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IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COURT OF JUSTICE

(2007/C 20/01)

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

OJ C 326, 30.12.2006

Past publications

OJ C 310, 16.12.2006

OJ C 294, 2.12.2006

OJ C 281, 18.11.2006

OJ C 261, 28.10.2006

OJ C 249, 14.10.2006

OJ C 237, 30.9.2006

These texts are available on:
EUR-Lex: http://eur-lex.europa.eu

V

(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Reference for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Netherlands) lodged on 14 November 2006 — Heemskerk BV en BV v/h Firma Schaap v Productschap Vee en Vlees

(Case C-455/06)

(2007/C 20/02)

Language of the case: Dutch

Referring court

College van Beroep voor het bedrijfsleven

Parties to the main proceedings

Applicant: Heemskerk BV en BV v/h Firma Schaap

Defendant: Productschap Vee en Vlees

Questions referred

1a. Is an administrative body empowered to decide, contrary to the declaration of the official veterinarian referred to in Article 2(2) of Regulation (EC) No 615/98 ([1]), that the transport of animals to which the official veterinarian's declaration relates is not in accordance with the conditions laid down in Directive 91/628/EEC? ([2])

1b. If the answer to Question 1a is in the affirmative:

Is the exercise by the administrative body of that power on grounds of Community law subject to specific restrictions, and if so, what are those restrictions?

2. If the answer to Question 1 is in the affirmative:

When assessing whether there is an entitlement to refunds, for which Regulation (EC) No 800/1999 ([3]), for example, provides, should an administrative body of a Member State determine whether a transport of live animals complies with Community animal welfare legislation by reference to the requirements applicable in the Member State or to those of the State in which the vessel transporting the live animals is registered and which has granted an authorisation for that vessel?

3. Does Community law require a court or tribunal to conduct, of its own motion, an examination — that is to say, an examination of grounds falling outside the basic framework of the disputes — of grounds derived from Regulation (EC) No 1254/1999 ([4]) and Regulation (EC) No 800/1999?

4. Is the phrase 'subject to compliance with the provisions established in Community legislation concerning animal welfare' in Article 33(9) of Regulation (EC) No 1254/1999 to be understood as meaning that, where it is established that while transporting live animals a vessel was so heavily laden as to exceed the cargo permitted by the relevant welfare legislation, there was a failure to comply with Community animal welfare legislation only in respect of the number of animals by which the permitted cargo was exceeded, or must it be found that that legislation was not complied with in respect of all the live animals transported?

5. Does the effective application of Community law entail that a court's examination, of its own motion, of compatibility with provisions of Community law prevails over the principle enshrined in Dutch law of administrative procedure that an individual bringing an action must not be placed thereby in a less advantageous position than if he had not brought that action?

([1]) Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport (OJ 1998 L 82, p. 19).

([2]) Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17).

([3]) Commission Regulation (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1999 L 102, p. 11).

([4]) Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal (OJ 1999 L 160, p. 21).

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Sot. Lelos kai Sia EE v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-468/06)

(2007/C 20/03)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Sot. Lelos kai Sia EE

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

2. If the Court holds that limitation of parallel trade, for the reasons set out above, does not constitute an abusive practice in every case where it is engaged in by an undertaking holding a dominant position, how is possible abuse to be assessed? In particular:

2.1 Do the percentage by which normal domestic consumption is exceeded and/or the loss suffered by an undertaking holding a dominant position compared with its total turnover and total profits constitute appropriate criteria? If so, how are the level of that percentage and the level of that loss determined (the latter as a percentage of turnover and total profits), above which the conduct in question may be abusive?

2.2 Is an approach entailing the balancing of interests appropriate, and, if so, what are the interests to be compared? In particular:

(a) is the answer affected by the fact that the ultimate consumer/patient derives limited financial advantage from the parallel trade and

(b) is account to be taken, and to what extent, of the interests of social insurance bodies in cheaper medicinal products?

2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Farmakemporiki Anonimi Etairia Emporias kai Dianomis Farmakeftikon Proionton v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-469/06)

(2007/C 20/04)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Farmakemporiki Anonimi Etairia Emporias kai Dianomis Farmakeftikon Proionton

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Konstantinos Xidias kai Sia OE v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-470/06)

(2007/C 20/05)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Konstantinos Xidias kai Sia OE

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Farmakemporiki Anonimi Etairia Emporias kai Dianomis Farmakeftikon Proionton v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-471/06)

(2007/C 20/06)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Farmakemporiki Anonimi Etairia Emporias kai Dianomis Farmakeftikon Proionton

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Ionas Stroumsas EPE v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-472/06)

(2007/C 20/07)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Ionas Stroumsas EPE

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Ionas Stroumsas EPE v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-473/06)

(2007/C 20/08)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Ionas Stroumsas EPE

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Farmakapothiki Pharma-Group Messinias Anonimi Etairia v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-474/06)

(2007/C 20/09)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: Farmakapothiki Pharma-Group Messinias Anonimi Etairia

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — K.P. Marinopoulos — Anonimos Etairia Emporias kai Dianomis Farmakeftikon Proionton v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-475/06)

(2007/C 20/10)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: K.P. Marinopoulos — Anonimos Etairia Emporias kai Dianomis Farmakeftikon Proionton

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

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Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — K.P. Marinopoulos — Anonimos Etairia Emporias kai Dianomis Farmakeftikon Proionton v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-476/06)

(2007/C 20/11)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Claimant: K.P. Marinopoulos — Anonimos Etairia Emporias kai Dianomis Farmakeftikon Proionton

Defendant: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

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2.3 What other criteria and approaches are considered appropriate in the present case?

Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Kokkoris D. Tsanas K. EPE and Others v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-477/06)

(2007/C 20/12)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Appellants: Kokkoris D. Tsanas K. EPE and Others

Respondent: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately correct for a national court to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

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Reference for a preliminary ruling from the Efetio Athinon (Greece) lodged on 21 November 2006 — Kokkoris D. Tsanas K. EPE and Others v GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

(Case C-478/06)

(2007/C 20/13)

Language of the case: Greek

Referring court

Efetio Athinon

Parties to the main proceedings

Appellants: Kokkoris D. Tsanas K. EPE and Others

Respondent: GlaxoSmithKline Anonimi Emporiki Viomikhaniki Etairia Farmakeftikon Proionton

Questions referred:

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2.3 What other criteria and approaches are considered appropriate in the present case?

Action brought on 24 November 2006 — Commission of the European Communities v Federal Republic of Germany

(Case C-480/06)

(2007/C 20/14)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: X. Lewis and B. Schima, Agents)

Defendant: Federal Republic of Germany

Form of order sought

— A declaration that the Federal Republic of Germany has failed to fulfil its obligations under Article 8 in conjunction with Titles III to VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ([1]), in that the Landkreise Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade concluded a waste disposal services contract with Stadtreinigung Hamburg directly and did not make that service contract subject to a Community-wide open or restricted tender procedure;

— An order that the Federal Republic of Germany pay the costs of the proceedings.

Pleas in law and main arguments

On 18 December 1995 four local counties (Landkreise) in Lower Saxony concluded a waste disposal services contract with Stadtreinigung Hamburg (Hamburg city cleaning authority), a body governed by a public law. That contract was concluded without carrying out an award procedure and without a Community-wide call for tenders.

The Landkreise are contracting authorities and the contract at issue is a service contract for pecuniary interest concluded in writing which exceeds the relevant threshold for the application of Directive 92/50/EEC and thus falls within the scope of that directive.

The fact that Stadtreinigung Hamburg as a body governed by public law is itself a contracting authority within the meaning of Directive 92/50/EEC does not alter the fact that the contract in dispute falls within the scope of that directive: as the Court of Justice has expressly declared, the directives on procurement law are always applicable if a contracting authority intends to conclude a contract for pecuniary interest in writing with a body which is distinct, in form, from itself and which has the power to make decisions independently of that authority.

There are no facts apparent which justify a private award of the contract at issue in the form of a negotiated procedure without a prior contract notice.

The Commission also does not agree with the view of the Federal Government that cooperation between local authorities as a product of municipal autonomy is not subject to procurement law, regardless of the legal form which it may take. Municipal autonomy cannot lead to a situation where local authorities are permitted to disregard the provisions on public awards of contracts. In so far as those local authorities were to conclude contracts on the provision of services with other bodies, even if those bodies were also contracting authorities themselves, they would be subject to procurement law. The German Government was also not able to prove that the service contract at issue could only be granted to a specific service provider for technical reasons.

For those reasons the Commission comes to the conclusion that the Federal Republic of Germany infringed Directive 92/50/EEC by directly concluding a waste disposal services contract without carrying out an award procedure and without a Community-wide call for tenders.

(1) OJ 1992 L 209, p. 1.

Action brought on 24 November 2006 — Commission of the European Communities v Italian Republic

(Case C-483/06)

(2007/C 20/15)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: L. Pignataro, Agent)

Defendant: Italian Republic

Form of order sought

— Declare that the Italian Republic has failed to fulfil its obligations under Article 5(1) of Directive 2003/33/EC (1) by exempting from the prohibition on sponsorship events, or related activities, where these take place exclusively within the Italian State;

— order the Italian Republic to pay the costs.

Pleas in law and main arguments

The effect of the Italian legislation is to introduce a derogation from the prohibition on sponsorship laid down in Article 5(1) of Directive 2003/33/EC which is not provided for by that directive.

(1) OJ L 152, p. 16.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden lodged on 27 November 2006 — Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën

(Case C-484/06)

(2007/C 20/16)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applicant: Fiscale eenheid Koninklijke Ahold NV

Defendant: Staatssecretaris van Financiën

Questions referred

1. Is the rounding-off of VAT amounts governed solely by national law, or — particularly in view of the first and second paragraphs of Article 2 of the First Directive (1) and Article 11 A(1)(a) of the Sixth Directive and Article 22(3)(b), first sentence, (version as at 1 January 2004) and (5) of the Sixth Directive (2) — is it a matter for Community law?

2. If the latter is the case, does it follow from the aforementioned provisions of the Directives that the Member States are required to permit rounding-down per article, even if different transactions are included in one invoice and/or one tax return?

(1) First Council Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

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

Reference for a preliminary ruling from the Hof van beroep te Antwerpen (Belgium) lodged on 27 November 2006 — BVBA Van Landeghem v Belgian State

(Case C-486/06)

(2007/C 20/17)

Language of the case: Dutch

Referring court

Hof van beroep te Antwerpen

Parties to the main proceedings

Applicant: BVBA Van Landeghem

Defendant: Belgian State

Question referred

'Should pick-ups — that is to say, motor vehicles consisting, on the one hand, of an enclosed cabin for use as a passenger compartment, there being behind the driver's seat folding or removable seats with three-point safety belts, and, on the other hand, of a load space which is separated from the cabin, is not higher than 50 centimetres, can be opened only at the rear and has no facilities for attaching a load — which were equipped with a highly luxurious, full-option interior (including electrically adjustable seats, leather seats, electrically operated mirrors and windows, a stereo with a CD player, etc.), an ABS braking system, an automatic, 4 to 8-litre, very high fuel-consumption engine, four-wheel drive and luxurious (sports) rims, be classified, if put into circulation and released for home use in the period between 10 April 1995 and 4 December 1997, under heading 87.03 of the then applicable combined nomenclature (originally introduced by Council Regulation (EEC) No 2658/87 ([1]) of 23 July 1987 on the tariff and statistical nomenclature), as motor cars and other motor vehicles, principally designed for the transport of persons (other than those of heading No 87.02), including motor vehicles of the "station wagon" or "break" type and racing cars, or under heading 87.04 of the then applicable combined nomenclature as motor vehicles for the transport of goods, or under a heading other than headings 87.03 or 87.04 of the then applicable combined nomenclature?'

([1]) OJ L 256, p. 1.

