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(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COURT OF JUSTICE

(2009/C 82/01)

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

OJ C 69, 21.3.2009

Past publications

OJ C 55, 7.3.2009

OJ C 44, 21.2.2009

OJ C 32, 7.2.2009

OJ C 19, 24.1.2009

OJ C 6, 10.1.2009

OJ C 327, 20.12.2008

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

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(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Judgment of the Court (Grand Chamber) of 10 February 2009 — Commission of the European Communities v Italian Republic

(Case C-110/05) [1]

(Failure of a Member State to fulfil obligations — Article 28 EC — Concept of 'measures having equivalent effect to quantitative restrictions on imports' — Prohibition on mopeds, motorcycles, motor tricycles and quadricycles towing a trailer in the territory of a Member State — Road safety — Market access — Obstacle — Proportionality)

(2009/C 82/02)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: D. Recchia and F. Amato, Agents,)

Defendant: Italian Republic (represented by: I.M. Braguglia, Agent, assisted by M. Fiorilli, avvocato dello Stato)

Re:

Failure of a Member State to fulfil its obligations — Breach of Article 28 EC — National legislation prohibiting motor vehicles (with the exception of tractors) from pulling trailers

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders the Commission of the European Communities to pay the costs.*

[1] OJ C 115, 14.5.2005.

Judgment of the Court (Grand Chamber) of 10 February 2009 — Ireland v European Parliament, Council of the European Union

(Case C-301/06) [1]

(Action for annulment — Directive 2006/24/EC — Retention of data generated or processed in connection with the provision of electronic communications services — Choice of legal basis)

(2009/C 82/03)

Language of the case: English

Parties

Applicant: Ireland (represented by: D. O'Hagan, acting as Agent, E. Fitzsimons, D. Barniville and A. Collins SC)

Intervener in support of the applicant: Slovak Republic (represented by: J. Čorba, acting as Agent)

Defendants: European Parliament (represented by: H. Duintjer Tebbens, M. Dean and A. Auersperger Matić, and subsequently by the latter two and K. Bradley, acting as Agents), Council of the European Union (represented by: J.-C. Piris, J. Schutte and S. Kyriakopoulou, acting as Agents)

Interveners in support of the defendants: Kingdom of Spain (represented by: M.A. Sampol Pucurull and J. Rodríguez Cárcamo, acting as Agents), Kingdom of the Netherlands (represented by: C. ten Dam and C. Wissels, acting as Agents), Commission of the European Communities (represented by: C. Docksey, R. Troosters and C. O'Reilly, acting as Agents), European Data Protection Supervisor (represented by: H. Hijmans, acting as Agent)

Re:

Annulment of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, p. 54) — Choice of legal basis

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Ireland to pay the costs;*

3. *Orders the Kingdom of Spain, the Kingdom of the Netherlands, the Slovak Republic, the Commission of the European Communities and the European Data Protection Supervisor to bear their own respective costs.*

([1]) OJ C 237, 30.9.2006.

Judgment of the Court (Second Chamber) of 12 February 2009 — Commission of the European Communities v Hellenic Republic

(Case C-45/07) ([1])

(Failure of a Member State to fulfil obligations — Articles 10 EC, 71 EC and 80(2) EC — Maritime safety — Monitoring of ships and port facilities — International agreements — Division of powers between the Community and the Member States)

(2009/C 82/04)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: K. Simonsson, M. Konstantinidis, F. Hoffmeister and I. Zervas, Agents)

Defendant: Hellenic Republic (represented by: A. Samoni-Rantou and S. Chala, Agents)

Intervener in support of the defendant: United Kingdom of Great Britain and Northern Ireland (represented by: I. Rao, Agent, and D. Anderson QC)

Re:

Failure of a Member State to fulfil obligations — Infringement of Articles 10, 71 and 80(2) of the EC Treaty — Submission to an international organisation of a proposal which falls within a field covered by exclusive Community external competence — Maritime safety — Proposal for monitoring the compliance of ships and port facilities with the requirements of Chapter XI-2 of SOLAS and the ISPS Code

Operative part of the judgment

The Court:

1. *Declares that, by submitting to the International Maritime Organisation (IMO) a proposal (MSC 80/5/11) for monitoring the compliance of ships and port facilities with the requirements of Chapter XI-2 of the International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974, and the International Ship and Port Facility Security Code, the Hellenic Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC.*

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

([1]) OJ C 82, 14.4.2007.

Judgment of the Court (First Chamber) of 12 February 2009 (reference for a preliminary ruling from the Hof van beroep te Antwerpen — Belgium) — Belgische Staat v N.V. Cobelfret

(Case C-138/07) ([1])

(Directive 90/435/EEC — Article 4(1) — Direct effect — National legislation designed to prevent double taxation of distributed profits — Deduction of the amount of dividends received from a parent company's basis of assessment only in so far as it has made taxable profits)

(2009/C 82/05)

Language of the case: Dutch

Referring court

Hof van beroep te Antwerpen

Parties to the main proceedings

Appellant: Belgische Staat

Respondent: N.V. Cobelfret

Re:

Reference for a preliminary ruling — Hof van beroep te Antwerpen — Interpretation of Article 4 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6) — National provisions designed to prevent double taxation of distributed dividends — Conditions

Operative part of the judgment

The first indent of Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that dividends received by a parent company are to be included in its basis of assessment in order subsequently to be deducted from that basis in the amount of 95 %, in so far as, for the tax period in question, the parent company has a positive profit balance after deduction of other exempted profits.

The first indent of Article 4(1) of Directive 90/435 is unconditional and sufficiently precise to be capable of being relied on before national courts.

([1]) OJ C 117, 26.5.2007.

Judgment of the Court (Grand Chamber) of 10 February 2009 (reference for a preliminary ruling from the House of Lords (United Kingdom)) — Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA v West Tankers Inc.

(Case C-185/07) ([1])

(Recognition and enforcement of foreign arbitral awards — Regulation (EC) No 44/2001 — Scope of application — Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement — New York Convention)

(2009/C 82/06)

Language of the case: English

Referring court

House of Lords

Parties to the main proceedings

Appellants: Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA

Respondent: West Tankers Inc.

Re:

Reference for a preliminary ruling — House of Lords — Interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) — Power of a court of a Member State to order a party not to commence court proceedings or to cease those proceedings in another Member State on the ground that they are contrary to an arbitration agreement

Operative part of the judgment

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

([1]) OJ C 155, 7.7.2007.

Judgment of the Court (First Chamber) of 12 February 2009 (reference for a preliminary ruling from the Bundesgerichtshof — Germany) — Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV

(Case C-339/07) ([1])

(Judicial cooperation in civil matters — Insolvency proceedings — Court with jurisdiction)

(2009/C 82/07)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH

Defendant: Deko Marty Belgium NV

Re:

Reference for a preliminary ruling — Bundesgerichtshof — Interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) — Jurisdiction of the court of the Member State within the territory of which the centre of a debtor's main interests is situated in respect of judgments deriving directly from the insolvency proceedings and which are closely linked with them — Action (Insolvenzanfechtungsklage) for reimbursement of a payment by the debtor to a company whose registered office is in another Member State

Operative part of the judgment

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.

