax-free allowance and tax credit for income tax in the calculation of his income from savings and investments if a foreign taxpayer who in resident in another Member State, in this case Belgium, has the right to such benefits in the calculation of his income from savings and investments by virtue of the Netherlands-Belgium Tax Convention (and the decision of the State Secretary for Finance of 21 February 2002, No CPP 2001/2745, BNB 2002/164) despite the fact that he does not receive at least 90 % of his income in the Netherlands?

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by judgment of that Court of 23 December 2003 in the case of in the criminal case against Geharo B.V.

(Case C-9/04)

(2004/C 59/28)

Reference has been made to the Court of Justice of the European Communities by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 23 December 2003, received at the Court Registry on 12 January 2004, for a preliminary ruling in the case of in the criminal case against Geharo B.V. on the following question:

Does the second sentence of Article 1 of Directive 91/338/EEC ([1]) (cadmium directive) preclude the application of the rules in that directive regarding the cadmium content of (finished) products and components, as set out in the Annex thereto, to toys within the meaning of Directive 88/378/EEC ([2]) (toy safety directive)?

([1]) Council Directive 91/338/EEC of 18 June 1991 amending for the 10th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ L 186 of 12.07.1991, p. 59 — Corrigendum in OJ L 253, 10.9.1991, p. 26).

([2]) Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ L 187 of 16.07.1988, p. 1).

Reference for a preliminary ruling by the Consiglio di Stato (Sixth Chamber) by order of that Court of 11 November 2003 in the case of Spa Fratelli Martini & C. Martini and Cargill srl against Ministero per le Politiche Agricole e Forestali, Ministero della Salute, and Ministero delle Attività Produttive

(Case C-11/04)

(2004/C 59/29)

Reference has been made to the Court of Justice of the European Communities by order of the Consiglio di Stato (Sixth Chamber) (Council of State, Judicial Division, Sixth Chamber) of 11 November 2003, received at the Court Registry on 15 January 2004, for a preliminary ruling in the case of Spa Fratelli Martini & C. Martini and Cargill srl against Ministero per le Politiche Agricole e Forestali, Ministero della Salute, and Ministero delle Attività Produttive on the following questions:

1. Must Article 152(4)(b) EC be interpreted as being the correct legal basis for the adoption of measures on labelling, contained in Directive 2002/2/EC, where they refer to the labelling of vegetable feedingstuffs?

2. In so far as it imposes an obligation to indicate the precise feed materials contained in compound feedingstuffs, which applies even to vegetable-based feedingstuffs, is Directive 2002/2/EC [1] justified on the basis of the precautionary principle in the absence of a risk assessment, based on scientific studies, which requires that precautionary measure on the basis of a possible correlation between the quantity of feed materials used and the risk of the diseases to be prevented? And is that directive nevertheless justified in the light of the principle of proportionality, in so far as the obligations on the part of the feedingstuffs industry to disclose information to the public authorities, which are required to maintain business secrecy, and are competent to monitor health protection, are not sufficiently directed to the attainment of the public health objectives supposed to be the purpose of the measure, instead imposing general rules requiring the indication of the percentage quantities of feed materials used on the labels of vegetable-based feedingstuffs?

3. In so far as it fails to respect the principle of proportionality, does Directive 2002/2/EC conflict with the fundamental right of property of the citizens of the Member States?

[1] OJ L 63 of 6.03.2002, p. 23.

Reference for a preliminary ruling by the Consiglio di Stato (Sixth Chamber) by order of that Court of 11 November 2003 in the case of Ferrari Mangimi srl and Associazione nazionale produttori alimenti zootecnici ASSALZOO against Ministero per le Politiche Agricole e Forestali, Ministero della Salute, and Ministero delle Attività Produttive

(Case C-12/04)

(2004/C 59/30)

Reference has been made to the Court of Justice of the European Communities by order of the Consiglio di Stato (Sixth Chamber) (Council of State, Judicial Division, Sixth Chamber) of 11 November 2003, received at the Court Registry on 15 January 2004, for a preliminary ruling in the case of Ferrari Mangimi srl and Associazione nazionale produttori alimenti zootecnici ASSALZOO against Ministero per le Politiche Agricole e Forestali, Ministero della Salute, and Ministero delle Attività Produttive on the following questions:

1. Must Article 152(4)(b) EC be interpreted as being the correct legal basis for the adoption of measures on labelling, contained in Directive 2002/2/EC [1], where they refer to the labelling of vegetable feedingstuffs?

2. In so far as it imposes an obligation to indicate the precise feed materials contained in compound feedingstuffs, which applies even to vegetable-based feedingstuffs, is Directive 2002/2/EC justified on the basis of the precautionary principle in the absence of a risk assessment, based on scientific studies, which requires that precautionary measure on the basis of a possible correlation between the quantity of feed materials used and the risk of the diseases to be prevented? And is that directive nevertheless justified in the light of the principle of proportionality, in so far as the obligations on the part of the feedingstuffs industry to disclose information to the public authorities, which are required to maintain business secrecy, and are competent to monitor health protection, are not sufficiently directed to the attainment of the public health objectives supposed to be the purpose of the measure, instead imposing general rules requiring the indication of the percentage quantities of feed materials used on the labels of vegetable-based feedingstuffs?

3. Must Directive 2002/2/EC be interpreted as meaning that its application, and therefore its effectiveness, is subject to the adoption of a positive list of feed materials containing their specific names, as set out in the tenth recital to the preamble and the Commission Report (COM2003 178) [2] dated 24 April 2003 or must the implementation of the directive in the Member States must take place before the adoption of the positive list of feed materials laid down by the directive, with reference to a list of the feed materials contained in the compound feedingstuffs by the names and generic definitions of their commodity classes?

4. Is Directive 2002/2/EC to be regarded as unlawful on the grounds of infringement of the principle of equal treatment and non-discrimination to the detriment of feedingstuff producers when compared with the producers of foodstuffs for human consumption in so far as the former are subject to rules requiring indications of the quantities of feed materials in compound feedingstuffs?

[1] OJ L 63 of 6.03.2002, p. 23.
[2] Not published.

Reference for a preliminary ruling by the Conseil d'État by order of that Court of 3 December 2003 in the case of Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT and Fédération nationale de l'action sociale Force Ouvrière against Secrétariat général du gouvernement; Intervener: Union des fédérations et syndicats nationaux d'employeurs sans but lucratif du secteur sanitaire, social et médico-social

(Case C-14/04)

(2004/C 59/31)

Reference has been made to the Court of Justice of the European Communities by order of the Conseil d'État (Council of State) of 3 December 2003, received at the Court Registry on 15 January 2004, for a preliminary ruling in the case of Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT and Fédération nationale de l'action sociale Force Ouvrière against Secrétariat général du gouvernement; Intervener: Union des fédérations et syndicats nationaux d'employeurs sans but lucratif du secteur sanitaire, social et médico-social (Union of national federations and unions of non-profit-making employers in the health, social and medico-social sectors) on the following questions:

1. In the light of the purpose of the Working Time Directive [1], namely to lay down minimum safety and health requirements for the organisation of working time, as set out in Article 1(1) thereof, must the definition of working time set out in the directive be considered to apply exclusively to the Community thresholds established by the directive or must it be considered to have general scope, applying also to the thresholds which, while adopted under the various national legal orders with a view to transposing the directive, may in fact be set — as they have been in France in the interest of employee protection — at a level affording greater protection than the thresholds established by the directive?