Appeal brought on 27 November 2006 by L & D S.A. against the judgment of the Court of First Instance (Fourth Chamber) delivered on 7 September 2006 in Case T-168/04 L & D S.A. v OHIM

(Case C-488/06 P)

(2007/C 20/18)

Language of the case: Spanish

Parties

Appellant: L & D S.A. (represented by: S. Miralles Miravet, abogado)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) and Julios Sämann Ltd

Form of order sought

— set aside the judgment of the Court of First Instance in its entirety

— annul paragraphs 1 and 3 of the decision of the Second Board of Appeal of OHIM of 15 March 2004, in so far as it (1) partially annuls the decision of the Opposition Division and refuses registration of the mark applied for in respect of goods in Classes 3 and 5, and, (2) orders each one of the parties to bear the costs that they incurred in the opposition proceedings and the appeal;

— order OHIM to pay all the costs.

Pleas in law and main arguments

Infringement of Article 8(1)(b) of Regulation No 40/94 ([1]).

The Court of First Instance infringed Article 8(1)(b) of Regulation No 40/94 by concluding: (i) that the earlier Community mark No 91.991 had acquired a distinctive character; (ii) that the figurative mark with the verbal element 'Aire Limpio' No 252.288 and the earlier Community figurative mark No 91.991 were similar; and, (iii) that there was a likelihood of confusion.

Infringement of Article 73 of Regulation No 40/94

The Opposition Division of OHIM (decision of 25 February 2003) and the Board of Appeal (decision of 15 March 2004) confined their examination to the mark whose registration is sought ('Aire Limpio' No 252.288) and the earlier Community mark No 91.991. However, the Court of First Instance relied on documents related to other marks, particularly in relation to international mark No 328.915 'ARBRE MAGIQUE'. As a consequence, the grounds of the judgment under appeal refer to a mark that even the applicant excluded from the comparative analysis in order to determine the existence of a likelihood of confusion. By so doing, the applicant was unable to present its case properly in respect of the arguments and information relating to other marks other than Community trade mark No 91.991, on which is based the error in the judgment under appeal of the Court of First Instance.

(1) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 28 November 2006 — Consorzio Elisoccorso San Raffaele v Elilombarda s.r.l.

(Case C-492/06)

(2007/C 20/19)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Applicant: Consorzio Elisoccorso San Raffaele

Defendant: Elilombarda s.r.l.

Question referred

Where a consortium without legal personality has participated as such in a procedure for the award of a public contract and has not been awarded that contract, is Article 1 of Council Directive 89/665/EEC (1) of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC (2) of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, to be interpreted as precluding the possibility under national law for an individual member of that consortium to bring an action against the decision awarding the contract?

(1) OJ 1989 L 395, p. 33.
(2) OJ 1992 L 209, p. 1.

Appeal brought on 30 November 2006 by Commission of the European Communities against the judgment of the Court of First Instance (Second Chamber) delivered on 6 September 2006 in Case T-304/04 Commission of the European Communities v Italian Republic, Wam SpA

(Case C-494/06 P)

(2007/C 20/20)

Language of the case: Italian

Parties

Appellant: Commission of the European Communities (represented by: V. Di Bucci and E. Righini, Agents)

Other parties to the proceedings: Italian Republic, Wam SpA

Forms of order sought

— Set aside the judgment of the Court of First Instance of the European Communities of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italian Republic and Wam SpA* v *Commission of the European Communities* and, in so doing,

— give a final ruling on the dispute and dismiss the action as unfounded;

— in the alternative, refer the case back to the Court of First Instance for a new ruling;

— order the Italian Republic and Wam SpA to pay the costs of the proceedings, together with the costs of the proceedings at first instance.

Pleas in law and main arguments

The Commission puts forward a single ground of appeal. In finding that the contested decision failed to give adequate reasons to enable the effect of the aid on trade and competition to be identified, the Court of First Instance has infringed Article 87(1) EC, read in conjunction with Article 253 EC, and has stated contradictory grounds for the judgment.

Reference for a preliminary ruling from the Sąd Okręgowy w Koszalinie (Poland) lodged on 8 December 2006 — Halina Nerkowska v Zakład Ubezpieczeń Społecznych

(Case C-499/06)

(2007/C 20/21)

Language of the case: Polish

Referring court

Sąd Okręgowy w Koszalinie (Regional Court, Koszalin)

Parties to the main proceedings

Applicant: Halina Nerkowska

Defendant: Zakład Ubezpieczeń Społecznych Oddział w Koszalinie

Question referred

Does Article 18 EC, which guarantees citizens of the European Union the right to move and reside freely within the territory of the Member States, preclude the binding force of the national rules laid down in Article 5 of the Ustawa o zaopatrzeniu inwalidów wojennych i wojskowych oraz ich rodzin (Law on provision for war and military invalids and their families) of 29 May 1974 (*Dziennik Ustaw* (Journal of Laws) of 2 September 1987, as subsequently amended) in so far as they make payment of a pension benefit for incapacity for work that is linked to a stay in places of isolation subject to fulfilment of the condition that the person entitled be resident in the territory of the Polish State?

COURT OF FIRST INSTANCE

Action brought on 27 November 2006 — 2K-Teint and Others v EIB and Commission

(Case T-336/06)

(2007/C 20/22)

Language of the case: French

Parties

Applicants: 2K-Teint SARL, Mohamed Kermoudi, Khalid Kermoudi, Laila Kermoudi, Mounia Kermoudi, Salma Kermoudi and Rabia Kermoudi (Casablanca, Morocco) (represented by: P. Thomas, lawyer)

Defendants: European Investment Bank (Luxembourg, Grand Duchy of Luxembourg) and Commission of the European Communities (Brussels, Belgium)

Form of order sought

— admit the application and declare the applicants' action well founded;

— order the EIB to release its entire file concerning the equity loan to the capital of 2K-Teint, including all documents exchanged in that regard with the BNDE, failing which to pay a late-payment fine of EUR 10 000 per day;

— rule that the EIB is liable to the applicants in quasi-delict by reason of the errors, failures, negligence and omissions of the EIB with regard to the applicants;

— rule that the applicants suffered a loss quantified [as set out in the application];

— order an expert to report on the extent and validity of the losses described;

— order the EIB and/or the European Community jointly and severally to pay the applicants amounts in respect of the causes of action set out above, converted to Euros [on the basis of the following indications] with statutory interest as from the first court summons issued to the applicants, that is to say the summons to appear before the Tribunal d'arrondissement, Luxembourg (District Court), dated 17 June 2003 and until payment in full;

— rule that the judgment to be delivered will be provisionally enforceable notwithstanding any remedies and without a guarantee;

— order the EIB and/or the European Community jointly and severally to pay, as an amount additional to the costs, the provisional sum of EUR 12 500 which the applicants have had to pay to ensure their defence and representation at the hearing and which it is inequitable that they should bear;

— order the EIB and/or the European Community to pay all the expenses and costs of the action;

— reserve to the applicants all rights and claims.

Pleas in law and main arguments

By a financing contract signed in Luxembourg on 28 April 1994, the EIB, acting in the name and on behalf of the European Community on the basis of a mandate granted by the European Commission, granted the Kingdom of Morocco, as assistance with risk capital, a conditional loan intended to finance productive projects in the industrial sector, in particular in association with European Union undertakings (natural and legal persons) (Global Loan Financial Sector II Project). According to the terms of the contract, the product of the EIB's loan to Morocco was to be on-loaned with a view to financing projects pursuant to agreements in the form of loans from banks in Morocco, subsequently acting as financial intermediaries. Those loans used for on-lending were intended to ensure the financing by the financial intermediaries of loans or investments in the capital of Moroccan operators, the final beneficiaries. The grant of each loan to the operators was to be the subject of a contract concluded between the bank and the operator concerned by the investment in question. The intermediary was obliged to submit every application with a view to financing investment or a loan to the EIB for approval together with the Moroccan State. The EIB was required to notify the Moroccan State of its agreement with a copy thereof sent simultaneously to the financial intermediary.

On 12 October 1994, an on-lending agreement was signed between the Kingdom of Morocco and the Banque Nationale pour le Développement Economique (BNDE) which then became one of the financial intermediaries within the meaning of the contract concluded between the EIB and the Kingdom of Morocco. On 29 November 1995, a loan agreement in the context of the IInd EIB Line was concluded between the BNDE and the applicants, subject to the EIB's agreement and receipt of the funds by the BNDE. The contract concerned the partial financing of investment in the company 2K-Teint. By letter of 14 October 1994, the EIB gave its agreement to the 2K-Teint project's receiving that financing.

By the present action in respect of non-contractual liability on the part of the Community, the applicants seek compensation for the loss which they claim to have suffered by reason of the allegedly wrongful conduct of the EIB in the exercise of its responsibilities as agent of the Community in the context of the management of the loan in question. Inter alia, they allege that the clearing of the loan was extremely slow and it was released only in July 1997, which led them to arrange a short-term loan with the BNDE. The applicants' failure to perform their financial obligations led the BNDE to initiate recovery proceedings before the national courts. By a judgment of a Moroccan national court, the company 2K-Teint was ordered to sell its business.

Firstly, the applicants allege a number of irregularities committed by the BNDE in the management of the Community funds, of which they informed the EIB, seeking its response. The applicants claim that the EIB did not react to the information sent to it. They argue that the EIB was required to act since the BNDE acted if not on instruction as its agent, at least as its apparent agent, the EIB retaining an important role in the decisions on the loans in question.

Furthermore, the applicants claim that the EIB should accept liability not only for the errors of the BNDE arising in connection with the legal relationship between them, but also the consequences of its own deficiencies and failures. They allege that the EIB did not efficiently monitor or check the use of the funds from the time of their receipt by the Moroccan bodies, which consequently meant that the allegedly fraudulent conduct of the BNDE was encouraged or even supported. They submit that the EIB was guilty of failures, negligence and omissions, to a serious extent, in its duties of prudence, diligence and care in the management of Community funds.

The applicants submit that the losses which they claim to have suffered are directly related to the omissions and failures of the EIB. They therefore seek an order that it compensate them for those losses.

Action brought on 1 December 2006 — Shell Petroleum and Others v Commission

(Case T-343/06)

(2007/C 20/23)

Language of the case: English

Parties

Applicants: Shell Petroleum NV (The Hague, The Netherlands), The Shell Transport and Trading Company Ltd (London, United Kingdom), Shell Nederland Verkoopmaatschappij BV (Capelle aan den IJssel, The Netherlands) (represented by: O.W. Brouwer, W. Knibbeler, S. Verschuur, lawyers)

Defendant: Commission of the European Communities

Form of order sought

Shell Petroleum NV and The Shell Transport and Trading Company Ltd request the Court:

— To annul, in full, Commission's Decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case COMP/F/38.456 — *Bitumen — NL*, hereinafter, 'the decision') insofar as it is addressed to Shell Petroleum NV and The Shell Transport and Trading Company Ltd; or in the alternative

— to annul, in part, the decision, insofar as it finds that Shell Petroleum NV and The Shell Transport and Trading Company Ltd infringed Article 81 EC between 1 April 1994 and 19 February 1996 and to reduce the fine imposed upon them; and

— in any event, to reduce the fine imposed on Shell Petroleum NV and The Shell Transport and Trading Company Ltd pursuant to the decision;

— to order the defendant to pay the costs of the proceedings, including costs incurred by Shell Petroleum NV and The Shell Transport and Trading Company Ltd associated with payment in whole or in part of the fine or constituting a bank guarantee;

— take any other measures that the Court considers to be appropriate.