([1]) OJ C 269, 10.11.2007.

Judgment of the Court (Fourth Chamber) of 12 February 2009 (reference for a preliminary ruling from the Landesarbeitsgericht Düsseldorf (Germany)) — Dietmar Klarenberg v Ferrotron Technologies GmbH

(Case C-466/07) ([1])

(Social policy — Directive 2001/23/EC — Transfer of undertakings — Safeguarding of employees' rights — Concept of legal transfer — Legal transfer of a part of a business to another undertaking — Organisational autonomy following the transfer)

(2009/C 82/08)

Language of the case: German

Referring court

Landesarbeitsgericht Düsseldorf

Parties to the main proceedings

Applicant: Dietmar Klarenberg

Defendant: Ferrotron Technologies GmbH

Re:

Reference for a preliminary ruling — Landesarbeitsgericht Düsseldorf — Interpretation of Article 1(1)(a) and (b) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) — Applicability of Directive 2001/23/EC in the event of a legal transfer of a part of a business to another undertaking which integrates, into its organisational structure, the part of the business that has been transferred without preserving the latter's organisational autonomy — Concept of 'transfer' for the purposes of Directive 2001/23/EC

Operative part of the judgment

Article 1(1)(a) and (b) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that that directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity, a matter which it is for the national court to determine.

([1]) OJ C 8, 8.12.2008.

Judgment of the Court (Third Chamber) of 12 February 2009 — Commission of the European Communities v Republic of Poland

(Case C-475/07) ([1])

(Failure of a Member State to fulfil its obligations — Electricity tax — Directive 2003/96/EC — First subparagraph of Article 21(5) — Time at which the tax becomes chargeable)

(2009/C 82/09)

Language of the case: Polish

Parties

Applicant: Commission of the European Communities (represented by: W. Mölls and K. Herrmann, Agents)

Defendant: Republic of Poland (represented by: T. Kozek, M. Dowgielewicz, M. Jarosz and A. Rutkowska, Agents)

Re:

Failure of a Member State to fulfil its obligations — Failure to adopt, within the prescribed time limit, the measures necessary to comply with Article 21(5) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (Text with EEA Relevance) (OJ 2003 L 283, p. 51) — Time at which the electricity tax becomes chargeable

Operative part of the judgment

The Court:

1. *Declares that, by failing to adapt, by 1 January 2006, its system of electricity tax, with regard to the time at which the electricity tax becomes chargeable, to the requirements of the first subparagraph of Article 21(5) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended by Council Directive 2004/74/EC of 29 April 2004, the Republic of Poland has failed to fulfil its obligations under that directive.*

2. *Orders the Republic of Poland to pay the costs.*

(1) OJ C 22, 26.1.2008.

Judgment of the Court (Fourth Chamber) of 12 February 2009 (reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands)) — Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën

(Case C-515/07) (1)

(Sixth VAT Directive — Goods and services forming part of the assets of a business for use in taxable transactions and in transactions other than taxable transactions — Right to an immediate and full deduction of the tax paid in respect of the acquisition of such goods and services)

(2009/C 82/10)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Applicant: Vereniging Noordelijke Land- en Tuinbouw Organisatie

Defendant: Staatssecretaris van Financiën

Re:

Reference for a preliminary ruling — Hoge Raad der Nederlanden — Interpretation of Articles 6(2) and 17(1), (2) and (6) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) — Goods and services (not only capital goods used partly for business and partly for private purposes) — Allocation in full to the taxpayer's business assets — Possibility of deducting immediately and in full the tax on the purchase of such goods and services.

Operative part of the judgment

Articles 6(2)(a) and 17(2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, must be interpreted as not being applicable to the use of goods and services allocated to the business for the purpose of transactions other than the taxable transactions of the taxable person, as the value added tax due in respect of the acquisition of those goods and services, and relating to such transactions, is not deductible.

(1) OJ C 22, 26.1.2008.

Judgment of the Court (Third Chamber) of 12 February 2009 (reference for a preliminary ruling from the Bundesfinanzhof — Germany) — Margarete Block v Finanzamt Kaufbeuren

(Case C-67/08) (1)

(Free movement of capital — Articles 56 EC and 58 EC — Inheritance tax — National rules not allowing inheritance tax in respect of capital claims, paid by an heir in one Member State, to be credited against inheritance tax payable in another Member State where the owner of the assets was resident at the time of death — Double taxation — Restriction — None)

(2009/C 82/11)

Language of the case: German

Referring court

Bundesfinanzhof

Parties to the main proceedings

Applicant: Margarete Block

Defendant: Finanzamt Kaufbeuren

Re:

Reference for a preliminary ruling — Bundesfinanzhof (Germany) — Interpretation of Articles 56(1) and 58(1)(a) and (3) of the EC Treaty — National inheritance tax legislation — Double taxation resulting from the impossibility of crediting tax levied in another Member State against national tax where the inherited assets situated in that other Member State are in the form of a bank account

Operative part of the judgment

Articles 56 EC and 58 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which — as regards the assessment of inheritance tax payable by an heir who is resident in that Member State in respect of capital claims against a financial institution in another Member State — does not provide for inheritance tax paid in that other Member State to be credited against inheritance tax payable in the first Member State where the person whose estate is being administered was, at the time of death, resident in the first Member State.

([1]) OJ C 107, 26.4.2008.

Judgment of the Court (Second Chamber) of 12 February 2009 (reference for a preliminary ruling from the Augstākās tiesas Senāta (Republic of Latvia)) — Schenker SIA v Valsts ieņēmumu dienests

(Case C-93/08) ([1])

(Reference for a preliminary ruling — Regulation (EC) No 1383/2003 — Article 11 — Simplified procedure of abandoning goods for destruction — Prior determination whether an intellectual property right has been infringed — Administrative penalty)

(2009/C 82/12)

Language of the case: Latvian

Referring court

Augstākās tiesas Senāts

Parties to the main proceedings

Applicant: Schenker SIA

Defendant: Valsts ieņēmumu dienests

Re:

Reference for a preliminary ruling — Augstākās tiesas Senāts — Interpretation of Article 11 of Council Regulation No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7) — Simplified procedure of abandoning goods for destruction without first determining whether there has been an infringement of an intellectual property right under law — National legislation providing that an administrative penalty be imposed where the goods declared infringe an intellectual property right

Operative part of the judgment

The initiation, with the agreement of an intellectual property right-holder and of the importer, of the simplified procedure laid down in Article 11 of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, does not deprive the competent national authorities of the power to impose, on the parties responsible for importing those goods into the Community customs territory, a 'penalty', within the meaning of Article 18 of that regulation, such as an administrative fine.

([1]) OJ C 128, 24.5.2008.