2. To what extent could a strictly proportional system of equivalence, which involves calculating the total number of hours in attendance before applying a weighting mechanism to them which reflects even the very least work-intensive periods during periods of inactivity, be considered compatible with the objectives of the Working Time Directive?

[1] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ L 307 of 13.12.1993, p. 18).

Action brought on 20 January 2004 by the Commission of the European Communities against the Federal Republic of Germany

(Case C-16/04)

(2004/C 59/32)

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 20 January 2004 by the Commission of the European Communities, represented by Denis Martin and Horstpeter Kreppel, acting as Agents, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. Declare that

   a) by virtue of the fact that, contrary to the requirements of Community law,

      — § 30(4) VBG 1/GUV.01 permits sliding doors and revolving doors as emergency doors,

— § 1(1), § 3(1), § 35 and § 37 of the Musterbauordnung do not contain any sufficiently clear workplace or protection rules for skylights, and

— § 3(1) point 1, and § 20 of the Arbeitsstättenverordnung do not contain sufficiently binding rules for loading ramps,

b) and also by failing to inform the Commission of the amendment of the laws at issue, the Federal Republic of Germany has failed to fulfil its obligations under Articles 3 and 10 of Council Directive 89/654/EEC ([1]) of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

2. Order the Federal Republic of Germany to pay the costs of the proceedings.

Pleas in law and main arguments

The period for implementing the directive expired on 31 December 1992 without the Federal Republic of Germany having adopted the necessary provisions in order to comply with its obligations under Article 3 in conjunction with Annex I, point 4.4, third sentence, point 10.1, first sentence, point 10.2 and point 14.1 of the directive.

([1]) OJ 1989 L 393, p. 1.

Action brought on 21 January 2004 by the Commission of the European Communities against the Kingdom of Spain

(Case C-17/04)

(2004/C 59/33)

An action against the Kingdom of Spain was brought before the Court of Justice of the European Communities on 21 January 2004 by the Commission of the European Communities, represented by Gregorio Valero Jordana of the Legal Service, with an address for service in Luxembourg.

The applicant claims that the Court should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2001/80/EC ([1]) of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants and in any event by failing to communicate those measures to the Commission, the Kingdom of Spain has failed to fulfil its obligations under that directive;

— order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The period prescribed for the transposition of the Directive into domestic law expired on 27 November 2002.

([1]) OJ L 309 of 27.11.2001, p. 1.

Action brought on 23 January 2004 by the Commission of the European Communities against the French Republic

(Case C-20/04)

(2004/C 59/34)

An action against the French Republic was brought before the Court of Justice of the European Communities on 23 January 2004 by the Commission of the European Communities, represented by W. Wils, acting as Agent, with an address for service in Luxembourg.

The Commission of the European Communities claims that the Court should:

1. declare that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Commission Directive 2002/50/EC of 6 June 2003 adapting to technical progress Council Directive 1999/36/EC on transportable pressure equipment ([1]), or, in any event, by failing to inform the Commission thereof, the French Republic has failed to fulfil its obligations under that directive;

2. order the French Republic to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of the directive expired on 1 January 2003.

([1]) OJ 2002 L 149, p. 28.

Action brought on 23 January 2004 by the Commission of the European Communities against Ireland

(Case C-21/04)

(2004/C 59/35)

An action against Ireland was brought before the Court of Justice of the European Communities on 23 January 2004 by the Commission of the European Communities, represented by Wouter Wils, acting as agent, with an address for service in Luxembourg.

The Applicant claims that the Court should:

1. declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2002/50/EC of the Commission of 6 June 2002 on the adaptation to technical progress of Council Directive 1999/36/EC on transportable pressure equipment [1] , or in any event by failing to communicate them to the Commission, Ireland has failed to fulfil its obligations under the Directive;

2. order Ireland to pay the costs.

Pleas in law and main arguments

The period within which the directive had to be transposed expired on 1 January 2003.

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[1] OJ L 149, 07.06.2002.

COURT OF FIRST INSTANCE

Action brought on 2 December 2003 by Yedas Tarim ve Otomotiv Sanayi ve Ticaret A.S. against the Council of the European Union and the Commission of the European Communities

(Case T-367/03)

(2004/C 59/36)

(Language of the case: English)

An action against the Council of the European Union and the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 2 December 2003 by Yedas Tarim ve Otomotiv Sanayi ve Ticaret A.S., Istanbul, (Turkey), represented by R. Sinner, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court should:

— grant compensation to the applicant for the loss incurred due to the Customs Union procedures generally, which arose from the Ankara Agreement, the Additional Protocol and its appendices, and especially the Common Council Decision No 1/95 of the European Community.

Pleas in law and main arguments

The applicant is a small and medium sized enterprise, active in the automotive industry. The applicant claims to have suffered a loss caused by the customs union between the European Union and Turkey [1], established in 1996. According to the applicant, the European Union has not fulfilled all of its obligations arising from the customs union and the Ankara Agreement [2].

The applicant claims that Turkey would be given loans and donations from the Community's program for Mediterranean countries and from the European Union's budget resources in order to eliminate the negative effects of the customs union on Turkey's economy. According to the applicant, the assistance given was inadequate. The applicant, as a small and medium company, claims to have suffered losses due to the lack of sufficient financial aid and therefore a disadvantage in terms of fair competition with other companies in the field.

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[1] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (OJ L 35 of 13 February 1996, p. 1).

[2] Agreement establishing an Association between the European Economic Community and Turkey (OJ P 217 of 29 December 1964, p. 3687) (No English text available).

Action brought on 10 December 2003 by Sophie van Weyenbergh against the Commission of the European Communities

(Case T-395/03)

(2004/C 59/37)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 10 December 2003 by Sophie van Weyenbergh, resident in Tervuren (Belgium), represented by Carlos Mourato, lawyer.

The applicant claims that the Court should:

— annul the decision of the selection board of Competition COM/TB/99 not to include the applicant in the list of suitable candidates;

— order the defendant to pay to the applicant the sum of EUR 72 924,00, subject to modification in the course of the proceedings, in respect of damages for material and non-material loss;

— order the defendant to pay the costs of the case.

Pleas in law and main arguments

Following the judgment of the Court of First Instance of 13 March 2002 in Joined Cases T-357/00, T-361/00, T-363/00 and T-364/00 [1] annulling the decision of the selection board to reject the applicant's candidature for internal Competition COM/TB/99 for the constitution of a reserve list of administrative assistants in career bracket B4/B5, the applicant was called to a new oral test. She objects to the failure to include her name on the list of suitable candidates in this competition.

In this regard, she points out that the letter by which she was notified of the contested decision bears the date of 20 January 2003, that is to say three days before the date on which the oral test in question actually took place. That error was later corrected.

In support of her claims, the applicant pleads:

— breach of the notice of the competition in question and a defect in the procedure, in that the selection board could not evaluate her on her oral abilities until it had interviewed her;

— misuse of powers given that the selection board was biased;

— breach of the principle of equal treatment; and

— breach of the requirement to state grounds for a decision.

(1) [2002] ECR-SC I-A-37, II-161.

Action brought on 11 December 2003 by Manuel Simões dos Santos against the Office for Harmonisation in the Internal Market

(Case T-409/03)

(2004/C 59/38)

(Language of the case: French)

An action against the Office for Harmonisation in the Internal Market (OHIM) was brought before the Court of First Instance of the European Communities on 11 December 2003 by Manuel Simões dos Santos, resident in Alicante (Spain), represented by Antonio Creus Carreras, lawyer.