Shell Nederland Verkoopmaatschappij BV requests the Court:

— to annul, in part, the decision insofar as it finds that Shell Nederland Verkoopmaatschappij BV infringed Article 81 EC between 1 April 1994 and 19 February 1996 and to reduce the fine imposed upon it; and

— in any event, to reduce the fine imposed on Shell Nederland Verkoopmaatschappij BV pursuant to the decision;

— to order the defendant to pay the costs of the proceedings, including costs incurred by Shell Verkoopmaatschappij BV associated with payment in whole or in part of the fine or constituting a bank guarantee;

— take any other measures that the Court considers to be appropriate.

Pleas in law and main arguments

The applicants argue that the following elements of the decision are based on errors of law and errors of assessment:

(a) the finding that Shell Verkoopmaatschappij BV was an instigator and leader of the cartel;

(b) the attribution of liability for the infringement to The Shell Transport and Trading Company Ltd and Shell Petroleum NV;

(c) the increase in the fine for repeated infringement;

(d) the calculation of the starting amount for Shell Nederland Verkoopmaatschappij BV;

(e) the duration of the infringement.

Action brought on 4 December 2006 — TOTAL v Commission

(Case T-344/06)

(2007/C 20/24)

Language of the case: French

Parties

Applicant: TOTAL SA (Courbevoie, France) (represented by: A. Gosset-Grainville, L. Godefroid and A. Lamothe, avocats)

Defendant: Commission of the European Communities

Form of order sought

— annul, pursuant to Article 230 EC, the Commission Decision of 13 September 2006 in Case COMP/F/38.456 — Bitumen — Netherlands) in so far as it concerns TOTAL SA in Articles 1(m), 2(m), 3 and 4;

— alternatively, annul Articles 1(m) and 2(m) and reduce accordingly the amount of the fine imposed on TOTAL SA by the decision;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the partial annulment of Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article 81 EC (Case COMP/F/38.456 — Bitumen — Netherlands) concerning a body of agreements and concerted practices designed to fix, for sales and purchases of road bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders. Alternatively, it seeks the annulment or at least a substantial reduction in the amount of the fine imposed on it by the contested decision.

The application contains five pleas.

First, the applicant states that the Commission infringed the rules relating to the accountability of a parent company for the practices of its subsidiary. It claims that the Commission acted wrongly when it attributed to the applicant the infringement at issue which was committed by its subsidiary TOTAL Nederland NV and, therefore, held the applicant jointly and severally liable for the infringements. The applicant considers that the Commission committed an error of law in finding that the fact that the applicant held 100 % of the capital of its subsidiary was sufficient for it to have decisive influence over it. The applicant also alleges that the Commission committed an error of law in failing to undertake a serious examination of all the evidence showing which entities within the TOTAL Group might have been responsible for the practices at issue.

Secondly, the applicant accuses the Commission of infringing the rules of evidence in failing to prove that the applicant exercised a decisive influence over the commercial policy of its subsidiary, TOTAL Nederland NV, on the relevant market, and in failing to take account of information which TOTAL SA submitted to enable it to delineate the undertaking in the TOTAL Group which was concerned.

Also, the applicant considers that the Commission infringed the principle that it must not act in an arbitrary manner, when it stated in the contested decision that it had a discretion when deciding which entities within an undertaking it considered to be responsible for an infringement.

Finally, the applicant states that the Commission infringed the principle of good administration in failing to send requests for information to the applicant during the investigation stage.

Alternatively, the applicant relies on two pleas in support of its application for annulment or at least reduction of the fine imposed on it in the contested decision. It considers that the Commission infringed the rules applicable to the setting of fines. It states that, if the acts should have been imputed to TOTAL SA, the date taken by the Commission to fix the starting point for the applicants' participation in the infringement is not correct and the Commission has failed to give sufficient grounds for its decision on this point. The applicant claims moreover that the Commission failed to respect the principle of proportionality when it applied a multiplier for deterrence of 1.5, based on the worldwide turnover of TOTAL Group for the period of reference, despite the fact that no ground for complaint was attributed to the applicant for a part of the said period.

Action brought on 4 December 2006 — Complejo Agricola v Commission

(Case T-345/06)

(2007/C 20/25)

Language of the case: Spanish

Parties

Applicant: Complejo Agrícola (Madrid, Spain) (represented by: D. A. Menéndez Menéndez and Da. G. Yanguas Montero)

Defendant: Commission of the European Communities

Form of order sought

— Grant the present application;

— Admit and examine the documentary evidence requested;

— Annul in part Article 1 in connection with Annex 1 of the decision of the European Commission of 19 July 2006, in so far as it concerns the declaration of Acebuchales as a SCI, and restore fully the exercise of the Complejo Agricola's ownership rights over that part of the farm which does not meet the environmental values required to be declared a SCI;

— Order the Commission to pay the costs incurred by Complejo Agrícola.

Pleas in law and main arguments

This action is brought against the Commission decision of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region, ([1]) in so far as it declares as a site of Community importance (SCI) ES6120015 'Acebuchales de la Campiña sur de Cádiz' given that the applicant is the owner of a farm covered by that SCI.

In support of its claims, the applicant submits that:

— the Commission has exceeded its powers in designating as a SCI 'Acebuchales de la Campiña sur de Cádiz', which affects the applicant's farm, by erring in its application of the criteria laid down in Annexes I, II and III to Directive 92/43/EEC. In addition, the Comission's misapplication of the criteria laid down in Annex III to Directive 92/43/EEC has led to the designation as a SCI area of a large part of the land belonging to the applicant which is lacking in environmental value, thereby constituting a breach of the principles of proportionality and lawfulness;

— the designation has led to an unjustified and disproportionate limitation of the powers inherent in the applicant's ownership rights in connection with areas of the farm affected by the SCI 'Acebuchales de la Campiña sur de Cádiz' which are lacking of environmental value;

— the applicant did not have the opportunity to participate in the procedure for the declaration of 'Acebuchales de la Campiña sur de Cádiz' as a SCI, which amounts to an infringement of the principles of the right to be heard and of legal certainty.

([1]) OJ L 259, 21.9.2006, p. 1.

Action brought on 6 December 2006 — IMS v Commission

(Case T-346/06)

(2007/C 20/26)

Language of the case: Italian

Parties

Applicant: IMS Industria Schio Srl (Schio, Italy) (represented by: F. Colonna and T.E. Romolotti, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annulment of the Commission's opinion C(2006) 3914 of 6 December 2006, and a declaration of the applicant's right to compensation for the damage suffered thereby

— an order that the defendant should pay the costs in accordance with Article 87 et seq. of the Rules of Procedure.

Pleas in law and main arguments

This action challenges the Commission's opinion C(2006) 3914 of 6 December 2006 concerning a prohibition measure adopted by the French authorities relating to certain IMS brand mechanical presses.

It is to be borne in mind in this connection that, as a result of the adoption by the French Republic of measures relating to mechanical presses manufactured by the applicant IMS, the Commission, in accordance with Article 7(2) of Directive 98/37/EC, examined the justification for those measures, issuing at the end of the investigation the opinion that the measures adopted by the French authorities were justified.

In support of its claims, the applicant alleges:

— that the Commission failed to take account of the judgment of the French Conseil d'Etat of 6 November 2002. It claims in this regard that, by its judgment of 6 November 2002 the French Conseil d'Etat had noted the irregularity of the procedure by which the French interministerial decision of 27 June 2001 had been adopted and had ordered its annulment. The Commission has therefore given its own opinion on the justification for an act that, according to the law of the Member State which adopted that act, would appear to be invalid. It follows that the opinion itself is unlawful, given that it is intended to confirm an act already held to be invalid by the competent authorities and which is no longer of any effect in the legal system;

— incorrect appraisal as to substance. According to the applicant, the Commission's appraisal of the substance would appear to be vitiated, since features of the machines produced by IMS were incorrectly assessed from the point of view of technical compliance with the rules applicable;

— with regard to compensation for damage, IMS claims to have suffered and still to suffer, for the reasons set out here, wrongful damage of a non-contractual nature caused it by the Commission, which failed to take into consideration the declaration that the French decision was null and void and made an incorrect appraisal of IMS's products.

Action brought on 4 December 2006 — Nynäs Petroleum and Nynas Belgium v Commission

(Case T-347/06)

(2007/C 20/27)

Language of the case: English

Parties

Applicants: AB Nynäs Petroleum (Stockholm, Sweden) and Nynas Belgium AB (Zaventem, Belgium) (represented by: A. Howard, Barrister, and M. Dean, Solicitor)

Defendant: Commission of the European Communities

Form of order sought

— Annul Article 1 of the decision in so far as it imputes joint and several liability to AB Nynas;

— annul Article 2 of the decision in so far as it imposes a fine of EUR 13.5 million on Nynas, or in the alternative, reduce that fine as appropriate; and

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicants seek partial annulment of Commission Decision C(2006) 4090 final of 13 September 2006 in Case COMP/F/38.456 — *Bitumen — NL*, by which the Commission found that the applicants, together with other undertakings, had infringed Article 81 EC by regularly and collectively fixing, for sales and purchases of road pavement bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.

In support of their application, the applicants submit, first of all, that the Commission committed errors of law and assessment in holding Nynäs Petroleum jointly and severally liable for the infringement committed by Nynas Belgium as Nynas Belgium operated as an autonomous legal entity that determined its commercial policy independently from Nynäs Petroleum. According to the applicants, the Commission has not demonstrated that Nynäs Petroleum had the power to direct the operations of Nynas Belgium to the point of depriving it of any real independence in determining its own course of action on the market.

Secondly, the applicants allege that the Commission disregarded the provisions of the Leniency Notice ([1]) contrary to the principles of legitimate expectations and equal treatment, when it dismissed the value of the information voluntarily provided by the applicants under Part B of the Leniency Notice and refused to grant the applicants a reduction for cooperation. The applicants claim that the Commission among others committed the following errors of law and assessment:

— the Commission wrongly concluded that the information provided by the applicants did not of its nature strengthen the Commission's ability to prove the infringement, since other participants in the infringement had already admitted the infringement and other replies to the request for information had already confirmed the existence of a system of meetings;

— the Commission wrongly concluded that the information provided by the applicants did not constitute significant added value.

([1]) Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3)

Action brought on 4 December 2006 — Total Nederland v Commission

(Case T-348/06)

(2007/C 20/28)

Language of the case: English

Parties

Applicant: Total Nederland NV (Voorburg, Netherlands) (represented by: A. Vandencasteele, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— Annul Article 1 of the Commission Decision of 13 September 2006 (Case COMP/38.456 — *Bitumen — Nederland*) in so far as it finds the existence of a single continuous infringement by the applicant from 1994 to 2002 rather than from 1996 to 2002;

— annul Article 2 of the decision in so far as:

  (i) it fails to take into account the reduced duration of the infringement referred to above;

  (ii) it fails to properly assess the gravity of the infringement;

  (iii) it fails to acknowledge the existence of mitigating circumstances;

  (iv) it increases the fine for deterrence purpose taking into account the turnover of Total SA which it wrongly considers to have participated to the applicant's infringement

— reduce, in the exercise of its unlimited jurisdiction under Article 31 of Council Regulation 1/2003, the level of fine so as to properly reflect the nature of the applicant's involvement in the practice;

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the partial annulment of Commission Decision C(2006) 4090 final of 13 September 2006 in Case COMP/F/38.456 — *Bitumen — NL*, by which the Commission found that the applicant, together with other undertakings, had infringed Article 81 EC by regularly collectively fixing, for sales and purchases of road pavement bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.

In support of its application, the applicant submits that the Commission made a manifest error of assessment by failing to take into account evidence showing that the agreement from 1994 was entered into for one year only and broken off before its term and by misconstruing evidence in claiming that a continuous adherence in 1995 to some of the terms of the 1994 agreement was shown.

Moreover, the applicant alleges that the Commission failed to demonstrate that the applicant actually implemented the agreement while it relied on such an implementation when assessing the gravity of the infringement.