Judgment of the Court (Eighth Chamber) of 10 February 2009 — Commission of the European Communities v French Republic

(Case C-224/08) ([1])

(Failure of a Member State to fulfil obligations — Directive 2006/100/EC — Failure to transpose within the period prescribed)

(2009/C 82/13)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: C. Huvelin, V. Peere and H. Stølvbæk, acting as Agents)

Defendant: French Republic (represented by: G. de Bergues and B. Messmer, Agents)

Re:

Failure of a Member State to fulfil its obligations — Failure to adopt or notify, within the period prescribed, the measures necessary to comply with Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 141)

Operative part of the judgment

The Court:

1. *Declares that, by failing to adopt, within the period prescribed, all the laws, regulations and administrative provisions necessary to comply with Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania, the French Republic has failed to comply with its obligations under Article 2 of that directive;*

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

([1]) OJ C 171, 5.7.2008.

Judgment of the Court (Seventh Chamber) of 5 February 2009 — Commission of the European Communities v Grand Duchy of Luxembourg

(Case C-282/08) ([1])

(Failure of a Member State to fulfil obligations — Directive 2005/38/EC — Unfair commercial practices — Failure to transpose within the period prescribed)

(2009/C 82/14)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: W. Roels and W. Wils, acting as Agents)

Defendant: Grand Duchy of Luxembourg (represented by: C. Schiltz, Agent)

Re:

Failure of a Member State to fulfil its obligations — Failure to adopt or notify, within the prescribed period, the provisions necessary to comply with Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22)

Operative part of the judgment

The Court:

1. *Declares that, by failing to adopt, within the period prescribed, the laws, regulations and administrative provisions necessary to comply with Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;*

2. *Orders the Grand Duchy of Luxembourg to pay the costs.*

([1]) OJ C 209, 15.8.2008.

Judgment of the Court (Seventh Chamber) of 5 February 2009 — Commission of the European Communities v Republic of Finland

(Case C-293/08) ([1])

(Failure of a Member State to fulfil obligations — Directive 2004/83/EC — Failure to transpose within the period prescribed)

(2009/C 82/15)

Language of the case: Finnish

Parties

Applicant: Commission of the European Communities (represented by: M. Condou-Durande and I. Koskinen, acting as Agents)

Defendant: Republic of Finland (represented by: J. Heliskoski, Agent)

Re:

Failure of a Member State to fulfil obligations — Failure to adopt, within the period prescribed, the measures necessary to comply with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)

Operative part of the judgment

The Court:

1. *Declares that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and, in any event, by failing to inform the Commission thereof, the Republic of Finland has failed to fulfil its obligations under that directive;*

2. *Orders the Republic of Finland to pay the costs.*

([1]) OJ C 223, 30.8.2008.

Appeal brought on 12 November2008 by Matthias Rath against the order of the Court of First Instance (Seventh Chamber) delivered on 8 September 2008 in Case T-373/06 Matthias Rath v Office for Harmonisation in the Internal Market

(Case C-488/08 P)

(2009/C 82/16)

Language of the case: German

Parties

Appellant: Matthias Rath (represented by: S. Ziegler, C. Kleiner and F. Dehn, Rechtsanwälte)

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

Form of order sought

— set aside the order of the Seventh Chamber of the Court of First Instance of 8 September 2008 in Case T-373/06;

— grant the form of order sought at first instance;

— order OHIM and the intervener to pay the costs of the proceedings.

Pleas in law and main arguments

In its contested order, the Court of First Instance confirmed the decision of the First Board of Appeal, according to which, with regard to food supplements and dietetic substances for non-medical purposes, there is a likelihood of confusion between the word mark 'EPICAN' notified by the appellant and the earlier Community word mark 'EPIGRAN'.

The appellant bases his appeal on an infringement of Article 8(1)(b) of Regulation No 40/94. The Court of First Instance, he claims, based its assessment of the similarity between the goods and signs on factual mistakes. If the Court of First Instance had correctly assessed the facts, it would necessarily have concluded that there was no likelihood of confusion between the opposing signs. This is so, in particular, because, as the Court of First Instance correctly held, consumers accord an increased level of attention to the goods which are the subject of the dispute.

Appeal brought on 12 November 2008 by Mr Matthias Rath against the order of the Court of First Instance (Seventh Chamber) made on 8 September 2008 in Case T-374/06 Matthias Rath v Office for Harmonisation in the Internal Market

(Case C-489/08 P)

(2009/C 82/17)

Language of the case: German

Parties

Appellant: Matthias Rath (represented by: S. Ziegler, C. Kleiner and F. Dehn, Rechtsanwälte)

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

Form of order sought

— Set aside the order of the Seventh Chamber of the Court of First Instance of 8 September 2008 in Case T-374/06;

— grant the forms of order sought at first instance;

— order the Office for Harmonisation in the Internal Market and the intervener to pay the costs of the proceedings.

Pleas in law and main arguments

By its order under appeal, the Court of First Instance confirmed the decision of the First Board of Appeal that there is a likelihood of confusion as regards food supplements not for medical purposes and dietetic substances not adapted for medical use between the word sign 'EPICAN' applied for by the appellant and the earlier Community word mark 'EPIGRAN FORTE'.

The appellant's appeal is based on an infringement of Article 8 (1)(b) of Regulation No 40/94. The Court of First Instance relied on erroneous facts in its assessment of the similarity of products and signs. If the Court had assessed the facts correctly, it would have had to conclude that there is no likelihood of confusion between the signs at issue. This is particularly the case since, as the Court correctly found, consumers pay a high level of attention to the goods at issue in the proceedings.

Action brought on 4 December 2008 — Commission of the European Communities v Republic of Poland

(Case C-545/08)

(2009/C 82/18)

Language of the case: Polish

Parties

Applicant: Commission of the European Communities (represented by A. Nijenhuis and K. Mojzesowicz, acting as Agents)

Defendant: Republic of Poland

Form of order sought

— declare that, by regulating retail tariffs for broadband access services without carrying out a prior market analysis, the Republic of Poland has failed to fulfil its obligations under Articles 16 and 17 of Directive 2002/22/EC ([1]) in conjunction with Articles 16 and 27 of Directive 2002/21/EC ([2]);

— order the Republic of Poland to pay the costs.

Pleas in law and main arguments

By regulating retail tariffs for broadband access services without carrying out a prior market analysis, the Republic of Poland has failed to fulfil its obligations under Articles 16 and 17 of Directive 2002/22/EC in conjunction with Articles 16 and 27 of Directive 2002/21/EC.

First, the obligations imposed on Telekomunikacja Polska by the President of the Urząd Komunikacji Elektronicznej, namely the requirement of submission by the undertaking of retail tariffs for broadband access services for approval by the national regulatory authority and the requirement that the tariffs are determined on the basis of the costs of providing the services, two years after the entry into force in Poland of the binding Community provisions, constitute new obligations and not the maintenance in force of existing obligations.