The applicant claims that the Court should:

— annul the implied decision of the Appointing Authority rejecting the complaint made by the applicant and the decision of 14 February 2003 fixing his initial number of merit points for the 2002 promotion year in so far as it limits his period of service in the European Parliament;

— order the defendant to pay all the costs of the case.

Pleas in law and main arguments

The applicant was an official of the European Parliament when he was transferred to OHIM on 1st October 1998. By the contested decision, OHIM informed the applicant of his number of merit points for the 2002 promotion year. When calculating those points, OHIM limited the applicant's length of service in the grade to five years and as a result did not take account of the period from 1 January 1991 to 31 October 1993.

In support of his claim for annulment, the applicant submits, firstly, that there was a breach of Article 1 of Decision ADM 02-39 rev of OHIM concerning the career and promotion of officials and temporary staff, and of the principles of legality, legal certainty and equal treatment. He submits, furthermore, that that there was a breach of the Staff Regulations in so far as the principles applicable to transfers between institutions were not adhered to and that the applicant's legitimate expectations when he accepted the transfer were not upheld. The applicant submits, finally, that there was a breach of the requirement to state the reasons for the disputed decision and of the principle of proportionality.

Action brought on 18 December 2003 by Hoechst AG against the Commission of the European Communities

(Case T-410/03)

(2004/C 59/39)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 18 December 2003 by Hoechst AG, Frankfurt am Main (Germany), represented by M. Klusmann and V. Turner, lawyers.

The applicant claims that the Court should:

— annul the contested decision in so far as it concerns the applicant;

— in the alternative, make an appropriate reduction in the amount of the fine imposed on the applicant in the contested decision;

— order the defendant to pay the costs.

Pleas in law and main arguments

By Decision K(2003) 3426 of 1 October 2003 the Commission found that the applicant and four other undertakings had infringed Article 81(1) EC by virtue of their participation in a complex, single and continuing agreement and in concerted practices in the sorbate sector, through which they agreed inter alia target prices. A fine of EUR 99 million was imposed on the applicant.

The applicant challenges the decision and claims that the Commission infringed the principle of good administration by unlawfully giving preferential treatment to another undertaking in the administrative procedure. Both undertakings cooperated with the Commission at the end of 1998 and the applicant claims that the other undertaking has been given an unlawful advantage.

The applicant complains that there were irregularities in the conduct of the procedure at that time and also that despite its requests the Commission has refused to grant it access to Commission documents. The Commission has already allowed access to some internal documents in the context of general inspection of documents and it can therefore no longer rely on general confidentiality of internal documents connected therewith. Furthermore, a complete version of the decision, or a version which is sufficiently comprehensible, has not been supplied to the applicant, information in the first part of the decision having been blanked out without justification, thus making it impossible inter alia to comprehend how the fines were calculated.

Moreover, the applicant claims that there were errors of assessment and of law in connection with the fixing of the fine. It complains that the basic amount is disproportionate because it has not been treated in the same way as other participants in the procedure. It also complains that the Commission wrongly inferred that its actions had detrimental consequences and that 'senior management' participated in the cartel. The applicant submits that the basic amounts of the fine calculated according to groups are wrong because, in particular, the additional cartel activities of the Japanese manufacturers have not been taken into account. The applicant also challenges, on the merits, the further additional fine of 30 % for its alleged position as 'ringleader' and also the further addition of 50 % for recidivism. With regard to appraisal of its cooperation, the applicant complains that the Commission wrongly failed to classify it as the first cooperating undertaking.

Moreover, the applicant complains that a previous penalty imposed in the United States in regard to the same matter was not taken into account and relies in that regard on the principle of *ne bis in idem* which also applies in relationships with non-member countries. Although that principle does not preclude further proceedings, it requires prior penalties to be taken into account.

Finally, the applicant complains that owing to the Commission's lack of activity in the first stage of the procedure, the length of the procedure was unreasonable within the meaning of Article 6(1) ECHR and complains that the order to desist is unlawful because the relevant business has been sold in the meantime.

Action brought on 15 December 2003 by Shandong Reipu Biochemicals Co. Ltd. against the Council of the European Union

(Case T-413/03)

(2004/C 59/40)

(Language of the case: English)

An action against the Council of the European Union was brought before the Court of First Instance of the European Communities on 15 December 2003 by Shandong Reipu Biochemicals Co. Ltd., Shandong, (People's Republic of China), represented by O. Prost, lawyer.

The applicant claims that the Court should:

— annul Article 1 of Council Regulation (EC) No 1656/2003 of 11 September 2003 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of para-cresol originating in the People's Republic of China (OJ 2003 L 234, p. 1) as long as it imposes a 12,3 % duty on imports of products manufactured by the applicant;

— ask the Council to pay the costs.

Pleas in law and main arguments

The applicant is established in the People's Republic of China and produces and exports para-cresol to the European Union. The applicant contests Regulation (EC) No 1656/2003 which imposes a definitive duty on imports of para-cresol, originating in the People's Republic of China.

The applicant submits that the Council failed to determine the normal value in an appropriate and not unreasonable manner within the meaning of Article 2(5) of Regulation (EC) No 384/96 [1], as modified, and in conformity with its duty of due care. The Commission, who initiated an anti-dumping procedure under Article 5 of the Regulation, should not have ignored the anti-dumping rule according to which costs of by-products should not be taken into account, but instead should be deducted, in the normal value determination, in order to meet the need for a normal value determined in an appropriate and not unreasonable manner. According to the applicant, the Commission was aware of the difference between the costs of production related to the production of para-cresol, on the one hand, and the costs of production related specifically to the by-products (sodium sulfite and mixed phenol), on the other hand. By extending the scope of the investigation to the two by-products and by taking into account the by-products in the normal value determination, the Commission violated the duty of due diligence.

Furthermore, the applicant claims that the Council failed to respect the duty of good administration and that it violated Article 2 of Regulation (EC) No 384/96 by failing to calculate a normal value for the like product only.

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[1] Council Regulation (EC) No 384/96 of 22.12.1995 on protection against dumped imports from countries not members of the European Community (OJ L 56 of 6.3.1996, p. 1).

Action brought on 19 December 2003 by Angel Angelidis against the European Parliament

(Case T-416/03)

(2004/C 59/41)

(Language of the case: French)

An action against the European Parliament was brought before the Court of First Instance of the European Communities on 19 December 2003 by Angel Angelidis, resident in Luxembourg, represented by Eric Boigelot, lawyer.

The applicant claims that the Court should:

— annul the decision of the Secretary General of the European Parliament taken on 4 March 2003 definitively adopting the applicant's staff report for 2001;

— annul that staff report for 2001;

— annul the implied decision to reject the applicant's complaint submitted on 27 May 2003 in accordance with Article 90(2) of the Staff Regulations and seeking the annulment of the contested decision;

— order the defendant to pay to the applicant the sum of EUR 20 000 assessed on an equitable basis, subject to increase or decrease in the course of the proceedings, in respect of damages for non-material harm and harm to his career, on the basis both of substantial irregularities and of significant delay in the writing of the 2001 report in a particularly distressing period for the applicant;

— order the defendant to pay the costs in accordance with Article 87(2) of the Rules of Procedure of the Court of First Instance.