Furthermore, the applicant contends that the Commission failed to take into account evidence demonstrating that the applicant breached the agreement.

Finally, the applicant considers that the Commission committed an error of law by calculating the multiplier for deterrence applied to the applicant's fine on the turnover of the parent company Total SA. The Commission thereby relied, without justification, on a presumption of participation by the parent company and retained a concept of objective *per se* liability for the parent company.

Action brought on 4 December 2006 — Germany v Commission

(Case T-349/06)

(2007/C 20/29)

Language of the case: German

Parties

Applicant: Federal Republic of Germany (represented by: M. Lumma, C. Schulze-Bahr and C. von Donat, lawyer)

Defendant: Commission of the European Communities

Form of order sought

The Court is asked to:

— annul Commission Decision C(2006) 4194 final of 25 September 2006 reducing the financial assistance from the ERDF granted by Commission Decision No C(95) 1736 of 27 July 1995 for the Operational Programme RESIDER North Rhine-Westphalia (ERDF No 49.02.10.036/ARINCO No 94.DE.16.051);

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

Pleas in law and main arguments

In the contested decision the Commission reduced the amount of financial assistance from the European Regional Development Fund (ERDF) for the RESIDER-North Rhine-Westphalia Programme.

In support of its action the applicant claims infringement of Article 24 of Regulation 4253/88 ([1]) since the requirements for a reduction are not met. In that context it claims, in particular, that the divergences from the indicative financing plan do not constitute a significant change to the programme.

Even if there were a significant change to the programme, the applicant submits that the Commission gave prior consent in the form of its 'Guidelines for the financial closure of operational measures (1994 to 1999) of the Structural Funds' (SEC (1999) 1316).

Assuming that the requirements for a reduction are met, the applicant claims that the defendant did not make use of its discretionary power in relation to the specific programme. In the applicant's view the Commission should have weighed up whether a reduction of the ERDF assistance was proportionate.

Finally, the contested decision infringes the principle of sound administration in that it required the applicant to bring a new action against the decision, against which an action was already pending.

([1]) Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ L 374 of 31.12.1988, p. 1).

Action brought on 5 December 2006 — Dura Vermeer Groep v Commission

(Case T-351/06)

(2007/C 20/30)

Language of the case: Dutch

Parties

Claimant: Dura Vermeer Groep NV (represented by: M.M. Slotboom, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— annul Articles 1(d) and 2(d) of the decision in so far as the liability of Dura Vermeer Groep is concerned; and

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

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its application the claimant first submits that the Commission has breached Article 81(1) EC and Article 23(2) of Regulation No 1/2003. In the claimant's view, the Commission's analysis is incorrect with regard to the case-law of the Court of Justice and Court of First Instance on parent company liability for an alleged breach by subsidiaries. The Commission for that reason imposed an excessively strict test on the claimant. Furthermore, the claimant alleges, the Commission misrepresented the factual description of the applicable relationships within the Dura Vermeer concern. The Commission therefore failed to demonstrate that the claimant exercised a determining influence over the conduct of Vermeer Infrastructuur BV.

Second, the claimant alleges infringement of the essential procedural requirements set out in Article 253 EC and of the principle that reasons must be given.

Action brought on 5 December 2006 — Dura Vermeer Infra v Commission

(Case T-352/06)

(2007/C 20/31)

Language of the case: Dutch

Parties

Claimant: Dura Vermeer Infra BV (represented by: M.M. Slotboom, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— annul Articles 1(d) and 2(d) of the decision in so far as the liability of Dura Vermeer Infra is concerned; and

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

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its application, the claimant invokes the same pleas in law and arguments as does the claimant in Case T-351/06 *Dura Vermeer Groep NV* v *Commission*.

Action brought on 5 December 2006 — Vermeer Infrastructuur v Commission

(Case T-353/06)

(2007/C 20/32)

Language of the case: Dutch

Parties

Claimant: Vermeer Infrastructuur BV (represented by: M.M. Slotboom, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— principally, annul Decision C(2006) 4090 final of the Commission of the European Communities of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL); or

— in the alternative, annul Articles 1, 2(d) and 3 of the decision in so far as (i) those provisions find that Vermeer participated in the fixing of the gross price for the sale and purchase in the Netherlands of bitumen for use in road construction, and (ii) a fine and an injunction were imposed in that regard;

— in the further alternative, annul Article 2(d) of that decision in so far as that provision imposed a fine on Vermeer;

— in the yet further alternative, reduce the fine imposed on Vermeer by Article 2(d) of the decision; and

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

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action the claimant alleges a breach of Article 81 EC by reason of the fact that the Commission failed to prove that the claimant had participated in the fixing of the gross prices for bitumen or that it had itself any interest whatever in such fixing. The Commission thereby wrongly concluded that the bitumen suppliers and the road construction companies had participated in one and the same breach of Article 81 EC.

The claimant submits further that the Commission has failed to demonstrate that the claimant participated in collusion between a group of bitumen suppliers and a group of major road construction companies for the purpose of fixing, on a regular basis, a smaller rebate on the gross price for other road construction companies.

Further, the claimant alleges, the Commission infringed Article 81 EC and the guidelines for the setting of fines in that it failed to prove (i) that the claimant had participated in a very serious breach of Article 81 EC and (ii) that the claimant's involvement in the alleged breach had lasted from 1 April 1994 to 15 April 2002. Consequently, in the view of the claimant, the Commission took an excessively long period into account for the purpose of calculating the fine imposed on it.

In conclusion, the claimant alleges a breach of Article 253 EC and an infringement of essential procedural requirements.

Action brought on 4 December 2006 — BAM NBM Wegenbouw and HBG Civiel v Commission

(Case T-354/06)

(2007/C 20/33)

Language of the case: Dutch

Parties

Claimants: BAM NBM Wegenbouw BV and HBG Civiel BV (represented by: M.B.W. Biesheuvel and J.K. de Pree, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul the Commission decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL — C(2006) 4090 final) or at least set that decision aside to the extent to which it found that BAM NBM and HBG Civiel had breached Article 81 EC, fines were imposed on BAM NBM and HBG Civiel in that regard, BAM NBM and HBG Civiel were enjoined to put an end to that breach and to refrain in future from any of the acts or conduct referred to in Article 1, and from any acts or conduct having the same or similar objective or consequence, and to the extent to which that decision is addressed to BAM NBM and HBG Civiel;

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

Pleas in law and main arguments

The claimants are challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimants for breach of Article 81 EC.

In support of their action, the claimants submit, in the first place, that the decision is at variance with Article 81 EC and with Articles 7 and 23(2) of Regulation No 1/2003, as well as being contrary to the principle laid down in Article 253 EC that measures must state the reasons on which they are based. In the opinion of the claimants, the Commission incorrectly established and interpreted the facts, and there is insufficient evidence to support the contention that the claimants infringed Article 81 EC.

In the alternative, the claimants submit that Article 2 of the decision is at variance with Article 23(3) of Regulation No 1/2003 and the guidelines on setting fines. ([1]). In the claimants' view, the gravity of the alleged infringement was incorrectly assessed. As a consequence, they argue, the infringement was wrongly classified as being very serious and the fine imposed was disproportionate.

In conclusion, it is submitted, the adoption of the decision was accompanied by a breach of essential procedural requirements, *inter alia* in that the Commission did not provide the claimants with any opportunity to examine the responses of the oil companies and the other road construction companies to the heads of complaint raised, even though the claimants had made a request in that regard.

([1]) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

Action brought on 5 December 2006 — Koninklijke BAM Groep v Commission

(Case T-355/06)

(2007/C 20/34)

Language of the case: Dutch

Parties

Claimant: Koninklijke BAM Groep NV (represented by: M.B.W. Biesheuvel and J.K. de Pree, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case COMP/38.456 — Bitumen — NL — C(2006) 4090 final) or at least set that decision aside to the extent to which it finds that BAM breached Article 81 EC, a fine is imposed on BAM in that regard, BAM is enjoined to put an end to that breach and to refrain in future from any of the acts or conduct referred to in Article 1, and from any acts or conduct having the same or similar objective or consequences, and to the extent to which that decision is addressed to BAM;

— order the Commission to pay the costs.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action, the claimant submits that the Commission acted contrary to Article 81 EC and to Articles 7 and 23(2) of Regulation No 1/2003 by concluding that the claimant had breached Article 81 EC. According to the claimant, the Commission wrongly attributed to it, as the parent company, the breach allegedly committed by a subsidiary.

In the alternative, the claimant submits that the Commission incorrectly determined the amount of the fine imposed on it. The Commission imposed a fine based on a period of two years and five months during which the claimant allegedly held 100 % of the shares in BAM NBM, whereas that period in fact amounted only to one year and five months.

Action brought on 5 December 2006 — Koninklijke Volker Wessels Stevin v Commission

(Case T-356/06)

(2007/C 20/35)

Language of the case: Dutch

Parties

Claimant: Koninklijke Volker Wessels Stevin NV (represented by: E.H. Pijnacker Hordijk and Y. de Vries, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— set aside Articles 1, 2 and 3 of the Decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), or at least set that decision aside to the extent to which it is addressed to Koninklijke Volker Wessels Stevin;

— order the Commission to pay its own costs and also those of Koninklijke Volker Wessels Stevin.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), which imposed a fine on the claimant for breach of Article 81 EC.

In support of its action, the claimant invokes a breach of Article 81 EC and of Articles 7 and 23(2) of Regulation No 1/2003. According to the claimant, the Commission applied an incorrect standard for the purpose of determining the liability of a parent company and in so doing wrongly concluded that the claimant was principally liable for the alleged conduct of Koninklijke Wegenbouw Stevin B.V.

Action brought on 5 December 2006 — Koninklijke Wegenbouw Stevin v Commission

(Case T-357/06)

(2007/C 20/36)

Language of the case: Dutch

Parties

Claimant: Koninklijke Wegenbouw Stevin BV (represented by: E. H. Pijnacker Hordijk and Y. de Vries, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— set aside, in relation to the claimant, the Commission's decision of 13 September 2006, notification of which Koninklijke Wegenbouw Stevin received on 25 November 2006, relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL — C(2006) 4090 final);

— in the alternative, annul Article 2 of the decision in relation to the claimant, or in any event reduce substantially the fine imposed on the claimant by Article 2 of the decision;

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

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action, the claimant alleges, in the first place, that there was an incorrect analysis of the facts, resulting in a defective appraisal of the conduct of the road construction companies in the light of Article 81 EC. According to the claimant, the suppliers of bitumen were involved in a classic and extremely serious breach of the European competition rules. It states that the five leading customers for bitumen for road construction attempted to establish a counter-balance to this cartel with the primary objective of securing for themselves collective rebates that were as favourable as possible.

The claimant also invokes a breach of Article 81 EC and of Article 23 of Regulation No 1/2003 in regard to the determination of the level of the fine imposed. According to the claimant, the basic amount of the fine was too high and the increases imposed for non-cooperation and its ostensible role as instigator and cartel leader were unjustified.

In conclusion, the claimant submits that the Commission refused to allow it access to the reactions to the heads of complaint of all the other parties to which those heads of complaint were addressed. In the claimant's view, that course of conduct is contrary to the rights of the defence.

Action brought on 5 December 2006 — Wegenbouwmaatschappij J. Heijmans v Commission

(Case T-358/06)

(2007/C 20/37)

Language of the case: Dutch

Parties

Claimant: Wegenbouwmaatschappij J. Heijmans B.V. (represented by: M.F.A.M. Smeets and A.M. van den Oord, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— set aside, in whole or in part, the decision addressed to Heijmans N.V. and Heijmans Infrastructuur B.V.;

— set aside or reduce the fine imposed on Heijmans N.V. and Heijmans Infrastructuur B.V.;

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

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL). Although the decision is not addressed to the claimant, it takes the view that it is directly and individually concerned by it inasmuch as it is mentioned in the decision as being part of the Heijmans Group and must expect, by reason of the decision, to be held liable in regard to the conduct in issue.