Second, the regulatory obligations concerning retail broadband access services imposed on Telekomunikacja Polska by the President of the Urząd Komunikacji Elektronicznej cannot, according to the Commission, be regarded as transitional measures within the meaning of Article 27 of the Framework Directive, since Article 17 of Directive 98/10/EC, mentioned in Article 27, concerns only tariffs for the use of the fixed public telephone network and fixed public telephone services.

([1]) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ 2002 L 108, p. 51.

([2]) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L 108, p. 33.

Appeal brought on 9 February 2009 by Deepak Rajani (Dear!Net Online) against the judgment of the Court of First Instance (Eighth Chamber) delivered on 26 November 2008 in Case T-100/06 Deepak Rajani (Dear!Net Online) v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-559/08 P)

(2009/C 82/19)

Language of the case: English

Parties

Appellant: Deepak Rajani (Dear!Net Online) (represented by: A. Kockläuner, Rechtsanwalt)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Artoz-Papier AG

Form of order sought

— Set aside in whole the Decision of the Court of First Instance dated 26 November 2008, Case T-l00/06.

— Order OHIM to pay the costs of the proceedings before the Court of Justice.

Pleas in law and main arguments

The appellant submits that the contested judgment should be annulled on the following grounds:

— the Court of First Instance, when rejecting the first plea in law, misinterpreted Article 43 Section 2 and Section 3 of the Community Trademark Regulation (CTMR) in conjunction with Article 4 Section 1 of the Madrid Agreement;

— the Court of First Instance, when rejecting the first plea in law, infringed Article 6 of the Treaty on the European Union (Consolidated Version) as well as Article 6 in connection with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);

— the Court of First Instance, when rejecting the first plea in law, infringed Article 10 of Directive 89/104 (EC) ([1]) in conjunction with Article 1 of Directive 89/104 (EC);

— the Court of First Instance, when rejecting the second plea in law, infringed Article 79 CTMR by not taking into account that the opponent acted in bad faith;

— the Court of First Instance, when rejecting the second plea in law, wrongly viewed the trademarks at issue as confusingly similar and thus, infringed Article 8 Section 1 b) CTMR;

— the Court of First Instance, when rejecting the second plea in law, infringed Article 135 Section 4 of the Rules of Procedure of the Court of First Instance by not taking into account the supportive evidence as annexes to the court action before it;

— the Court of First Instance, when rejecting the second plea in law, infringed Articles 49 and 50 in conjunction with Article 220 of the Treaty on European Union (Consolidated Version);

— the Court of First Instance, when rejecting the second plea in law, did not take into account that OHIM misused their power.

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

Reference for a preliminary ruling from the Hof van beroep te Gent (Belgium) lodged on 8 January 2009 — Erotic Center BVBA v Belgian State

(Case C-3/09)

(2009/C 82/20)

Language of the case: Dutch

Referring court

Hof van beroep te Gent

Parties to the main proceedings

Applicant: Erotic Center BVBA

Defendant: Belgian State

Question referred

Should a cubicle consisting of a lockable space where there is room for only one person and where this person can watch films on a television screen for payment, where this person personally starts the film projection by inserting a coin and has a choice of different films, and during the time paid for can continually modify his/her choice of projected films, be regarded as a 'cinema' as referred to in the Sixth Council Directive No 77/388/EEC (1) of 17 May 1977, Annex H, Category 7 (subsequently: Annex III, No 7, of Council Directive 2006/112/EC (2) of 28 November 2006)?

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

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

Appeal brought on 8 January 2009 by Gerasimos Potamianos against the judgment delivered on 15 October 2008 in Case T-160/04 Potamianos v Commission

(Case C-4/09 P)

(2009/C 82/21)

Language of the case: French

Parties

Appellant: Gerasimos Potamianos (represented by: S. Orlandi, A. Coolen, J.-N.Louis and E. Marchal, lawyers)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— Annul all the provisions of the judgment of the Court of First Instance (Seventh Chamber) of 15 October 2008 in Case T-160/04 *Potamianos* v *Commission*, by which the Court of First Instance dismissed in its entirety the appellant's action of 26 April 2004 against the decision of the authority empowered to conclude contracts of employment (AECE) not to extend his contract as a temporary agent;

— annul the decision of the AECE not to renew his contract as a temporary agent;

— order the defendant to pay the costs at both instances.

Pleas in law and main arguments

By his appeal, the appellant relies on four pleas in support of his appeal.

In accordance with the first plea, he alleges that the interpretation of the Court of First Instance that the fact that his contract as a temporary agent was not renewed is based on reasons related to the interests of the service is incorrect. The appellant's hierarchy made a number of requests for his contract to be extended. On the contrary, objective, relevant and concordant evidence shows that the sole basis of the decision not to renew his contract was the application of the rule prohibiting aggregation of service, which imposes a maximum limit of six years on the employment of a temporary agent.

By his second plea, the appellant submits that the Court of First Instance erred in law in that it considered that he had not submitted an application for the post in question, whereas, in good time, he had requested that his contract be extended and reiterated that request on several occasions, including after publication of the vacancy notice.

By his third plea, the appellant submits that the Court of First Instance erred in law in that it found that the AECE did not misuse its powers. The stated aim of employment of temporary agents was to reduce the number of posts vacant within the Commission and, in particular, to make up for the shortage of candidates who had been successful in competitions.

The latter aim was in no way met by the refusal to extend the appellant's contract following application of the rule prohibiting aggregation of service, since his post was advertised before any competition lists were published. Moreover, another temporary agent was given a long-term contract in that post, while the contracts of all the other temporary agents employed on a short-term basis in the same directorate were automatically extended, without prior advertisement of their posts.

Finally, the principle of equal treatment has been breached since all the other temporary agents who were in a comparable situation apart from their length of service, had their contracts extended without their posts being advertised, unlike the procedure adopted in the case of the appellant. In that context, the burden of proof was wrongly reversed in the proceedings before the Court of First Instance, since it is for the defendant — and not for the applicant — to prove that rules which it laid down itself have been followed.

Reference for a preliminary ruling from the Oberlandesgericht Wien (Austria) lodged on 15 January 2009 — Wood Floor Solutions Andreas Domberger GmbH v Silva Trade, SA

(Case C-19/09)

(2009/C 82/22)

Language of the case: German

Referring court

Oberlandesgericht Wien

Parties to the main proceedings

Applicant: Wood Floor Solutions Andreas Domberger GmbH

Defendant: Silva Trade, SA

Questions referred

1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([1]) ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

   If the answer to that question is in the affirmative,

   Should the provision referred to be interpreted as meaning that

   (b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

   (c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative: Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

([1]) OJ 2001 L 12, p. 1.