Pleas in law and main arguments

The applicant claims, firstly, a breach of Articles 26 and 43 of the Staff Regulations, of the general provisions for giving effect to Article 43 as adopted by the Bureau of the European Parliament on 8 March 1999 and of the instructions relating to the procedure for the writing of staff reports.

He also pleads misuse of powers and infringement of general principles of law, such as respect for the rights of the defence, the principle of good administration, the principle of the protection of legitimate expectations and the duty to have regard for the welfare of officials, the principle of equal treatment and those general principles requiring the AIPN to take a decision only on the basis of legally permissible grounds, namely those which are pertinent and not tainted by a manifest error of assessment, fact or law.

Action brought on 22 December 2003 by Fédération Internationale des Maisons de l'Europe (FIME) against the Commission of the European Communities

(Case T-417/03)

(2004/C 59/42)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 22 December 2003 by Fédération Internationale des Maisons de l'Europe, established in Saarbrücken (Germany), represented by Pierre Soler-Couteaux, lawyer.

The applicant claims that the Court should:

— annul the decision of 9 October 2003, in which the Commission applied set-off in two respects, on the ground that the decision is wrong in law;

— rule that the European Commission is liable in respect of three wrongful acts or omissions:

  — by offending against the principles of legitimate expectations and good faith;

  — by continually failing thereafter to observe the contractual time-limits for payment of the grants;

  — by failing to fulfil its obligation under Article 155 of the EC Treaty (now Article 211 EC) to ensure that the measures taken by it are applied, and by failing to perform public functions or duties in that there have been material omissions on its part and an unlawful failure to fulfil its duty to act and to monitor the proper use of Community funds;

— rule that these omissions have caused loss to FIME for which the Commission is liable to make compensation;

— rule that the applicant, FIME, has suffered non-pecuniary damage amounting to EUR 300 000 and order payment of that amount, together with interest for late payment;

— rule that the applicant, FIME, has suffered pecuniary loss amounting to EUR 210 000 and order payment of that amount, together with interest for late payment;

— order the Commission to pay to it the sum of EUR 10 000 in respect of irrecoverable expenditure;

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

Pleas in law and main arguments

By the contested decision, the Commission has applied set-off in two respects to the operating grant due to the applicant for the year 2003, first, in deducting the overpayment for the year 2002, and, secondly, in recovering the grants paid, through FIME, to one of its members, namely Maison de l'Europe Avignon Méditerranée, in respect of projects that the latter had failed to complete.

Following an inquiry by the European Anti-Fraud Office (OLAF), which established that Maison de l'Europe Avignon Méditerranée had failed to complete certain projects for which it had received grants and that it had accordingly misappropriated Community funds [1], the Commission took the view that these grants fell to be repaid to it by the applicant.

In support of its application for annulment, the applicant argues that the decision to apply set-off to the overpayment of the subsidy for the year 2002 was in breach of the principles of legitimate expectations and of good administration, in that the Commission had led the applicant to expect that it could cover losses arising through some of its projects by using its own funds and subscriptions from its members, without thereby rendering this expenditure ineligible.

The applicant also claims that there has been a breach of the obligation to state reasons for the contested decision.

It also argues that it is not required to repay to the Commission the sums allegedly misappropriated by Maison de l'Europe Avignon Méditerranée, as it did not breach its duties of supervision and monitoring in any way. It accordingly submits that the contested decision has no legal basis and contains a manifest error of assessment.

Lastly, the applicant alleges breach of the principle of good administration and the duty to exercise care in that the Commission failed to give full consideration to the matter in question.

In support of its claim for damages, the applicant claims that the Commission committed three errors which have caused the applicant unavoidable loss and damage, both pecuniary and non-pecuniary. The failures for which the Commission is alleged to be responsible are breach of the principle of legitimate expectations already considered in the context of the application for annulment, failure to observe contractual time-limits for the payment of grants and inadequate scrutiny of the use of funds provided by the applicant.

[1] See also Case T-43/03 Maison de l'Europe Avignon Méditerranée v Commission, published in OJ C 101, 26.4.2003, p. 39, and Case T-100/03 Maison de l'Europe Avignon Méditerranée v Commission, published in OJ C 112, 10.5.2003, p. 46.

Action brought on 22 December 2003 by ARGEV Verpackungsverwertungs-Gesellschaft mbH and Altstoff Recycling Austria Aktiengesellschaft against the Commission of the European Communities

(Case T-419/03)

(2004/C 59/43)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 22 December 2003 by ARGEV Verpackungsverwertungs-Gesellschaft mbH and Altstoff Recycling Austria Aktiengesellschaft, Vienna (Austria), represented by Dr Hanno Wollmann, lawyer.

The applicant claims that the Court should

— annul Article 2 and Article 3 of the Commission Decision of 16 October 2003 in a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP D3/35.470 — ARA, COMP D3/35.743 — ARGEV, ARO);

— in the alternative, annul Article 3 of that decision;

— order the defendant to pay the costs.

Pleas in law and main arguments

In 1994 the applicants notified several agreements and requested negative clearance or, in the alternative, an exemption decision. By the contested decision, the Commission approved, subject to conditions, the bundle of contracts of ARA, the countrywide Austrian system for the collection and recycling of packaging waste.

The applicants object to Articles 2 and 3 of the decision and claim that the restriction of competition found by the Commission does not exist. The Commission bases Article 2 of the decision on the fact that ARGEV has given exclusive contracts in the relevant collecting region to those disposal undertakings with which it has concluded collection and sorting agreements ('services contracts'). That is incorrect. The services contracts do not contain either a commitment to exclusivity which binds ARGEV or on which it can rely. For that reason, the Commission ought to have given the services contracts the negative clearance primarily applied for instead of an exemption.

Moreover, the applicants claim that the services contract satisfies the requirements of the block exemption in Regulation No 2790/1999 ([1]). Even if the services contracts of ARGEV contained an obligation of exclusivity (*quod non*) the agreements would fulfil the requirements of the block exemption regulation. The imposition of conditions which exceed the provisions of the block exemption is impermissible.

Furthermore, the applicants submit that the conditions provided for cannot be fulfilled and are unreasonable. Article 3(b) of the decision requires ARGEV and/or its disposal partner to have continuing information concerning the total amount of packaging licensed through systems in the domestic sector. That information is not, however, available. In addition, market shares can only be determined retrospectively. The distribution key laid down by the Commission for the goods collected is therefore impracticable. Moreover, Article 3(b) would, on the basis of realistic assumptions, result in ARGEV failing to achieve the collection and recycling quota laid down by the authorities. In the worst case, that would lead to the withdrawal of approval. The condition is therefore unreasonable, in particular because there were less severe means of achieving the objective sought by the Commission. The proposals made by ARGEV in that regard were left out of account by the Commission in the decision, without any reasons being given.

Finally, the applicants submit that there is a contradiction between the operative part and the statement of reasons of the decision in material respects. The statement of reasons contains material restrictions of the conditions that are not reproduced in the operative part of the decision.

([1]) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21).

Action brought on 22 December 2003 by European New Car Assessment Programme ('Euro NCAP') against the Commission of the European Communities

(Case T-424/03)

(2004/C 59/44)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 22 December 2003 by European New Car Assessment Programme ('Euro NCAP'), Brussels, Belguim, represented by Mr S. Kinsella and Mr K. Daly, Solicitors.