In support of its action, the claimant first of all submits that there has been a breach of Article 81 EC and of Articles 2, 7 and 23(2) of Regulation No 1/2003 in that the Commission wrongly assumed that the Netherlands market for bitumen used in road construction constituted the relevant economic context for the appraisal of the evidence against Heijmans Infrastructuur B.V. The claimant further submits that the Commission also wrongly assumed that Heijmans Infrastructuur B.V. was part of a permanent cartel of road construction undertakings operating with regard to the purchase of bitumen for road construction and, in that capacity, colluded with the suppliers of bitumen in the Netherlands with a view to restricting competition. Lastly, according to the claimant, the Commission unjustly failed, on the basis of the guidelines on horizontal cooperation, to check solely the consequences of the participation of Heijmans Infrastructuur B.V.in that collusion. ([1])

Second, the claimant alleges that there has been a breach of Article 81 EC and of Articles 11 and 16 of Regulation No 1/2003, as well as infringement of the duty of care, the general principles of sound administration, the principle of equality and the rights of the defence by reason of the fact that the Commission disregarded the reasoned substantive and procedural defence submissions made by Heijmans Infrastructuur B.V. and Wegenbouwmaatschappij J. Heijmans B.V. during the administrative procedure as being an 'innocent interpretation of the events'.

Third, the claimant alleges infringement of the principle that reasons must be given in that the decision is unclear or ambiguous in certain vital sections.

By way of alternative submission, the claimant argues the Commission has adduced no, or insufficient, evidence to substantiate the claim that Heijmans Infrastructuur B.V. participated in the alleged infringement over the entire period thereof.

Also in the alternative, the claimant submits that the Commission incorrectly assessed the gravity and scope of the infringement. It argues that Heijmans Infrastructuur B.V. played merely a minor role on the relevant market.

([1]) Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (text with EEA relevance) (OJ 2001 C 3, p. 2).

Action brought on 5 December 2006 — Heijmans Infrastructuur v Commission

(Case T-359/06)

(2007/C 20/38)

Language of the case: Dutch

Parties

Claimant: Heijmans Infrastructuur B.V. (represented by: M.F.A.M. Smeets and A.M. van den Oord, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— set aside, in whole or in part, the decision addressed to the claimant;

— set aside or reduce the fine imposed on the claimant;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action, the claimant invokes the same pleas in law and arguments as those set out by the claimant in Case T-358/06 *Wegenbouwmaatschappij J. Heijmans B.V.* v *Commission*.

Action brought on 5 December 2006 — Heijmans v Commission

(Case T-360/06)

(2007/C 20/39)

Language of the case: Dutch

Parties

Claimant: Heijmans NV (represented by: M.F.A.M. Smeets and A. M. van den Oord, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul in whole or in part the decision addressed to the claimant;

— set aside or reduce the fine imposed on the claimant;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), whereby a fine was imposed on the claimant for breach of Article 81 EC.

The claimant first submits that there has been a breach of Article 81 EC and of Articles 2, 7 and 23(3) of Regulation No 1/2003. According to the claimant, the Commission has not proved that the claimant is a unitary organisation of natural persons and of material and immaterial assets which acted contrary to Article 81 EC by regulating the fixing of bitumen prices in the Netherlands. Furthermore, the claimant contends, there is no basis in law on which the claimant can be held principally liable and that determination of liability is unreasonable.

In support of its action, the claimant also relies on the similar pleas and arguments submitted by the claimant in Case T-358/06 *Wegenbouwmaatschappij J. Heijmans B.V.* v *Commission*.

Action brought on 5 December 2006 — Ballast Nedam v Commission

(Case T-361/06)

(2007/C 20/40)

Language of the case: Dutch

Parties

Claimant: Ballast Nedam N.V. (represented by: A.R. Bosman and J.M.M. van de Hel, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul Commission Decision C(2006) 4090 final of 13 September 2006, notified to the claimant on 25 September 2006, relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), to the extent to which that decision is addressed to the claimant;

— in the alternative, annul the decision in part, to the extent to which it is addressed to the claimant, with regard to the duration of the infringement and reduce the fine imposed on the claimant accordingly;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

According to the claimant, the Commission assumed, on grounds that are legally and factually flawed, that the claimant exercised a determining influence on the market conduct of Ballast Nedam Infra B.V. and Ballast Nedam Grond en Wegen B. V.

In support of its action, the claimant invokes, in the first place, a breach of Article 81 EC. Second, the claimant submits that there has been an infringement of the general principles of Community law, in particular the principle of the presumption of innocence. In conclusion, the claimant contends that there has been a breach of Article 27(1) of Regulation No 1/2003 and of the rights of the defence in that it was not until the decision that the claimant's liability was assumed. The claimant was thus not given an opportunity to disprove that view by adducing evidence.

Action brought on 5 December 2006 — Ballast Nedam Infra v Commission

(Case T-362/06)

(2007/C 20/41)

Language of the case: Dutch

Parties

Claimant: Ballast Nedam Infra B.V. (represented by: A.R. Bosman and J.M.M. van de Hel, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul Commission Decision C(2006) 4090 final of 13 September 2006, notified to the claimant on 25 September 2006, relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), to the extent to which that decision is addressed to the claimant;

— in the alternative, set aside Article 2 of the decision, to the extent to which it is addressed to the claimant, or at least reduce the fine imposed on it by the said Article 2;

— set aside in part Article 1 of the decision, in so far as it relates to the duration of the infringement up to October 2000, and consequently reduce the fine imposed in Article 2 of the decision, in so far as the claimant is concerned;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action, the claimant invokes, in the first place, a breach of Article 81 EC and of Article 23(2) of Regulation No 1/2003. According to the claimant, the Commission has failed to adduce any evidence of a single ongoing breach of Article 81 EC. The claimant submits that the Commission has adduced no evidence that the bitumen suppliers and the major road construction companies jointly fixed the gross price for bitumen and that the major road construction companies had an interest in concluding those agreements. The claimant argues that the Commission also erred in classifying as a breach of Article 81 EC the agreement on the standard rebate and the desire on the part of the road construction companies to secure for themselves better conditions than small road construction companies with a less extensive purchase volume.

Second, the claimant invokes a breach of Article 81 EC and of Article 23(2) of Regulation No 1/2003 and the Commission's guidelines on setting fines [1]. The claimant argues that the Commission incorrectly assessed the gravity of the breach.

Third, the claimant alleges a breach of Article 81 EC in that the Commission assumed, on grounds that are incorrect in both factual and legal terms, that the claimant exercised a determining influence on the market conduct of Ballast Nedam Grond en Wegen B.V.

The claimant concludes by invoking a breach of Article 27(1) of Regulation No 1/2003 and of the rights of the defence by reason of the fact that the Commission deprived the claimant of the opportunity to challenge a number of new elements in the decision concerning the claimant's involvement in the alleged infringement during the period from 21 June 1996 to 1 October 2000 inclusive.

[1] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

Action brought on 5 December 2006 — Honda Motor Europe v OHIM — SEAT (MAGIC SEAT)

(Case T-363/06)

(2007/C 20/42)

Language in which the application was lodged: English

Parties

Applicant: Honda Motor Europe Ltd (Slough, United Kingdom) (represented by: S. Malynicz, Barrister, N. Cordell, Solicitor)

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

Other party to the proceedings before the Board of Appeal: Seat SA (Barcelona, Spain)

Form of order sought

— the decision of the first Board of Appeal dated 7 September 2006 in Case R 960/2005-1 shall be annulled;

— the Office and other parties to the procedure shall bear their own costs and pay those of the applicant.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: the Community word mark 'MAGIC SEAT' for goods and services in class 12 — vehicle seats and vehicle seat mechanisms, parts and fittings and accessories for these goods — application No 2 503 902

Proprietor of the mark or sign cited in the opposition proceedings: SEAT SA

Mark or sign cited: the national figurative mark 'SEAT' for goods and services in class 12

Decision of the Opposition Division: Opposition upheld

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation No 40/94

In support of its submissions, the applicant claims that the Board of Appeal erred in its approach to the visual analysis, in effect conferring word-only protection on a composite earlier mark that contained a large and striking device element.

According to the applicant, the Board of Appeal's phonetic comparison of the marks was allegedly flawed in two respects. First, it failed to appreciate that the word MAGIC in MAGIC SEAT would not be pronounced as a Spanish word and hence the mark as a whole, MAGIC SEAT, would not be pronounced in a Spanish way either. Secondly, it failed to take into account the fact that MAGIC was the first word of the two-word mark, MAGIC SEAT.

Moreover, the Board of appeal failed to apply the 'rule of counteraction' in the current case and therefore failed to take into account the fact, as part of the conceptual analysis, that the earlier Spanish mark, comprising the word SEAT and the large 'S' badge device element, would be immediately and clearly understood as designating the Spanish carmaker whereas the mark MAGIC SEAT would not be understood so.

In addition, on the question of conceptual dissimilarity, the applicant contends that the Board failed to take into any account the linguistic evidence supplied by the applicant as to how Spanish consumers were likely to see the words MAGIC SEAT.

Furthermore, the applicant claims that the Board failed to appreciate that the category of goods, the features of the relevant market and the attributes of the national consumer for these goods militated against any finding of a likelihood of confusion.

Finally, the applicant considers that the Board failed to take into account whatsoever the applicant's evidence from the trade as to how products of this sort are marketed.

Action brought on 6 December 2006 — Xinhui Alida Polythene v Council

(Case T-364/06)

(2007/C 20/43)

Language of the case: English

Parties

Applicant: Xinhui Alida Polythene Ltd (Xinhui, China) (represented by: C. Munro, Solicitor)

Defendant: Council of the European Union

Form of order sought

— Annulment, pursuant to Article 230 of the Treaty of the European Union, of Council Regulation 1425/2006 of 25 September 2006 imposing a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand, and terminating the proceeding on imports of certain plastic sacks and bags originating in Malaysia; and

— order the Council to pay the costs of the appellant in the present proceedings.

Pleas in law and main arguments

The applicant seeks the annulment of Council Regulation (EC) No 1425/2006 of 25 September 2006 imposing a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand, and terminating the proceeding on imports of certain plastic sacks and bags originating in Malaysia ([1]).

The applicant contends that the Council has infringed essential procedural requirements and misused its powers by adopting the contested regulation without properly considering the underlying proceedings conducted by the Commission.

According to the applicant, the Commission i) did not properly examine the standing of the complainants and/or failed to make a proper determination of their standing, ii) considered irrelevant information and/or failed to take available information into account, iii) made an inadequate assessment of the injury to the relevant Community industry, iv) failed to establish that there was a Community interest in imposing duties on imports, and v) infringed the applicant's rights of defence.

The applicant alleges that this amounts to an abuse of powers.

([1]) OJ 2006 L 270, p. 4.

Action brought on 4 December 2006 — Calebus v Commission

(Case T-366/06)

(2007/C 20/44)

Language of the case: Spanish

Parties

Applicant: Calebus, S.A. (Almería, Spain) (represented by: R. Bocanegra Sierra, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— Annul Commission Decision 2006/613/EC of 19 July 2006 (OJ 2006 L 259, p.1) approving the list of sites of Community importance for the Mediterranean biogeographical region, in relation to the inclusion of the farm 'Las Cuerdas' as a SCI 'ES6110006 Ramblas de Gergal, Tabernas y Sur de Sierra Alhamilla', appearing on that list, and order the Commission to change the delimitation of that SCI so as to exclude the farm referred to.

Pleas in law and main arguments

In support of its claims, the applicant submits that the contested decision is:

— contrary to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, ([1]) in so far as it includes some areas of the appellant's property in SCI ES 6110006 which lack the necessary environmental requirements; and

— arbitrary, in that it has excluded, in that same zone, areas which have the required environmental values which call for classification as a SCI.