Action brought on 15 January 2009 — Commission of the European Communities v Portuguese Republic

(Case C-20/09)

(2009/C 82/23)

Language of the case: Portuguese

Parties

Applicant: Commission of the European Communities (represented by: R. Lyal and A. Caeiros, Agents)

Defendant: Portuguese Republic

Form of order sought

— A declaration that, by providing, in connection with adjustment in accordance with Law No 39-A/2005, preferential tax treatment for public debt securities issued by the Portuguese State alone, the Portuguese Republic has failed to fulfil its obligations under Article 56 of the EC Treaty and Article 40 of the Agreement on the European Economic Area (EEA);

— an order that the Portuguese Republic should pay the costs.

Pleas in law and main arguments

In September 2005 the Commission received a complaint concerning the incompatibility of certain provisions of the 'Regime Excepcional de Regularização Tributária de elementos patrimoniais que não se encontrem no território português em 31 de Dezembro de 2004' (Extraordinary Scheme for the tax adjustment of financial assets not situated within Portuguese territory on 31 December 2004), approved by Law No 39-A/2005.

The effect of that Extraordinary Scheme is that persons liable to tax must, in the context of tax adjustment, pay the sum corresponding to the application of a rate of 5 % on the value of the financial assets appearing in the tax adjustment declaration and that if any or all of the financial assets listed in that declaration were Portuguese State securities, that rate would be reduced to half in respect of those securities and that reduction would be applied also to other financial assets if their respective value had been reinvested in Portuguese State securities before the date on which the tax adjustment declaration was submitted.

The Commission maintains that the Extraordinary Scheme confers an advantage, with regard to the repatriation of pecuniary items and to investment in Portuguese State securities, consisting of the application of a reduced rate to pecuniary items that are Portuguese State securities or to the value of financial assets reinvested in Portuguese State securities. As a matter of fact, persons using that scheme are discouraged from keeping their adjusted assets in forms other than Portuguese State securities.

The Court of Justice of the European Communities has already declared that a provision of domestic fiscal law capable of dissuading tax-payers from investing in other Member States amounts to a restriction of free movement of capital for the purpose of Article 56 EC.

In the present case, the Commission, while not denying that public debt securities may enjoy more favourable treatment, maintains that a lower tax rate applicable only to adjusted financial assets that are Portuguese State securities constitutes a discriminatory restriction of movements of capital prohibited by Article 56 EC and cannot be vindicated on the basis of Article 58 EC.

The rules of the EEA Agreement relating to movements of capital are, substantially, the same as those laid down in the EC Treaty. In consequence, the fact that the persons who could make use of the Extraordinary Scheme for the tax adjustment of financial assets have been dissuaded from keeping their adjusted financial assets in Norway, Lichtenstein or Iceland also constitutes a restriction of movements of capital, prohibited by Article 40 of the EEA Agreement.

Action brought on 15 January 2009 — Commission of the European Communities v Grand Duchy of Luxembourg

(Case C-22/09)

(2009/C 82/24)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: B. Schima and L. de Schietere de Lophem, acting as Agents)

Defendant: Grand Duchy of Luxembourg

Form of order sought

— Declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings ([1]), or, in any event, by failing to notify them to the Commission, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

— order the Grand Duchy of Luxembourg to pay the costs.

Pleas in law and main arguments

The period prescribed for transposition of Directive 2002/91/EC expired on 4 January 2006. At the time the present action was brought, the defendant had not yet adopted all the measures necessary to transpose the Directive or, in any event, had not notified those measures to the Commission.

([1]) OJ 2003 L 1, p. 65.

Reference for a preliminary ruling from the Fővarosi Bíróság (Hungary) lodged on 19 January 2009 — Sió-Eckes Kft. v Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve

(Case C-25/09)

(2009/C 82/25)

Language of the case:Hungarian

Referring court

Fővarosi Bíróság

Parties to the main proceedings

Applicant: Sió-Eckes Kft.

Defendant: Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve

Questions referred

1. May Article 2(1) of Council Regulation (EC) No 2201/96 ([1]) be interpreted as meaning that, in accordance with Annex I, the production aid scheme applies, not only to peaches in syrup and/or in natural fruit juice included in CN code ex 2008 70 61, but also to the products with other CN codes listed in that annex (ex 2008 70 69, etc)?

2. Does the processor which manufactures products under CN code ex 2008 70 92 comply with the provisions of Regulation No 2201/96?

3. May Article 2(1) of Commission Regulation (EC) No 1535/2003 ([2]) be interpreted as meaning that the products designated by CN codes ex 2008 70 61, ex 2008 70 69, ex 2008 70 71, ex 2008 70 79, ex 2008 70 92, ex 2008 70 94 and ex 2008 70 99 are also finished products within the meaning of the regulation?

4. In so far as, in accordance with the answers to the previous questions, the definition of finished products is applicable only to the peaches described in Article 3 of Commission Regulation (EEC) No 2320/89 ([3]), why are the CN codes of other products included in the regulations previously cited?

5. In accordance with the regulations cited above, may the products resulting from the separate phases of peach processing be regarded as finished products, regardless of whether they may be marketed (for example, the pulp)?

([1]) Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organisation of the markets in processed fruit and vegetable products (OJ 1996 L 297, p. 29).

([2]) Commission Regulation (EC) No 1535/2003 of 29 August 2003 laying down detailed rules for applying Council Regulation (EC) No 2201/96 as regards the aid scheme for products processed from fruit and vegetables (OJ 2003 L 218, p. 14).

([3]) Commission Regulation (EEC) No 2320/89 of 28 July 1989 of minimum quality requirements for peaches in syrup and peaches in natural fruit juice for the application of the production aid scheme (OJ 1989 L 220, p. 54).

Appeal brought on 21 January 2009 by the French Republic against the judgment delivered on 4 December 2008 by the Court of First Instance (Seventh Chamber) in Case T-284/08 People's Mojahedin Organisation of Iran v Council of the European Union

(Case C-27/09 P)

(2009/C 82/26)

Language of the case: English

Parties

Appellant: French Republic (represented by: E. Belliard, G. de Bergues, A.-L. During, acting as Agents)

Other parties to the proceedings: People's Mojahedin Organisation of Iran, Council of the European Union, Commission of the European Communities

Form of order sought

— set aside the judgment of the Court of First Instance of the European Communities of 4 December 2008 in Case T-284/08 People's Mojahedin Organisation of Iran v Council;

— itself give final judgment in the case by dismissing the PMOI's action or refer the case back to the Court of First Instance.

Pleas in law and main arguments

The French Government considers that the judgment under appeal should be set aside, first, because the Court of First Instance erred in law by holding that the Council had adopted Decision 2008/583/EC ([1]) in disregard of the PMOI's rights of defence, without taking account of the specific circumstances of the adoption of that decision; second, because the Court erred in law by considering that the judicial procedure opened in France against alleged members of the PMOI did not constitute a decision meeting the definition in Article 1(4) of Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism; and, finally, because the Court erred in law by holding that the refusal by the Council to communicate point 3 a) of one of the three documents supplied by the French authorities to the Council in support of their request for the inclusion of the PMOI in the list established by Decision 2008/583/EC, and sent to the Court by the Council in response to the Court Order of 26 September

2008 on measures of inquiry, did not enable the Court to review the lawfulness of Decision 2008/583/EC and infringed the right to effective judicial protection.