The applicant claims that the Court should:

— Direct the defendant to honour the settlement agreement reached with the applicant and to pay it a total final sum in respect of the Grant Agreement of EUR 40 919,65.

— Annul the Commission's Decision of 20 October 2003 to pay only EUR 257 598,91, despite the existence of the settlement agreement.

— In the alternative to the first and second pleas above, should the Court find that no settlement agreement exists, to order the defendant to pay the applicant the final amount specified in its Final Report, less amounts already paid, totalling EUR 47 706,39.

— In the further alternative to the first and second pleas above, should the Court find that no settlement agreement exists, annul the Commission's Decision of 20 October 2003 to pay only EUR 257 598,91 despite the applicant's contractual claim in the Final Report for EUR 305 305,30.

— Order the defendant to pay interest on any amounts that the Court finds remain due or have been paid late in accordance with the pleas above.

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

Pleas in law and main arguments

The Applicant is an international nonprofit making association active in the field of new car safety. On 22 August 2001, the applicant submitted to the Commission an application for a grant of 25 % funding of a project concerned with the safety assessment of certain types of vehicles, most notably four wheel drive vehicles. Thereafter, on 12 October 2001 the applicant and the Commission concluded a Grant Agreement the terms of which provided that the applicant would present to the Commission a final statement of all eligible costs, that on the basis of an examination of the final settlement the Commission would pay the balance of the grant to the applicant and that all sums under the agreement were to be paid within sixty days unless the Commission, within that period, informed the applicant that the request was not admissible . On 10 December 2002 the applicant submitted an application for payment of the outstanding balance, of the grant, which it claimed was EUR 305 305,30. On 31 March 2003, i.e. more than sixty days after receipt of the application, the Commission, not having paid the sum requested, raised certain queries with the applicant. These led to further submissions of documents by the applicant and a meeting between the parties representatives. On 2 May 2003 the Commission informed the applicant that final payment would be EUR 298 518,65 and asked the applicant to mark its approval of this sum, which the applicant duly did. On 20 October 2003, however, the Commission proceeded to pay to the applicant the sum of EUR 257 598,91 which, as it claimed in subsequent correspondence, represented the final amount due under the agreement.

In support of its application the applicant first submits that a binding settlement agreement was reached in May 2003 between the parties, providing that the amount payable would be EUR 298 518,65. It therefore asks the Court to enforce that agreement. In the alternative, if the Court should conclude that no settlement agreement was reached, the applicant claims that the Commission was bound to pay the original amount claimed, i.e. EUR 305 305,30, since it failed to express its concerns within sixty days of receipt of the application of payment. The applicant further argues that, in any case, the Commission's decision to pay the applicant only EUR 257 598,91 should be annulled for failure to state reasons and for non-respect of the applicant's right to be heard by the Commission before the final decision was adopted.

Action brought on 21 December 2003 by Gregorio Valero Jordana against the Commission of the European Communities

(Case T-429/03)

(2004/C 59/45)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 21 December 2003 by Gregorio Valero Jordana, residing in Uccle (Belgium), represented by Nicolas Lhoëst, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court should:

— Annul the decision of the appointing authority dated 19 December 2003 confirming the applicant's initial classification in Grade A 7;

— In so far as necessary, annul the decision of the appointing authority of 9 September 2003 rejecting the applicant's complaint;

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

Pleas in law and main arguments

Following the judgment of the Court of First Instance in Case T-17/95 [1], the Commission adopted an amendment of the rules relating to the criteria applicable to appointment in grade and classification in scale on recruitment, which entitled officials to seek a review of their classification on entering the service. By the contested decision, the Commission confirmed the applicant's classification in Grade A 7 on the date of his recruitment and, accordingly, rejected a request for reclassification submitted by the applicant.

In support of his action, the applicant relies on a failure to state reasons in the contested decision, a manifest error of assessment and alleged discrimination between the applicant, whose request for reclassification was rejected, and other officials who, with less professional experience than the applicant, were none the less reclassified in the higher grade of the career bracket.

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[1] Judgment of the Court of First Instance of the European Communities of 5 October 1995, published in OJ C 315, 25.11.95, p. 14.

Action brought on 24 December 2003 by Gibtelecom Limited against the Commission of the European Communities

(Case T-433/03)

(2004/C 59/46)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 24 December 2003 by Gibtelecom Limited, Gibraltar, represented by Mr M. Llamas, Barrister and Mr B. O'Connor Solicitor.

The applicant claims that the Court should:

— Annul the Commission's decision of 17 October 2003 rejecting the complaint brought by Gibtelecom under Article 86 EC in conjunction with Article 82 EC;

— order the Commission to pay Gibtelecom's costs.

Pleas in law and main arguments

By the contested decision the Commission rejected a complaint filed by the applicant on 14 May 1996 alleging that the Spanish telecommunications operator, Telefonica SA, had committed a series of abuses of dominant position contrary to Article 82 EC in refusing to conclude a cross-border roaming (GSM) agreement with the applicant. The applicant later converted that complaint into a complaint under Article 86 (EC, in conjunction with Articles 82 EC, 49 EC and 12 EC, against Spain alleging that Telefonica was acting under instructions from the Spanish Government which claims sovereignty over Gibraltar.

In support of its application, the applicant invokes a series of alleged manifest errors of assessment of the contested decision. According to the applicant, the Commission erred in considering that Telefonica is not a public undertaking or that it enjoys special rights within the meaning of article 86 EC. The applicant further alleges that Telefonica is in a dominant position and that there is an appreciable effect on trade and on competition of the refusal to conclude an agreement with the applicant. In the context of the same plea the applicant argues that the Commission's assessment that consumers in Gibraltar have access to mobile telecommunications services in Spain is manifestly unsound and that there is no suitable alternative to the Commission's intervention.

The applicant further puts forward a number of procedural and administrative grounds for annulment referring, in this context, to inadequate reasoning and a violation of the applicant's legitimate expectations which allegedly arose as a result of a letter sent on 7 June 2000 by three members of the Commission to Spain and the United Kingdom, requesting the two countries, among other things, to find a solution to the complaint about roaming. The applicant further submits, in the context of the same plea, that the Commission has failed to act impartially and that it has breached the principle requiring it to act within a reasonable period.

Action brought on 24 December 2003 by Gibtelecom Limited against the Commission of the European Communities

(Case T-434/03)

(2004/C 59/47)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 24 December 2003 by Gibtelecom Limited, Gibraltar, represented by Mr M. Llamas Barrister and Mr B. O'Connor Solicitor.

The applicant claims that the Court should:

— Declare that the Commission was under a duty to define its position in respect of that part of Gibtelecom's complaint concerning an infringement of Article 86 (1) EC in conjunction with Article 12 and/or Article 49 EC;

— Declare that the Commission, by not defining its position within two months of Gibtelecom's letter of formal notice of 18 August 2003, in respect of that part of its complaint concerning an infringement of Article 86 (1) EC in conjunction with Article 12 and/or Article 49 EC, failed to act;

— Call upon the Commission to act by adopting a decision on that part of Gibtelecom's complaint concerning an infringement of Article 86 (1) EC in conjunction with Article 12 and/or Article 49 EC;

— Order the Commission to pay Gibtelecom's costs;

— Alternatively, annul the Commission's decision of 17 October 2003 (Reference No D005602) rejecting that part of Gibtelecom's complaint concerning an infringement of Article 86 (1) EC in conjunction with Article 12 and/or Article 49 EC;

— Order the Commission to pay Gibtelecom's costs.