([1]) OJ L 206, 22.7.1992, p. 7

Action brought on 4 December 2006 — Kuwait Petroleum Corp. and others v Commission

(Case T-370/06)

(2007/C 20/45)

Language of the case: English

Parties

Applicants: Kuwait Petroleum Corp. (Shuwaikh, Kuwait), Kuwait Petroleum International Ltd (Woking, United Kingdom), and Kuwait Petroleum (Nederland) BV (Rotterdam, The Netherlands) (represented by: D.W. Hull, Dr. G. M. Berrisch, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annul Commission's Decision C(2006)4090 of 13 September 2006 insofar as it applies to the applicants; in the alternative

— reduce the amount of the fine imposed;

— in any event, order the Commission to bear the costs of these proceedings.

Pleas in law and main arguments

By a decision adopted on 13 September 2006 (the 'contested decision'), the Commission imposed on Kuwait Petroleum Corp. ('KPC'), Kuwait Petroleum International Ltd ('KPI') and Kuwait Petroleum (Nederland) BV ('KPN'), the applicants, jointly and severally, a fine of EUR 16.632 million for infringing Article 81 EC by fixing prices in the Dutch bitumen market. Each of the applicants hereby seeks the annulment of the contested decision or, in the alternative, a reduction of the fine on the following grounds:

In their first plea, the applicants claim that the Commission committed a manifest error of law and fact because it applied a wrong legal standard in holding KPC and KPI liable for acts of KPN and because it failed to provide adequate evidence under the correct legal standard. Precisely, it is claimed that the Commission, in the contested decision, found that both KPC and KPI are liable for the involvement of KPN's managers in the Dutch bitumen cartel on the grounds that KPN is a wholly-owned subsidiary of KPC and that each of KPC and KPI exercise broad supervisory powers over KPN. The applicants submit that a parent company may not be held liable on the basis of shareholdings and broad supervisory powers alone, and that the Commission must establish that the parent company exercised sufficient control over the subsidiary's conduct on the market affected by the infringement that it would be reasonable to assume that the subsidiary did not act autonomously with respect to the infringement.

The applicants further submit, in their second plea, that the contested decision should be annulled or, in the alternative, the fine reduced, because the Commission allegedly erred as a matter of law in fining the applicants in contravention to the 2002 Leniency Notice [1], which provides that, when a leniency applicant provides evidence relating to facts that were previously unproven and those facts have a direct bearing on the gravity or duration of the cartel, the Commission may not use such facts against the leniency applicant.

Finally, in their third plea, the applicants submit that the Commission committed a manifest error of assessment in determining the percentage of the reduction in the fine pursuant to the 2002 Leniency Notice, and accordingly argue that the fine should be reduced by the maximum amount of 50 %.

[1] Notice on Immunity from Fines and Reduction of Fines in cartel cases, OJ (2002) C 45, p. 3.

Action brought on 14 December 2006 — IMI and Others v Commission

(Case T-378/06)

(2007/C 20/46)

Language of the case: English

Parties

Applicants: IMI plc (Birmingham, United Kingdom), IMI Kynoch Ltd (Birmingham, United Kingdom), Yorkshire Fittings Limited (Leeds, United Kingdom), VSH Italia Srl (Bregnano, Italy), Aquatis France SAS (La Chapelle St. Mesmin, France), and Simplex Armaturen + Fittings GmbH & Co. KG (Ravensburg, Germany) (represented by: M. Struys and D. Arts, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annul Articles 2(b)1. and 2(b)2. of the decision of the Commission of 20 September 2006 as amended by the decision of the Commission of 29 September 2006 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 — Fittings — C(2006) 4180 final);

— alternatively reduce the fines imposed on the applicants; and

— order the Commission to pay the costs.

Pleas in law and main arguments

The applicants seek the partial annulment of Commission Decision C(2006) 4180 final of 20 September 2006 in Case COMP/F-1/38.121 — Fittings, by which the Commission found that the applicants, together with other undertakings, had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area by fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information.

In support of their application, the applicants submit that the Commission has violated the principles of proportionality and of non-discrimination as the fine imposed on the applicants in the contested decision is excessive in terms of the size of the applicants as well as of the relevant market when compared to the Commission's approach in its previous decisions. By including sales of press fittings in the size of the relevant market for the purpose of assessing the gravity of the infringement, the Commission has committed a manifest error of assessment.

The applicants further submit that the Commission committed a manifest error of assessment by considering that the applicants did not provide the evidence of the link between the UK and pan-European arrangements. The Commission provided an inadequate statement of reasons in that regard. Furthermore, by refusing to grant the applicants a reduction in their fines for their cooperation outside the Leniency Notice [1] for providing evidence of a link between the UK and the pan-European cartel, while granting the company FRA.BO a reduction in its fine on the same basis for providing evidence of post-inspection continuation, the Commission breached the principle of equal treatment.

Moreover, the applicants contend that the Commission breached Article 253 EC as the contested decision does not provide any statement of reasons for imposing an additional amount of EUR 2.04 million on the applicants Aquatis France and Simplex Amaturen + Fittings.

Finally, the applicants allege that, by imposing a separate fine upon Aquatis France and Simplex Amaturen + Fittings in addition to the fine already imposed on each of their predecessors and current parent companies, the Commission breached the principle 'non bis in idem' according to which no one can be condemned twice for the same offence.

(1) Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3)

Action brought on 15 December 2006 — Vischim v Commission

(Case T-380/06)

(2007/C 20/47)

Language of the case: English

Parties

Applicant: Vischim Srl. (Milan, Italy) (represented by: C. Mereu, K. Van Maldegem, lawyers)

Defendant(s): Commission of the European Communities

Form of order sought

— Partial annulment of Commission Directive 2006/76/EC, in particular Article 2, paragraph 2 thereof;

— order the defendant to comply with its obligations under Community law and provide for accurate, reasonable and legally acceptable prospective time limits; and

— order the defendant to pay all costs and expenses in these proceedings.

Pleas in law and main arguments

By means of its application, the applicant seeks partial annulment of Commission Directive 2006/76/EC (1), of 22 September 2006, and in particular its Article 2, paragraph 2, insofar as the amended specification of the active substance Chlorothalonil listed in Annex I to Directive 91/414/EEC (2) concerning the placing of plant protection products on the market (hereinafter, the 'PPPD') has not provided for reasonable time limits in line with those given to other active substances under the current review and instead provides for retroactive application of its provisions.

The applicant claims that the Commission violated its legal rights and legitimate expectations as a notifier and main data submitter of Chlorothalonil within the meaning of the PPPD and its implementing regulations, since no reasonable period was granted before the amended specification of the active substance was included in Annex I during which Member States and the applicant could prepare themselves to meet new requirements. In that sense, the applicant submits that, instead of allowing for an appropriate time period for its Chlorothalonil-based product registrations to be properly assessed for re-registration purposes in Member States, the contested measure entered into force on 23 September 2006 and only prescribed retroactive application of its provisions as of 1 September 2006 by reference to situations which already had produced legal effects in the period up to 31 August 2006. Moreover, the applicant submits that the contested measure is not in conformity with the requirements established by the PPPD and that it lacks sufficient statement of reasons in terms of Article 253 EC. Finally, the applicant claims that the contested provision also discriminates between the situation of the applicant and other notifiers in the review process of existing active substances without objective justification.

(1) Commission Directive 2006/76/EC, of 22 September 2006, amending Council Directive 91/414/EEC as regards the specification of the active substance chrothalonil; OJ L 263, p. 9

(2) Council Directive 91/414/EEC, of July 1991, concerning the placing of plant protection products on the market; OJ 1991 L 230, p. 1

Action brought on 19 December 2006 — Icuna.com v Parliament

(Case T-383/06)

(2007/C 20/48)

Language of the case: French

Parties

Applicant: Icuna.com SCRL (Braîne-le-Château, Belgium) (represented by: J. Windey and P. de Bandt, lawyers)

Defendant: European Parliament

Form of order sought

— annul the decision of the European Parliament of 1 December 2006, accepting the tender of the firm MOSTRA and rejecting the applicant's tender within the framework of the call for tenders EP/DGINFO/WEBTV/2006/2003;

— declare that the Community is non-contractually liable and order the European Parliament to pay the applicant the sum of EUR 58 700 as compensation for the costs incurred in the framework of the call for tenders, as well as an amount for non-pecuniary damage by way of damage to reputation, and appoint an expert to assess that damage.

— in any event, order the European Parliament to pay the costs of the present proceedings.

Pleas in law and main arguments

The applicant challenges the decision of the European Parliament rejecting the applicant's tender relating to the call for tenders EP/DGINFO/WEBTV/2006/0003, lot 2: programme contents, with a view to the creation of a European Parliament web television channel. ([1])

In support of its action, the applicant pleads, first, a manifest irregularity in the procedure leading to the adoption of the contested decision, due to the lack of competence of the author of the measure, the infringement of Article 101 of the Financial Regulation ([2]) and the infringement of Article 149 of Regulation No 2342/2002. ([3])

Secondly, the applicant claims that (a) the Parliament adopted a decision contrary to that initially issued on 7 August 2006 awarding it the contract, without giving reasons for this change, and (b) the selection criteria followed in the contested decision are not those which were applied in the context of the first decision of the Parliament, and are not defined as such in the call for tenders. The selection criteria contained therein, the principles of equal treatment and transparency and the duty to state reasons have therefore been contravened.

([1]) Contract notice: 'European Parliament web television channel' (OJ 2006 S 87-091412)

([2]) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

([3]) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1)

Action brought on 13 December 2006 — IBP and International Building Products France v Commission

(Case T-384/06)

(2007/C 20/49)

Language of the case: English

Parties

Applicants: IBP Ltd (Tipton, United Kingdom) and International Building Products France SA (Sartrouville, France) (represented by: M. Clough, QC, and A. Aldred, Solicitor)

Defendant: Commission of the European Communities

Form of order sought

— Annul the decision insofar as it relates to the applicants in respect of the period from 23 November 2001 to 1 April 2004;

— in any event, cancel the fine imposed on the applicants or reduce such fine by the amount considered appropriate by the Court in all the circumstances;

— order the Commission to pay the applicants' costs.

Pleas in law and main arguments

The applicants seek the partial annulment of Commission Decision C(2006) 4180 final of 20 September 2006 in Case COMP/F-1/38.121 — Fittings, by which the Commission found that the applicants, together with other undertakings, had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area by fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information.

In support of their application, the applicants submit that the Commission infringed Article 81 EC by concluding that the applicants were party to a single, complex and continuous infringement in breach of Article 81 EC during the period from 23 November 2001 to 1 April 2004, when the evidence before it does not, according to the applicants, support that finding.

Furthermore, the applicants allege that the Commission, contrary to Article 253 EC, has not provided reasons, or has provided insufficient reasons, for its findings.

Moreover, the applicants claim that the Commission has infringed their right to be heard by finding infringements without previously stating the case against the applicants in any statement of objections or allowing the applicants to comment prior to the adoption of the contested decision.

As for the cancellation or reduction of the fine imposed on the applicants, they submit that:

a) the Commission failed to apply Article 15(2) of Regulation No 17 ([1]), Article 23(2) of Regulation No 1/2003 ([2]) and Article 5(a) of the 1998 Guidelines on the method of setting fines ([3]);

b) the Commission has fined International Building Products France the sum of EUR 5.63 million twice for the same conduct;

c) the Commission has misapplied the 1998 Guidelines on the method of setting fines; and

d) the Commission has misapplied the 1996 Leniency Notice ([4]).

([1]) Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).
([2]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).
([3]) Commission Notice of 14 January 1998 entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3).
([4]) Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).