(1) Council Decision of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC (OJ 2008 L 188, p. 21).

Action brought on 22 January 2009 — Commission of the European Communities v Portuguese Republic

(Case C-30/09)

(2009/C 82/27)

Language of the case: Portuguese

Parties

Applicant: Commission of the European Communities (represented by: A. Sipos and P. Guerra e Andrade, acting as Agents)

Defendant: Portuguese Republic

Forms of order sought

— Declare that, by not drawing up external emergency plans for the establishments requiring such plans, the Portuguese Republic has failed to fulfil its obligations under Article 11 of Council Directive 96/82/EC (1) of 9 December 1996 on the control of major-accident hazards involving dangerous substances, as amended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003;

— Order the Portuguese Republic to pay the costs.

Pleas in law and main arguments

It is apparent from the letters sent by the Portuguese Administration to the Commission in this matter that none of the establishments required to draw up emergency plans has had its external emergency plan approved in accordance with the directive.

Article 11 of Directive 96/82 requires Member States to ensure that operators supply to the competent authorities the information necessary to draw up external emergency plans. The competent authorities must prepare such emergency plans.

Under Article 11(4) of the directive, internal and external emergency plans must be reviewed, tested, revised and updated at intervals of no longer than three years.

According to the Portuguese Administration's own information, none of those obligations has been fulfilled in Portugal.

(1) OJ 1997 L 10, p. 13.

Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary) lodged on 26 January 2009 — Bolbol Nawras v Bevándorlási és Állampolgársági Hivatal

(Case C-31/09)

(2009/C 82/28)

Language of the case: Hungarian

Referring court

Fővárosi Bíróság

Parties to the main proceedings

Applicant: Bolbol Nawras

Defendant: Bevándorlási és Állampolgársági Hivatal

Questions referred

For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC (1)

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of this directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion in the scope ratione personae of the directive?

(1) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

Reference for a preliminary ruling from the Corte Suprema di Cassazione (Italy) lodged on 28 January 2009 — Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v Paolo Speranza

(Case C-35/09)

(2009/C 82/29)

Language of the case: Italian

Referring court

Corte Suprema di Cassazione

Parties to the main proceedings

Appellants: Ministero dell'Economia e delle Finanze, Agenzia delle Entrate

Respondent: Paolo Speranza

Questions referred

1. Is Article 4(1)(c) of Directive 69/335/EEC ([1]), which provides that an increase in the capital of a capital company by contribution of assets of any kind is to be subject to capital duty, to be interpreted as meaning that an actual contribution is to be taxable, but not a mere decision to increase the share capital which remains essentially unimplemented?

2. Is Article 4(1)(c) of Directive 69/335/EEC to be interpreted as meaning that the duty must be levied exclusively on the company to which the capital is contributed and not also on the public official who drafts or certifies the transaction?

3. In any event, are the means of defence afforded to that public official by the Italian legislation consistent with the principle of proportionality, in light of the fact that, under Article 38 of Decree No 131/1986 of the President of the Republic, it is irrelevant whether the resolution to increase share capital is null and void or may be annulled, and repayment of the duty paid may be effected only after a civil judgment declaring the transaction null and void or annulling it has become final?

([1]) OJ, English Special Edition, 1969 (II), p. 412.

Appeal brought on 28 January 2009 by Transportes Evaristo Molina SA against the judgment delivered on 14 November 2008 in Case T-45/08 Transportes Evaristo Molina SA v Commission of the European Communities

(Case C-36/09 P)

(2009/C 82/30)

Language of the case: Spanish

Parties

Appellant: Transportes Evaristo Molina SA (represented by: A. Hernández Pardo, S. Beltrán Ruiz and L. Ruiz Ezquerra, lawyers)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— annul the judgment of the Court of First Instance of 14 November 2008 in Case T-45/08 in its entirety and, if the Court of Justice considers that it has sufficient evidence to give a ruling on the substance of the appeal brought against the Court of First Instance:

  — Prior to the assessment of the substance of the case, declare relevant and order the production of the evidence requested by Transportes Evaristo Molina SA in its application for annulment; and

  — Uphold the submissions put forward by Transportes Evaristo Molina SA before the Court of First Instance: annulment of the Commission decision of 12 April 2006 ([1]) relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP) on the grounds that it infringes Article 9 of Regulation No 1/2003 ([2]), and the principles of Community law laid down in the action for annulment, Article 81 EC and the exemption regulations for the categories which are set out in Article 81(3), Regulation (EEC) No 1984/83 ([3]) and Regulation (EC) No 2790/99 ([4]).

— order the Commission of the European Communities to pay the costs.

Pleas in law and main arguments

(a) The 'dies a quo' (day from which) the starting point for the limitation period laid down in Article 230 EC is calculated is the day on which the contested measure (Commission decision of 12 April 2006 ([5]) relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP) directly and individually affected TRANSPORTES EVARISTO MOLINA SA.

(b) If the Court considers that the action for annulment brought by TRANSPORTES EVARISTO MOLINA SA is time-barred, the applicant submits that that should be regarded as excusable since the conduct of the Commission caused confusion on the applicant's part.

([1]) Commission Decision 2006/446/of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP) (summary published in OJ 2006 L 176, p. 104).

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

([3]) Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5).

([4]) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

([5]) Commission Decision 2006/446/of 12 April 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 — Repsol CPP) (summary published in OJ 2006 L 176, p. 104).

Action brought on 28 January 2009 — Commission of the European Communities v Portuguese Republic

(Case C-37/09)

(2009/C 82/31)

Language of the case: Portuguese

Parties

Applicant: Commission of the European Communities (represented by: J.-B. Laignelot, S. Pardo Quintillán and P. Guerra e Andrade, Agents)

Defendant: Portuguese Republic

Form of order sought

— A declaration, first, that by not having adopted the measures necessary to ensure that waste tipped in the dos Limas, dos Linos and dos Barreiras quarries in the district of Lourosa is disposed of or recovered without endangering human health or harming the environment, in particular without creating risks to water or soil, and to ensure that the waste is entrusted to a private or public collection service or to an undertaking responsible for its disposal or recovery and, secondly, by not having adopted the measures necessary to restrict the introduction into groundwater of substances included in List II of Directive 80/68/EEC so as to prevent the pollution of groundwater by those substances, the Portuguese Republic has failed to fulfil its obligations under Articles 4 and 8 of Directive 2006/12/EC on waste, codifying Directive 75/442/EEC on waste, and under Articles 3 and 5 of Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances;

— an order that the Portuguese Republic should pay the costs.

Pleas in law and main arguments

Starting in the 1980s, waste from various sources began to be tipped in disused quarries without any supervision by the authorities whatsoever. Discharging of waste into the quarries continued until February 2004. Only in June 2004 were those areas closed off.