Pleas in law and main arguments

The pleas and arguments invoked by the applicant are similar to those invoked by the same applicant in case T-433/03.

Action brought on 26 December 2003 by Anne-Marie Mathieu against the Commission of the European Communities

(Case T-437/03)

(2004/C 59/48)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 26 December 2003 by Anne-Marie Mathieu, residing in Kraainem (Belgium), represented by Nicolas Lhoëst, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court should:

— Annul the decision of the appointing authority dated 20 December 2003 in so far as it did not award the applicant any additional seniority and therefore reclassified her in Grade C 4, first step, instead of Grade C 4, third step;

— In so far as necessary, annul the express decision of the appointing authority of 11 September 2003, notified to the applicant on 16 September 2003, dismissing complaint No R/222/03;

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

Pleas in law and main arguments

Following the judgment of the Court of First Instance in Case T-17/95 [1], the Commission adopted an amendment of the rules relating to the criteria applicable to appointment in grade and classification in scale on recruitment, which entitled officials to seek a review of their classification on entering the service. By the contested decision, the Commission granted such a request submitted by the applicant and reclassified her in Grade C 4, Step 1. The applicant is contesting that decision, in so far as it does not award her any additional seniority.

In support of her action, the applicant relies on a breach of the Commission's decisions of 6 June 1973 and 1 September 1983 on the criteria applicable to appointment in grade and classification in step on recruitment. She also claims that the Commission has infringed Article 5(3) of the Staff Regulations and the principle of equal treatment by refusing to award her any additional seniority although it awarded the maximum additional seniority to other officials whose professional experience is much shorter than hers. Last, the applicant relies on a failure to state reasons in the contested decision.

[1] Judgment of the Court of First Instance of the European Communities of 5 October 1995, published in OJ C 315, 25.11.95, p. 14.

Action brought on 29 December 2003 by Jean Arizmendi and 43 other applicants against the Council of the European Union and the Commission of the European Communities

(Case T-440/03)

(2004/C 59/49)

(Language of the case: French)

An action against the Council of the European Union and the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 29 December 2003 by Jean Arizmendi and 43 other applicants, all residing in France, represented by Jean-François Péricaud and Philippe Péricaud, lawyers.

The applicants claim that the Court should:

1. Order the Council of the European Union and the Commission of the European Communities jointly and severally to pay to each applicant the compensation representing the loss suffered, together with interest at the legal rate from the date the application was lodged;

2. Order the Council of the European Union and the Commission of the European Communities jointly and severally to pay the costs.

Pleas in law and main arguments

The subject matter of the present action is the loss allegedly suffered by the applicants, who are French ship brokers, as a result of the abolition in French law, under Law 2001-43 of 16 January 2001, of the monopoly traditionally held by French ship brokers. This abolition occurred by reason of Article 5 of the Community Customs Code [1], as applied by the Commission, when steps were taken following infringement proceedings against the French Republic (letter of formal notice of 12 February 1997 and reasoned opinion of 3 December 1997) concerning the monopoly held by ship brokers, under French law, in respect of representation for performing the acts and formalities laid down by customs rules.

In support of their claims, the applicants contend that the abolition of the monopoly is an act for which the Commission is liable for the following reasons:

— Breach of Article 55 of the EC Treaty (now Article 45 EC), in that ship brokers, in implementing customs legislation, participate in the exercise of official authority.

— Breach of the principles of legal certainty and legitimate expectations, in that, first, the contested provision refers to customs representation, which is a separate matter from presentation of goods at customs which is the task of the applicants, and, secondly, the monopoly was abolished without any form of transitional measure.

— Breach of the principles of equality and proportionality, in that the abrupt opening-up of the market in presentation of goods at customs has resulted in a draconian reduction in prices, which ships brokers, who are handicapped by the restrictive rules under which they operate, cannot resist, in the absence of any transitional measures.

Lastly, the applicants allege breach of the right to property, as laid down in the First Protocol to the European Convention on Human Rights.

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

Action brought on 31 December 2003 by N.V. Firma Léon Van Parys, N.V. Pacific Fruit Company, Pacific Fruchtimport GmbH and Pacific Fruit Company Italy S.p.A. against the Commission of the European Communities

(Case T-441/03)

(2004/C 59/50)

(Language of the case: Dutch)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 31 December 2003 by N.V. Firma Léon Van Parys, established in Antwerp (Belgium), N.V. Pacific Fruit Company, established in Antwerp (Belgium), Pacific Fruchtimport GmbH, established in Hamburg (Germany), and Pacific Fruit Company Italy S.p.A., established in Rome (Italy), represented by P. Vlaemminck and J. Holmens.

The applicants claim that the Court should:

1. order the defendant to pay compensation under Article 235 EC in conjunction with Article 288 EC for the damage suffered by the applicants as a result of the unlawful measures introduced by Commission Regulation No 2362/98, including default interest of 8 % to be paid on all amounts with effect from the date on which the damage was caused;

2. order the defendant to pay interest at the statutory rate of 8 % on all amounts due;

3. order the defendant to pay the costs.

Pleas in law and main arguments

The applicants claim to have suffered damage as a result of Regulation No 2362/98 [1] in so far as bananas from Ecuador do not qualify for the quota provided for in respect of traditional ACP bananas and as a result of the 'country allocation' system.

The applicants submit that, despite the Community's express intention to comply with the GATS and GATT 1994 Agreements from 1 January 1999, as determined and ordered by the WTO dispute-resolution bodies, there has been a sufficiently serious breach of superior rules of law as a result of Regulation No 2362/98 and Regulation No 1637/98 [2]. According to the applicants, the amendments made by those regulations, which were enforced up to the end of 2001, infringe the GATS and GATT Agreements, Community law, the principle of the protection of legitimate expectations, the principle of good faith, international customary law as codified in the Vienna Convention on the Law of Treaties and are at variance with the binding effect of the outcome of a dispute resolution procedure which has been incorporated in an international agreement concluded by the Community.

The applicants also allege infringement of the principle of equal treatment and submit that the Commission exceeded its powers of implementation by enforcing, up to the end of 2001, Regulation No 2362/98 containing rules on the implementation of Regulation No 404/93 which are contrary to the GATS and GATT 1994 Agreements. Finally, the applicants allege infringement of the protection of legitimate expectations and of the general legal principle of 'patere legem quam ipse fecisti' as a result of the failure to grant import licences to the actual importer as declared to the Council.

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[1] Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (Text with EEA relevance) (OJ 1998 L 293, p. 32).

[2] Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas (OJ 1998 L 210, p. 28).

Action brought on 31 December 2003 by Retecal Sociedad Operadora de Telecomunicaciones de Castilla y León S.A., Euskaltel S.A., Telecable de Asturias S.A., R Cable y Telecomunicaciones Galicia S.A. and Tenaria S.A.

(Case T-443/03)

(2004/C 59/51)

(Language of the case: Spanish)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 31 December 2003 by Retecal Sociedad Operadora de Telecomunicaciones de Castilla y León S.A., established in Valladolid (Spain), Euskaltel S.A., established in Zamudio, (Bizkaia, Spain), Telecable de Asturias, established in Oviedo (Spain), R Cable y Telecomunicaciones Galicia S.A., established in La Coruña (Spain) and Tenaria S.A., established in Cordovilla (Navarra, Spain), represented by José Maria Jiménez Laiglesia, lawyer.