Action brought on 14 December 2006 — Aalberts Industries and Others v Commission

(Case T-385/06)

(2007/C 20/50)

Language of the case: English

Parties

Applicants: Aalberts Industries NV (Utrecht, Netherlands), Aquatis France (La Chapelle St. Mesmin, France), and Simplex Armaturen + Fittings GmbH & Co. KG (Argenbühl-Eisenharz, Germany) (represented by: R. Wesseling and M. van der Woude, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annul Article 1, Article 2 a), Article 3;

— annul Article 2 b)(2) in as far as Aquatis and Simplex are concerned;

— or, in the alternative, reduce significantly the amount of the fine imposed on the applicants;

— order, in both cases, that the costs be paid by the Commission.

Pleas in law and main arguments

The applicants seek the partial annulment of Commission Decision C(2006) 4180 final of 20 September 2006 in Case COMP/F-1/38.121 — Fittings, by which the Commission found that the applicants, together with other undertakings, had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area by fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information.

In support of their application, the applicants invoke five pleas in law in order to demonstrate that the Commission's decision is based on manifest errors of appreciation and violations of Article 81 EC and general principles of proper administration.

Firstly, the applicants submit that Alberts did not exercise decisive influence over the commercial behaviour of its portfolio companies Aquatis and Simplex Armaturen + Fittings and that Alberts has rebutted the presumption of decisive influence. The applicant Alberts should therefore not be held liable for Aquatis and Simplex Armaturen + Fittings alleged infringements.

Secondly, the applicants contend that a) some of the documents and statements held against the applicants fall outside the litigious period in that they relate to events after 1 April 2004, and b) other elements cannot be held against the applicants because they were not part of the Statement of Objections addressed to the applicants. Even so, the applicants claim that these documents and statements do not prove, individually or cumulatively, an infringement of Article 81 EC on their side.

Thirdly, the applicants submit that the elements relied upon by the Commission do not establish to the requisite legal standard that the general cartel continued after the inspections in April 2001. Nor does the contested decision, according to the applicants, contain any justification for linking the applicant's market conduct to such an alleged scheme.

Fourthly, the applicants allege that the fine should be reduced as the Commission misapplied the fining guidelines and made errors in the calculation of the fine by an illegal setting of the starting amount as a) the alleged infringement cannot be qualified as 'very serious', b) the actual impact of the infringement has not been properly taken into account, and c) the size of the relevant geographic market has been wrongly identified as being the EEA.

Moreover, the applicants contend that the Commission breached Article 253 EC as the contested decision does not provide any statement of reasons for imposing an additional amount of EUR 2.04 million on the applicants Aquatis France and Simplex Amaturen + Fittings.

Fifthly, the applicants submit that the Commission violated Article 2 of Regulation 1/2003 [1] and the principle of equality of arms by shifting the burden of proof on the applicants by relying entirely on leniency statements and by refusing to use its fact-finding powers. Furthermore, the applicants contend that the Commission violated Article 11(2) of Regulation 773/2004 [2] by including in the contested decision objections which were not formulated against the applicants in the Statement of Objections.

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

[2] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2004 L 123, p. 18).

Action brought on 15 December 2006 — Pegler v Commission

(Case T-386/06)

(2007/C 20/51)

Language of the case: English

Parties

Applicant: Pegler Ltd (Doncaster, United Kingdom) (represented by: R. Thompson, QC, and A. Collinson, solicitor)

Defendant: Commission of the European Communities

Form of order sought

— Annul Articles 1 and 3 of the Decision COMP/F-1/38.121 in respect of the applicant; and

— annul Article 2(h) of the decision in so far as it imposes a fine jointly and severally on the applicant.

— Alternatively, order that the fine imposed pursuant to Article 2(h) of the decision is reduced to EUR 5.2 million; and

— the fine for which the applicant is made jointly and severally liable pursuant to Article 2(h) is reduced to EUR 1.7 million.

— In either case, the defendant should be ordered to bear the costs of this appeal.

Pleas in law and main arguments

The applicant seeks the partial annulment of Commission Decision C(2006) 4180 final of 20 September 2006 in Case COMP/F-1/38.121 — Fittings, by which the Commission found that the applicant, together with other undertakings, had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area by fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information.

In support of its application, the applicant submits that the Commission has not taken account of factual documentary evidence from the applicant and that the contested decision should have been addressed exclusively to the applicant's former parent company Tomkins for the following reasons.

Concerning the period from 31 December 1988 to 20 January 1989 the Commission has, according to the applicant, imposed liability on the applicant simply by virtue of its acquisition on 20 January 1989 of the name 'Pegler Ltd' and by virtue of the existence of an agency relationship with the Tomkins group company FHT Holdings Ltd ('FHT') in circumstances where the applicant did not acquire any of the underlying assets, employees or liabilities and remained dormant, receiving no remuneration in its capacity as agent for FHT.

Concerning the period from 20 January 1989 to 29 October 1993 the applicant submits that the Commission has imposed liability on the applicant for acts that could only have been carried out as agent for FHT, in circumstances where FHT owned all of the underlying assets, employees or liabilities of the 'Pegler' business.

The Commission has, according to the applicant, failed to identify a clear addressee for the contested decision and has instead addressed its decision in respect of the same facts to two different undertakings.

The applicant contends, moreover, that the Commission has, inconsistently with the principle of equality of treatment, with Article 23 of Regulation 1/2003 [1] and with the Commission's fining guidelines [2], imposed on two different undertakings joint and several liability for payment of a fine calculated without reference to their individual circumstances but rather on the individual circumstances of only one of them, i.e. Tomkins.

Alternatively, the applicant submits that the Commission failed to comply with the fining guidelines, its own consistent practice and the principles of non-discrimination and equality of treatment in calculating the fine for which the applicant is held liable by reference to the individual circumstances of a different undertaking, Tomkins. The applicant further alleges that the Commission committed an error in calculating the fine.

(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

(2) Commission Notice of 14 January 1998 entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3).

Action brought on 20 December 2006 — Inter-IKEA v OHIM (representation of a pallet)

(Case T-387/06)

(2007/C 20/52)

Language of the case: English

Parties

Applicant: Inter-IKEA Systems BV (Delft, Netherlands) (represented by: J. Gulliksson, lawyer)

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

Form of order sought

— Annul the decision of the First Board of Appeal of 26 September 2006 in Case R 353/2006-1;

— order OHIM to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark representing a pallet consisting of an elongated rectangular platform or base and an equally elongated flange, ornamented with square holes, which are both at a 90 degree angle to each other, for goods and services in classes 6, 7, 16, 20, 35, 39 et 42 — application No 4 073 763

Decision of the examiner: Refusal of the application

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Violation of Article 7(1)(b) of Council Regulation No 40/94 as the trade mark is sufficiently distinctive to be registered.

Action brought on 20 December 2006 — Inter-IKEA v OHIM (representation of a pallet)

(Case T-388/06)

(2007/C 20/53)

Language of the case: English

Parties

Applicant: Inter-IKEA Systems BV (Delft, Netherlands) (represented by: J. Gulliksson, lawyer)

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

Form of order sought

— Annul the decision of the First Board of Appeal of 26 September 2006 in Case R 354/2006-1;

— order OHIM to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark representing a pallet consisting of an elongated rectangular platform or base and an equally elongated flange, ornamented with round holes, which are both at a 90 degree angle to each other, for goods and services in classes 6, 7, 16, 20, 35, 39 et 42 — application No 4 073 731

Decision of the examiner: Refusal of the application

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Violation of Article 7(1)(b) of Council Regulation No 40/94 as the trade mark is sufficiently distinctive to be registered.

Action brought on 20 December 2006 — Inter-IKEA v OHIM (representation of a pallet)

(Case T-389/06)

(2007/C 20/54)

Language of the case: English

Parties

Applicant: Inter-IKEA Systems BV (Delft, Netherlands) (represented by: J. Gulliksson, lawyer)

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

Form of order sought

— Annul the decision of the First Board of Appeal of 26 September 2006 in Case R 355/2006-1;

— order OHIM to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark representing a pallet consisting of an elongated rectangular platform or base and an equally elongated flange, ornamented with triangle holes, which are both at a 90 degree angle to each other, for goods and services in classes 6, 7, 16, 20, 35, 39 et 42 — application No 4 073 748

Decision of the examiner: Refusal of the application

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Violation of Article 7(1)(b) of Council Regulation No 40/94 as the trade mark is sufficiently distinctive to be registered.

Action brought on 20 December 2006 — Inter-IKEA v OHIM (representation of a pallet)

(Case T-390/06)

(2007/C 20/55)

Language of the case: English

Parties

Applicant: Inter-IKEA Systems BV (Delft, Netherlands) (represented by: J. Gulliksson, lawyer)

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

Form of order sought

— Annul the decision of the First Board of Appeal of 26 September 2006 in Case R 356/2006-1;

— order OHIM to pay the costs.

Pleas in law and main arguments

Community trade mark concerned: Figurative mark representing a pallet consisting of an elongated rectangular platform or base and an equally elongated flange, both ornamented with round holes, which are both at a 90 degree angle to each other, for goods and services in classes 6, 7, 16, 20, 35, 39 et 42 — application No 4 073 722

Decision of the examiner: Refusal of the application

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Violation of Article 7(1)(b) of Council Regulation No 40/94 as the trade mark is sufficiently distinctive to be registered.

Action brought on 18 December 2006 — Makhteshim Agan Holding and others v Commission

(Case T-393/06)

(2007/C 20/56)

Language of the case: English

Parties

Applicants: Makhteshim Agan Holding BV (Amsterdam, The Nederlands), Makhteshim Agan Italia Srl (Bergamo, Italy) and Magan Italia Srl (Bergamo, Italy) (represented by: C. Mereu and K. Van Maldegem, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annulment of Commission Decision D/531125, of 12 October 2006;

— order the defendant to comply with its obligations under Community law and review and use all available data, including human data, to ensure the inclusion of azinphos-methyl in Annex I to the PPPD;

— order the defendant to pay all costs and expenses in these proceedings.

Pleas in law and main arguments

By means of their application, the applicants seek annulment of Commission Decision D/531125 set forth in a letter of 12 October 2006, addressed to the agency within the rapporteur Member State responsible for the review of the active substance azinphos-methyl under the framework of Directive 91/414/EEC concerning the placing of plants protection products on the market (hereinafter, the 'PPPD') [1], in which the defendant states it will not take a decision on the approval and inclusion of the active substance concerned in Annex I of the said directive and further indicates that in the absence of approval at Community level by the date laid down in Article 8, paragraph 2, of the PPPD, there would no longer be any legal basis for keeping the substance on the market.

The applicants claim that the contested decision amounts to a *de facto* and *de jure* ban of azinphos-methyl, insofar as it unambiguously states that no further decision on the inclusion of the substance in Annex I of the PPPD will be taken and in that it aims to achieve an azinphos-methyl marketing ban through the defendant's inactivity until the expiration of the set time-limit for approval.

The applicants further submit that the contested decision jeopardises their rights to a fair consideration of the substance at stake in the light of state-of-the-art scientific studies submitted by them. In addition, by depriving the applicants of their right to re-register and continue selling their products in the Member States, the defendant allegedly breached the principle of proportionality as well as their fundamental right to carry out their business activities thereby interfering with their property right.

Moreover, the applicants contend that the contested decision is vitiated by substantial procedural flaws. Precisely, the defendant's lack of initiative in making a proposal regarding the inclusion of azinphos-methyl in Annex I to the PPPD, as well as the marketing ban it aims to achieve by its inactivity, violate Article 5, paragraph 2, of Council Decision 1999/468/EC [2] and Article 8, paragraph 2, of the PPPD.