Analysis of the water at separate points in the old quarry area disclosed troubling levels of chemical contamination. The water table in that area is contaminated.

For many years the Portuguese authorities did not take the measures necessary to prevent holders of unidentified waste from discharging and abandoning waste in disused quarries. They did not check the discharge or abandonment of waste in the quarries or monitor its disposal.

Furthermore, the Portuguese authorities did not take the measures necessary to prevent the introduction into groundwater of harmful toxic substances. They did not make subject to prior investigation the tipping of waste capable of leading to the indirect discharge of noxious substances into groundwater. Nor did they check the surface discharge of waste.

Appeal brought on 29 January 2009 by Mr Ralf Schräder against the judgment of the Court of First Instance (Seventh Chamber) delivered on 19 November 2008 in Case T-187/06 Ralf Schräder v Community Plant Variety Office

(Case C-38/09 P)

(2009/C 82/32)

Language of the case: German

Parties

Appellant: Ralf Schräder (represented by: T. Leidereiter and W.-A. Schmidt, Rechtsanwälte)

Other party to the proceedings: Community Plant Variety Office (CPVO)

Form of order sought

— Set aside the judgment of the Court of First Instance (Seventh Chamber) of 18 November 2008 in Case T-187/06;

— Allow the appellant's application for annulment of the decision of the Board of Appeal of the CPVO of 2 May 2006 (Reference A003/2004) made in the proceedings at first instance.

With regard to point 2, in the alternative:

— Refer the case back to the Court of First Instance for fresh judgment.

— Order the CPVO to pay all the costs arising from the present proceedings, the proceedings before the Court of First Instance and the proceedings before the Board of Appeal.

Pleas in law and main arguments

The object of the present appeal is the judgment of the Court of First Instance by which the appellant's action against the decision of the Board of Appeal of the Community Plant Variety Office concerning the application for Community plant variety rights in respect of the plant variety SUMCOL 01 was dismissed. By that judgment which is subject to the present appeal the Court of First Instance confirmed the decision of the Board of Appeal, according to which the candidate variety was not clearly distinguishable from the reference variety, which was to be regarded as a matter of common knowledge.

The appellant's first ground of appeal refers to a number of procedural errors. In its review of the decision of the Board of Appeal the Court of First Instance made findings the incorrectness of which is immediately apparent from the pleadings. In addition it distorted facts and evidence, imposed excessive demands with regard to the applicant's submissions, drew contradictory conclusions and infringed the appellant's right to be heard. The Court of First Instance for example ignored large parts of the appellant's submissions and numerous offers of evidence made by him, rejecting them by pointing out that the submissions were too general. The Court of First Instance in so doing also overlooked the fact that it was in part objectively impossible for the appellant to be any 'more specific' in his submissions. It thus infringed both the appellant's right to be heard and the principles governing the burden of proof and evidence-gathering. Furthermore the Court of First Instance unlawfully expanded the subject-matter of the appeal proceedings by basing the judgment which is subject to the present appeal on reasoning which was not used either by the Office or by the Board of Appeal.

By its second ground of appeal the appellant argues that the Court of First Instance infringed Community law when interpreting Article 7(2) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights by regarding the written description of a variety in the academic literature as proof that it was a matter of common knowledge. In addition, the appellant contends that infringements of Article 62 of the abovementioned Regulation and Article 60 of Regulation (EC) No 1239/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office occurred.

Action brought on 2 February 2009 — Commission of the European Communities v Italian Republic

(Case C-47/09)

(2009/C 82/33)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: F. Clotuche-Duvieusart and M. Nardi, Agents)

Defendant: Italian Republic

Form of order sought

The Commission claims that the Court should:

— Declare that, by making it possible to add the adjective 'puro' or the phrase 'pure chocolate' to the sales names of chocolate products which do not contain vegetable fat other than cocoa butter, the Italian Republic has failed to fulfil its obligations under Article 3 of Directive 2000/36/EC ([1]) in conjunction with Article 2(1)(a) of Directive 2000/13/EC ([2]) and Article 3(5) of Directive 2000/36;

— order the Italian Republic to pay the costs.

Pleas in law and main arguments

The labelling and, in particular, sales names of chocolate products have been totally harmonised within the Community, with the aim of ensuring that the consumer is given accurate information, by means of the directive on labelling (2000/13) and the directive on chocolate products (2000/36). Directive 2000/36 provides that products which contain a maximum of 5 % of certain vegetable fats are to be allowed to retain their sales names unchanged but the labelling of those products must contain the specific statement, in bold letters, 'contains vegetable fats in addition to cocoa butter'.

The Italian legislation at issue, which restricts the addition of the word 'puro' to the sales name of products containing only cocoa butter by way of fat alters the harmonised definitions adopted at Community level and undermines them. Given that, in Italian, the word 'puro' means unadulterated, untouched and therefore genuine, consumers are led to believe that goods which, while complying with the directive and the conditions laid down therein relating to sales names, contain vegetable fats other than cocoa butter and are not pure, that is to say, they are adulterated, processed and not genuine. That is attributable to the simple fact that those products contain vegetable fats of a kind and in an amount which are nevertheless permitted by the legislation itself without requiring a change in the sales name.

Moreover, the word 'puro' is an adjective which qualifies the noun and its use in sales names is subject to compliance with a number of conditions. In particular, Article 3(5) of Directive 2000/36 provides that the use of information or descriptions relating to quality criteria is subject to compliance with

conditions laying down a minimum content for dry cocoa solids which is greater than that laid down for the use of names in which those descriptions do not appear. The Italian legislation makes the use of the word 'puro' subject simply to the presence of cocoa butter by way of fat and there is no requirement to comply with the higher minimum content for dry cocoa solids. That constitutes an infringement of Article 3(5) of the directive and is misleading for the consumer.

(1) Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption (OJ 2000 L 197, p. 19).
(2) Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29).

Appeal brought on 2 February 2009 by Lego Juris A/S against the judgment of the Court of First Instance (Eighth Chamber) delivered on 12 November 2008 in Case T-270/06 Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Other party before the Board of Appeal, intervener before the Court of First Instance Mega Brands, Inc.

(Case C-48/09 P)

(2009/C 82/34)

Language of the case: English

Parties

Appellant: Lego Juris A/S (represented by: V. von Bomhard, Rechtsanwältin, T. Dolde, A. Renck, Rechtsanwälte)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Megabrands, Inc.

Form of order sought

The appellant claim that the Court should:

— set aside the judgment of the Court of First Instance, because it violates Article 71(1)(e)(ii)CTMR (1)

Pleas in law and main arguments

The appellant submits that the contested judgment infringes art. 7(1)(e)(ii) of the Community Trade Mark Regulation. The appellant maintains that the Court of First Instance:

a) interpreted art. 7(1)(e)(ii) CTMR in such a way as to effectively preclude any shape which performs a function from trade mark protection, independently of whether the criteria of art. 7(1)(e)(ii) CTMR as defined by the Court in the Philips/Remington decision (2) are fulfilled or not.

b) applied the wrong criteria in the identification of the essential characteristics of a three-dimensional trade mark: and

c) applied an incorrect functionality test in that it i) did not limit its assessment to the essential characteristics of the trade mark at issues and, ii) did not define the appropriate criteria for assessing whether a characteristic of a shape is functional and, in particular, refused to take into account any potential a lternative designs.