The applicants claim that the Court should:

— annul the decision of 21 October 2003; and

— order the Commission to pay all the costs arising from the proceedings.

Pleas in law and main arguments

The present action is brought against the decision of the Commission to take no further action on the complaint submitted by the applicants relating to the alleged failure by the Kingdom of Spain to fulfil its obligations under Article 9(8) of the Council Regulation (EEC) No 4064/89 of 21 December 1989 [1] on the control of concentrations between undertakings, with respect to the merger between VIA DIGITAL Y SOGECABLE (Case No COMP/M.2845 Sogecable/Canal Satélite Digital/Vía Digital) and conditions applied to that merger by the Spanish authorities. The applicants submit that that article lays down an obligation to carry out investigation and verification, which, in the present case, the Commission has failed to fulfil.

The applicants recall that on 22 April 2003, they sent a letter to the Commission in which they submitted, essentially, that the conditions adopted by the Spanish authorities were not capable of maintaining effective competition in the sector concerned, in that they ensured that SOGECABLE would remain in a monopoly situation, given what was stated by the Commission in the referral decision.

In support of their claims the applicants submit that the Commission, having only limited discretion, was obliged, in accordance with the principle of sound administration, to deal diligently and impartially with the complaint in this case. They argue that in that respect, that the Commission's discretion in the matter at issue must correspond to the objective of establishing a scheme which ensures that competition is not distorted in the common market, so that the Member States do not adopt, in favour of one undertaking, measures which may give rise to the elimination or restriction of effective competition in the market at issue.

This application also takes account of the fact that the Commission itself has assessed the conditions of competition in the referral decision, so as to include all the criteria which may be used for the purpose of determining whether the measures adopted maintain or preserve competition in the markets at issue, and also that it has accepted commitments which are substantially different in another current and very similar case (M.2876 Newscorp/telepiú), and that therefore it cannot be claimed that the measures adopted by the Spanish Government maintain or preserve competition in the markets concerned.

([1]) OJ L 395 of 30.12.89, p. 1.

Action brought on 2 January 2004 by Electronics for Imaging, Inc., against Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case T-1/04)

(2004/C 59/52)

(Language of the case: English)

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before the Court of First Instance of the European Communities on 2 January 2004 by Electronics for Imaging, Inc., Foster City, California, USA, represented by Mr S. Malynicz, Barrister.

The applicant claims that the Court should:

— annul the decision of the Fourth Board of Appeal dated 25 August 2003, case number R 0793/2002-4 in so far as it refused the application for registration of VELOCITY as a trade mark on the basis of Articles 7(1)(b) and (c) of the CTMR;

— order the Office to bear its own costs and pay those of the Applicant.

Pleas in law and main arguments

Trade mark concerned:	Verbal trade mark 'VELOCITY' — Application No 1661842.
Products or services:	Products and services in classes 9, 16, 37 and 42.
Challenged Decision before the Board of Appeal:	Refusal of registration by the examiner.
Pleas in law:	Infringement of Article 7 (1) (b) and (c) of Regulation No 40/94.

Action brought on 7 January 2004 by Simonds Farsons Cisk Plc., against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case T-3/04)

(2004/C 59/53)

(Language of the case to be determined pursuant to article 131(2) of the Rules of Procedure — language in which the case was submitted: English)

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before the Court of First Instance of the European Communities on 7 January 2004 by Simonds Farsons Cisk Plc., Mriehel, Malta, represented by Ms M. Bagnall and Mr I. Wood, Solictors and Mr R. Hacon, Barrister. SA Spa Monopole, Compagnie fermière de Spa, en abrégé SA Spa Monopole NV., was also a party to the proceedings before the Board of Appeal.

The applicant claims that the Court should:

— annul the Decision of the First Board of Appeal of 4 November 2003;

— uphold Decision No 2880/2002 of 27 September 2002 of the Opposition Division;

— require OHIM to refuse the CTM Application;

— order Spa Monopole and/or OHIM to (a) bear the costs of the Opposition proceedings (b) the proceedings before the Board of Appeal, and (c) the costs of these proceedings.

Pleas in law and main arguments

Applicant for the Community trade mark:	S.A. Spa Monopole N.V.
The Community trade mark concerned:	The figurative mark 'KINJI by SPA' for goods in Classes 29 and 32 (e.g. fruit pulp and mineral and aerated waters and other non-alcoholic drinks containing fruit juice)
Proprietor of the right to the trade mark or sign asserted by way of opposition in the opposition proceedings:	The applicant
Trade mark or sign asserted by way of opposition in the opposition proceedings:	The Community trade mark 'KINNIE' (No 427 237) for goods in Class 32 (Beers; non-alcoholic drinks; preparations for making beverages)
Decision of the Opposition Division:	Rejection of the trade mark application
Decision of the Board of Appeal:	Annulment of the Decision of the Opposition Division and rejection of the opposition
Grounds of claim:	— Violation of Article 8 (1)(b) of Regulation (EC) No 40/94; — Breach of Article 73 of Regulation (EC) 40/94; — Likelihood of confusion on the part of the public in all, or alternatively in a significant proportion of territories within the European Community.

Action brought on 5 January 2004 by R.K. Achaiber Sing against the Commission of the European Communities and Council of the European Union

(Case T-4/04)

(2004/C 59/54)

(Language of the case: Dutch)

An action against the Commission of the European Communities and Council of the European Union was brought before the Court of First Instance of the European Communities on 5 January 2004 by R.K. Achaiber Sing, residing in Leiden (Netherlands), represented by J.G.G. Wilgers.

The applicant claims that the Court should:

1. Primarily, declare that Decision 2000/666/EC contains a measure having an equivalent effect to a quantitative and qualitative restriction on imports between Member States of the World Trade Organisation and that this decision is at variance with Article 131 of the EEC Treaty, with the result that it is null and void;

2. Primarily and in the alternative, order the European Community to pay compensation in respect of the damage, to be quantified, which the applicant has incurred as a result of the obligations arising under Decision 2000/666/EC;

3. Order the Community to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant imports live birds from non-member countries and states that he is obliged under the contested decision to incur costs for the establishment of a quarantine area. He states further that, as he has recently discovered, he is obliged to incur further costs by reason of the national provisions giving effect to the contested decision.

The applicant submits that the contested decision is at variance with the Agreement establishing the World Trade Organisation, and in particular with Articles 2(2) and 3 of the Agreement on the Application of Sanitary and Phytosanitary Measures. In the applicant's view, the contested decision constitutes a hidden barrier to trade which makes commerce in live, non-protected birds practically impossible.

Action brought on 2 January 2004 by Carlo Scano against the Commission of the European Communities

(Case T-5/04)

(2004/C 59/55)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 2 January 2004 by Carlo Scano, resident in Brussels (Belgium), represented by Marc-Albert Lucas, lawyer.

The applicant claims that the Court should:

— annul the decision of the selection board in Competition COM/PA/02 determining the applicant's results in the pre-selection tests;

— annul the list of successful candidates in Subject Area No 3 of the competition and any decision adopted on that basis;

— order the Commission to pay to him compensation for non-material damage to him in a sum to be fixed by the Court;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant, who lodged his candidature for Competition COM/PA/02 for promotion from category B to category A, choosing the subject area 'Human Resources Management/ Administrative Organisation and Coordination', seeks firstly the annulment of the selection board's decision determining his results in the pre-selection test and on that basis refusing to admit him to the oral test.