Finally, should the Court consider that the contested decision is not a challengeable act under Article 230, paragraph 4, EC, the applicants submit that their action should still be declared admissible under Article 232 EC, insofar as the defendant's inactivity constitutes an unlawful failure to act.

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[1] OJ 1991 L 230, p. 1

[2] Council Decision 1999/468/EC laying out the procedures for the exercise of implementing powers conferred on the Commission, OJ (1999) L 184, p. 23

EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Action brought on 31 October 2006 — Molina Solano v Europol

(Case F-124/06)

(2007/C 20/57)

Language of the case: Dutch

Parties

Applicant: Beatriz Molina Solano (Rijswijk, Netherlands) (represented by: D.C. Coppens, lawyer)

Defendant: European Police Office (Europol)

Form of order sought

The Tribunal is asked to:

— annul the decision taken on the applicant's complaint by Europol on 1 August 2006 and Europol's initial decision of 27 January 2006;

— order Europol to award the applicant an incremental point with effect from 1 January 2005;

— order Europol to pay the costs.

Pleas in law and main arguments

Following a complaint, Europol awarded the applicant one of the incremental points referred to in paragraph 2 of Article 29 of the Europol Staff Regulations with effect from 1 July 2005. In her action, the applicant asks that that incremental point should be awarded to her with effect from 1 January 2005. In support of her claims, she asserts that, according to the policy for managing incremental points which Europol was applying at the time of the facts at issue, the mark which she had obtained gave her the right to a step with effect from 1 January 2005. In denying her this benefit, which had been accorded to other agents who had received comparable marks, Europol was in breach of the principle of equal treatment. The applicant relies in addition on breach of the principles of legal certainty and impartiality, and the prohibition on acting arbitrarily.

Action brought on 30 November 2006 — Reali v Commission

(Case F-136/06)

(2007/C 20/58)

Language of the case: English

Parties

Applicant: Enzo Reali (Sofia, Bulgaria) (represented by: S. A. Pappas, Lawyer)

Defendant: Commission of the European Communities

Form of order sought

The applicant claims that the Tribunal should:

— Annul the Decision of the authority authorised to conclude contracts of employment dated 30 August 2006 in response to the complaint lodged on 7 July 2006 by Mr Enzo Reali;

— Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant is a contractual agent classified in Fonction Group IV, grade 14. He claims that he should have been classified in grade 16, because in the calculation of his professional experience the Commission should have considered his degree (Laurea in Scienze Agrarie) as a Bachelor Degree plus a Master.

In support of his action, the applicant pleads that:

— The Commission breached Directive 89/48/EEC [1], as amended by Directive 2001/19/EC [2], and the principle of subsidiarity, by refusing to recognise that the Applicant's degree is equivalent to a 'Bachelor Degree plus a Master' even though the equivalence had previously been clearly recognised at national level by his University;

— The Commission breached the principle of non-discrimination by unduly refusing to count the Applicant's Master as a year of professional experience;

— The attacked decision is illegal due to a manifest error of assessment in the calculation of the professional experience of the Applicant and to a lack of motivation;

— The rejection of the complaint is based on implementing measures [Article 3 (1) (c) of the General implementing provisions on the procedures governing the engagement and the use of contract staff at the Commission] that are beyond the power delegated to the Commission by Article 86 (6) of the Conditions of Employment of Other Servants of the Communities.

(1) Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

(2) Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (OJ L 2006, p. 1).

Action brought on 27 November 2006 — Chassagne v Commission

(Case F-137/06)

(2007/C 20/59)

Language of the case: French

Parties

Applicant: Olivier Chassagne (Brussels, Belgium) (represented by: S. Rodrigues and C. Bernard-Glanz)

Defendant: Commission of the European Communities

Form of order sought

— annul the decision of the Appointing Authority refusing to take an express decision concerning the fixing of the date of the first taking up of post for the applicant, so far as that refusal follows implicitly from the decision of the Appointing Authority of 14 January 2006;

— annul, so far as is necessary, the decision of the Appointing Authority rejecting the applicant's complaint;

— state to the Appointing Authority the consequences of the annulment of the contested decisions, and, in particular, that it should take an express decision by which it recognises that the date of 1 July 2002 amounts to a first taking up of post within the meaning of Article 12(d) of the Protocol on the Privileges and Immunities of the European Communities ('PPI');

— order the Appointing Authority to pay to the applicant: (i) the sum of EUR 9 523,26 by way of compensation for his material loss, plus default interest at the statutory rate from the date on which it becomes due; (ii) the sum of EUR 5 000, by way of compensation for his non-material loss, plus default interest at the statutory rate from the date on which it becomes due;

— reserve judgment concerning that part of the material loss which still cannot be liquidated and which is represented by the costs that the applicant has incurred since 18 April 2006 and continues to incur in the framework of the dispute between him and the Belgian tax authorities before Belgian national courts concerning the fixing of the date of his first taking up of post;

— order the defendant to pay the costs.

Pleas in law and main arguments

In support of his claim, the applicant relies on the following grounds:

— infringement of Article 18 of the PPI;

— infringement of Article 26 of the Staff Regulations, of the principle of sound administration and of the duty to have regard for the welfare of officials;

— infringement of the principle of the protection of legitimate expectations and the existence of a manifest error of assessment.

Action brought on 11 December 2006 — Kurrer v Commission

(Case F-139/06)

(2007/C 20/60)

Language of the case: French

Parties

Applicant: Christian Kurrer (Watermael-Boitsfort, Belgium) (represented by: S. Orlandi, A. Coolen, J.-N. Louis and E. Marchal, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The Tribunal is asked to:

— Annul the decision of the Commission to approve the applicant a probationary official with effect from 1 April 2006 inasmuch as that decision fixes his grade and step as A*6/2 and does not take into account the points he accumulated as a 'research' temporary agent;

— Order the defendant to pay the costs.

Pleas in law and main arguments

On 16 January 2004, the applicant entered the service of the Commission as a 'research' temporary agent in Grade A7. As a successful candidate in Open Competition COM/A/3/02 published on 25 July 2002 to constitute a reserve list for the recruitment of administrators in career bracket A7/A6, he was appointed a probationary official in Grade A*6.

In view of the undertaking made by the Commission to extend the effects of possible annulment in pending cases concerning Article 12 of Annex XIII to the Staff Regulations, the applicant confines himself to relying on breach of the principle of equal treatment and non-discrimination in relation to former colleagues, also 'research' temporary agents, who had been successful in internal competitions and, when established as officials, retained their grade and accumulated points.

The applicant further asserts in so far as is necessary, that Article 5(4) of Annex XIII to the Staff Regulations is unlawful, to the extent that it fails to comply with the above-mentioned principle and the principle of proportionality.

Action brought on 11 December 2006 — Hartwig v Commission and Parliament

(Case F-141/06)

(2007/C 20/61)

Language of the case: French

Parties

Applicant: Marc Hartwig (Brussels, Belgium) (represented by: T. Bontinck, lawyer)

Defendant: Commission of the European Communities and European Parliament

Form of order sought

— annul the individual decisions of the Commission of the European Communities and of the European Parliament of 12 April 2006 and of 27 March 2006 respectively, concerning a transfer from the status of a member of temporary staff to the status of official;

— Order the defendants to pay the costs.

Pleas in law and main arguments

The applicant, after working for a number of years at the Commission as a member of temporary staff in Grade B*7, passed open competition PE/34/B of the European Parliament (Grade B5/B4). Subsequently, he was appointed as a probationary official in Grade B*3 by the latter institution, which immediately transferred him to the Commission, where he was classified in that same grade.

In support of his action, the applicant pleads infringement of Articles 31 and 62 of the Staff Regulations and Articles 5 and 2 of Annex XIII thereto.

The applicant pleads, moreover, breach of the principle of the protection of legitimate expectations and of the principle of maintenance of rights acquired.

Action brought on 28 December 2006 — Bligny v Commission

(Case F-142/06)

(2007/C 20/62)

Language of the case: French

Parties

Applicant: Francesco Bligny (Tassin-la-Demi-Lune, France) (represented by: P. Lebel-Nourissat, avocat)

Defendant: Commission of the European Communities

Form of order sought

— annul the decision of the selection board for competition EPSO/AD/06/05 of 7 December 2006 and that of 23 November 2006, refusing to admit the applicant to the competition and therefore to correct his written test;

— find that the application form published on 15 May 2006 on the EPSO internet site for use by candidates of the competition was improper;

— order the defendant to pay to the applicant the sum of EUR 5 000 in compensation for his loss;

— Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, after passing the pre-selection tests for the above-mentioned competition, was not admitted to the next stage since, contrary to what was indicated in the notice of competition published in the Official Journal ([1]), he had failed to include with his application form any document proving his citizenship.

In support of his action, the applicant pleads breach of the principle of protection of legitimate expectations, of the principle of sound administration and of the duty to have regard for the welfare of officials. He submits in particular that, concerning citizenship, the model application form to be downloaded from the EPSO internet site merely required an honour declaration and warned candidates that, on request, they would have to provide documentary evidence.

([1]) OJ C 178 A of 27.7.2005, p. 3.

Action brought on 18 December 2006 — Continolo v Commission

(Case F-143/06)

(2007/C 20/63)

Language of the case: French

Parties

Applicant: Donato Continolo (Duino, Italy) (represented by: S. Rodrigues, C. Bernard-Glanz and R. Albelice, lawyers)

Defendant: Commission of the European Communities

Form of order sought

The Tribunal is asked to:

— annul the decision of the Commission of 3 January 2006 concerning the award and calculation of the applicant's pension rights to the extent that it credits the period which the applicant spent on leave on personal grounds from 11 June 1981 to 1 March 1983 only 5 months, 6 days of pensionable service, instead of 8 months, 20 days;

— annul the decision of the Commission of 5 September 2006 dismissing the applicant's complaint;

— indicate to the Commission the consequences of the annulment of the contested decisions, in particular, concerning the percentage acquired, currently fixed at 66.66666 %, which must be recalculated to take account of the months of January and February 1983;

— order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, a former Commission official, has been retired since 1 January 2006. In his action, he contests the decision of the Commission concerning the award and calculation of his pension rights inasmuch as that decision discloses that the rights which he acquired for the period of his leave on personal grounds, in respect of which he had obtained a transfer into the Community system, have not been wholly credited.

The applicant relies, first, on breach of the principle of protection of legitimate expectations, of the principle of sound administration and of the duty to have regard for the welfare of officials and, secondly, on a manifest error of assessment and of a breach of the duty to state reasons.

Action brought on 22 December 2006 — Bleyaert v Council

(Case F-144/06)

(2007/C 20/64)

Language of the case: French

Parties

Applicant: Eric Bleyaert (Maldegem, Belgium) (represented by: S. Orlandi, A. Coolen, J.-N. Louis and E. Marchal, lawyers)

Defendant: Council of the European Union

Form of order sought

— annul the decision of the Appointing Authority not to include the applicant's name on the list of officials selected to follow the training programme in the framework of the certification procedure for 2005;

— order the defendant to pay the costs.

Pleas in law and main arguments

The applicant, a Council official in Grade AST 8, applied for the certification procedure for 2005. His name, which appeared in the draft list of officials selected to follow the training programme in the framework of the 2005 certification exercise, was not included in the definitive list, published on 22 May 2006, which the Appointing Authority adopted taking into account the opinion of the joint committee for the certification procedure. That committee had heard the applicant on 17 May 2006.

In support of his action, the applicant relies, first, on breach of the duty to state reasons, especially as the Appointing Authority did not reply to his complaint. Moreover, the applicant asserts the infringement of Article 45a of the Staff Regulations and Article 5 of the general provisions implementing that article of those Regulations. In particular, the joint committee, which could hear only officials who challenged the draft list, was not entitled to summon the applicant. In any event, the applicant claims that the principle of equal treatment was also infringed, in that the joint committee did not hear all the officials whose names were included on the draft list.