In support of his claims the applicant pleads a breach of the principles of good administration, of the duty to have regard for the interests of officials, and of the principles of equal treatment of candidates throughout the competition and of objectivity when choosing between them. He claims, furthermore, that there was a manifest error of assessment in that the sixth multiple choice question in the Italian version of the verbal and numerical test contained differences, caused by translation errors, from the English and French versions. Consequently the applicant, who had opted for the Italian version, logically chose an answer considered incorrect and did not choose that considered correct, unlike candidates who had opted for the other two language versions.

Action brought on 7 January 2004 by Shaker s.a.s. di Lucia Laudato & C. against the Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case T-7/04)

(2004/C 59/56)

(Language of the case: Italian)

An action against the Office for Harmonisation in the Internal Market was brought before the Court of First Instance of the European Communities on 7 January 2004 by Shaker s.a.s. di Lucia Laudato & C., represented by F. Sciaudone, lawyer. The other party to the proceedings before the Board of Appeal was Liminana y Botella S.L.

The applicant claims that the Court should:

— annul the contested decision and/or vary it by rejecting the opposition by Liminana y Botella S.L., and by granting the application for registration of the Community trade mark submitted by the applicant;

— order OHIM to pay the costs of these proceedings.

Pleas in law and main arguments

Party seeking the registration of the Community trade mark:	The applicant
Relevant Community mark:	Figurative mark 'Limoncello della Costiera Amalfitana-Shaker' — Registration application No 1267434 for products in Classes 29, 32 and 33 (jellies, preserves, jams and liqueurs), subsequently limited to Classes 29 and 33.
Owner of the mark or distinctive sign asserted in the opposition proceedings:	Liminana y Botella S.L.
Mark or distinctive sign asserted in the opposition proceedings:	Spanish word mark 'limonchelo', for products in Class 33.
Opposition Division's decision:	Opposition upheld and application for registration rejected, limited to Class 33.
Appeal Board's decision:	Appeal dismissed.

Grounds of the appeal:	Wrong application of Article 8(1)(b) of Regulation (EC) No 40/94 (likelihood of confusion), failure to state reasons and misuse of powers by manifest error of assessment and inconsistency with the Examiner's decision of 23 November 1999 regarding partial rejection of the registration of the mark concerned.

Action brought on 9 January 2004 by Muswellbrook Limited against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case T-8/04)

(2004/C 59/57)

(Language of the case to be determined pursuant to article 131(2) of the Rules of Procedure — language in which the case was submitted: English)

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before the Court of First Instance of the European Communities on 9 January 2004 by Muswellbrook Limited, Dublin, Ireland, represented by Ms P. Koch Moreno, lawyer. Friedrich Grimm and Engelbert Rolli were also party to the proceedings before the Board of Appeal.

The applicant claims that the Court should:

— declare that the decision which was issued on 5 November 2003 by the First Board of Appeal of OHIM, which dismissed the plaintiff's appeal against the resolution of 29 April 2002 in opposition procedure No B 1181/2002, which dismissed the opposition that was lodged against community trade mark application No 847640 for the registration of the word SNIKE in relation to all the products of class 25 covered by the application, does not comply with the EC Regulations on Community Trade Marks, No 40/94, and that the said decision be set aside;

— declare that there is a risk of confusion between the community trade mark application with No 847640 for the word SNIKE in class 25 and Spanish trade mark No 88222, consisting of the word NIKE with device, which protects identical products that also fall under class 25;

— order the respondent and, if applicable, the intervening party to pay the costs of these proceedings.

Pleas in law and main arguments

Applicants for the Community trade mark:	Friedrich Grimm and Engelbert Rolli
Community trade mark sought:	Community trade mark application No 847640 for word mark SNIKE in relation to certain goods in classes 12, 25 and 41 (Vehicles, clothing, footwear, headgear, education, entertainment,...)
Proprietor of mark or sign cited in the opposition proceedings:	The applicant, Muswellbrook Ltd.
Mark or sign cited in opposition:	The national figurative mark No 88222 for certain goods in class 25 (Stockings, socks, shirts, gloves, coats, footwear, sporting footwear, ...)
Decision of the Opposition Division:	Rejection of the opposition
Decision of the Board of Appeal:	Dismissal of the appeal
Pleas in law:	Violation of Article 8 (1) (b) of Council Regulation (EC) No 40/941 [1]

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

Action brought on5 January 2004 by Carlos Leite Mateus against the Commission of the European Communities

(Case T-10/04)

(2004/C 59/58)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 5 January 2004 by Carlos Leite Mateus, residing in Zaventem (Belgium), represented by Sébastien Orlandi, Albert Coolen, Jean-Noël Louis and Étienne Marchal, lawyers, with an address for service in Luxembourg.

The applicant claims that the Court should:

— Annul the final decision of 20 December 2002 fixing the applicant's classification on recruitment in Grade B 3 with effect from 1 March 1988;

— Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant was classified in Grade B, Step 3, upon entering the service of the Commission in March 1988 and is contesting the appointing authority's decision not to reclassify him after reconsidering his situation following the judgment of the Court of Justice in Case C-389/98 P Gevaert.

In support of his claims, the applicant submits that in reconsidering his file, the Commission took the view that his professional experience could be taken into account only from May 1970, the date on which he obtained the diploma rendering him eligible for a Category B post. The applicant claims that he obtained his diploma of secondary education in July 1964. He submits that the decision is vitiated by a manifest error of assessment and is therefore unlawful.

The applicant also claims that there has been a breach of Article 5 of the Staff Regulations.

Action brought on 14 January 2004 by Georges Martins against the Commission of the European Communities

(Case T-11/04)

(2004/C 59/59)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 14 January 2004 by Georges Martins, residing in Brussels, represented by Sébastien Orlandi, Albert Coolen, Jean-Noël Louis and Étienne Marchal, lawyers, with an address for service in Luxembourg.

The applicant claims that the Court should:

— Annul the Commission's decision of 14 April 2003 in so far as it:

  — revises and fixes, with effect from 1 June 1991, the applicant's classification on recruitment in Grade A 6, Step 1;

  — revises and fixes, with effect from 1 April 2000, his classification in Grade A 5, Step 3;

  — limits the pecuniary effects to 5 October 1005;

— Order the Commission to pay the costs.

Pleas in law and main arguments

The applicant was classified in Grade A 7, Step 3, upon entering the service in June 1991 with the Economic and Social Committee and was transferred to the Commission on 1 November 1992. On 31 July 2002, the appointing authority of the Economic and Social Committee revised and fixed his recruitment on classification in Grade A 6, Step 1.

In the applicant's submission, the Commission was therefore required to take the measures to implement that decision with effect from 1 November 1992, the date on which he was transferred to its services, and also to reconstruct his career; as it has failed to do so, it has infringed Articles 62 and 45 of the Staff Regulations and also the principle that an official is entitled to reasonable career prospects.

III

(Notices)

(2004/C 59/60)

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

OJ C 47, 21.2.2004

Past publications

OJ C 35, 7.2.2004

OJ C 21, 24.1.2004

OJ C 7, 10.1.2004

OJ C 304, 13.12.2003

OJ C 289, 29.11.2003

OJ C 275, 15.11.2003

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