(1) OJ L 11, p. 1.
(2) Case C-299/99 *Philips* [2002] ECR I-5475.

Action brought on 4 February 2009 — Commission of the European Communities v Ireland

(Case C-50/09)

(2009/C 82/35)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: P. Oliver, C. Clyne, J.-B. Laignelot, Agents)

Defendant: Ireland

The applicant claims that the Court should:

— declare that by failing to transpose Article 3 of Council Directive 85/337/EEC (1) on the assessment of the effects of certain public and private projects on the environment as amended;

— declare that by failing to ensure that, where Irish planning autorities and the Environmental Protection Agency both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2, 3 and 4 of that Directive;

— declare that by excluding demolition works from the scope of its legislation transposing that Directive,

Ireland has failed to fulfil its obligations under that Directive.

— order Ireland to pay the costs.

Pleas in law and main arguments

Failure to transpose article 3 of the directive

The Commission submits that Section 173 of the Planning and Development Regulations 2000, which requires planning authorities to have regard to the environmental impact statement (EIS) and information coming from consultees, relates to the duty under art. 8 of the directive to take into consideration information gathered pursuant to arts. 5, 6 and 7 of the directive. In the Commission's view Section 173 does not correspond to the wider duty under art. 3 of the directive to ensure that an environmental impact assessment (EIA) identifies, describes and assesses all the matters referred to in that provision.

As for Articles 94, 108 and 111 and Schedule 6 of the Planning and Development Regulations 2001, the Commission makes the following observations. Art. 94 read with Schedule 6.2(b) sets out the information that an EIS must contain. This is a reference to the information that the developer must provide pursuant to art. 5 of the directive; it is therefore to be distinguished from the EIA which is the overall assessment process. Arts. 108 and 111 require planning authorities to consider the adequacy of an EIS. The Commission considers that these provisions relate to Art. 5 of the directive but are not a substitute for a transposition of art. 3 of the directive. The information to be provided by a developer is only one part of an EIA and provisions concerning such information are not a substitute for the obligation set out in art. 3.

Failure to require proper coordination between authorities

Although the Commission has no objection in principle to multi-stage decision-making or to decision-making responsibility for the same project being divided between different decision-makers, it does have concerns relating to the precise manner in which duties on different decision-makers are framed. In the Commission's view Irish legislation contains no obligation on decision-makers to coordinate with each other effectively and is, therefore, contrary to articles 2, 3 and 4 of the directive.

Failure to apply the directive to demolition works

The Commission takes the view that, where the other conditions set out in the directive are fulfilled, an EIA must be carried out for demolition works. Ireland purported to exempt nearly all demolition works by the Planning and Development Regulations 2001 (Schedule 2, part I, Class 50). In the Commission's submission, this is plainly at variance with the directive.

([1]) OJ L 175, p. 40.

Appeal brought on 3 February 2009 by Barbara Becker against the judgment of the Court of First Instance (First Chamber) delivered on 2 December2008 in Case T-212/07 Harman International Industries, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-51/09 P)

(2009/C 82/36)

Language of the case: English

Parties

Appellant: Barbara Becker (represented by: P. Baronikians, A. Hofstetter, Rechtsanwälte)

Other parties to the proceedings: Harman International Industries, Inc., Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

The appellant claims that the Court should order:

— annulment of § 1 of the Court of First Instance's decision of 2 December 2008 (Case T-212/07), by which the decision of the First Board of Appeal of 7 March 2007 (Case R-502/2006-1) was annulled;

— annulment of § 3 of the Court of First Instance's decision of 2 December 2008;

— order that the defendant pays the appellant's costs incurred in the entire proceedings.

Pleas in law and main arguments

The appellant submits that the Court of First Instance erred in finding that there was similarity between the trademark 'Barbara Becker' applied for by the appellant and the defendant's mark 'BECKER', and therefore misapplied article 8(1)(b) CTMR in concluding that there was likelihood of confusion.

Appeal brought on 6 February 2009 by the Hellenic Republic against the judgment of the Court of First Instance (Fifth Chamber) delivered on 11 December 2008 in Case T-339/06 Hellenic Republic v Commission of the European Communities

(Case C-54/09 P)

(2009/C 82/37)

Language of the case: Greek

Parties

Appellant: Hellenic Republic (represented by: I. Khalkias and M. Tassopoulou)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— allow the appeal;

— set aside the judgment of the Court of First Instance;

— uphold the action in accordance with the form of order sought;

— order the Commission to pay all the appellant's costs.

Grounds of appeal and main arguments

The Hellenic Republic submits: (i) that the Court of First Instance misinterpreted Articles 16(1) and (2) and 17 of Regulation No 1227/2000 in finding that the time-limit laid down in Article 16(1) is binding, when it is in fact indicative — as is apparent from the interpretation of Article 16(2) and 17 of the regulation; (ii) that the Court of First Instance misinterpreted Article 10 of the Treaty and general principles of law because the Commission, in agreeing that it was aware of the corrected data 23 days prior to adoption of the contested decision but did not take them into account, and that it accepts data which are submitted belatedly by other Member States while refusing to do the same in Greece's case, infringes the principles of cooperation in good faith, sound administration and equal treatment; and (iii) that the judgment of the Court of First Instance under appeal contains contradictory reasoning given that the recognition of the binding nature of the time-limit conflicts with the recognition and admission that the Commission accepts information submitted after expiry of the time-limit too.

Appeal brought on 16 February 2009 by Georgios Karatzoglou against the judgment of the Court of First Instance (First Chamber) delivered on 2 December 2008 in Case T-471/04 Georgios Karatzoglou v European Agency for Reconstruction (EAR)

(Case C-68/09 P)

(2009/C 82/38)

Language of the case: English

Parties

Appellant: Georgios Karatzoglou (represented by: S. A. Pappas, dikigoros)

Other party to the proceedings: European Agency for Reconstruction (EAR)

Form of order sought

The appellant claims that the Court should:

— set aside the appealed decision;

— Cancel the contested decision of the appointing authority;

— Order the Defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The appellant submits that in holding that dismissals of temporary staff do not require reasoning the Court of First Instance disregarded recent case law of the Court of Justice, infringed international law and infringed art. 253 of the EC Treaty, which imposes a general obligation to give reasons.

The appellant also submits that the CFI was wrong in declaring that he had not presented evidence capable of establishing the existence of a misuse of powers. He also contests the finding of the CFI that there was no breach of the principle of sound administration.

Appeal brought on 14 February 2009 by Makhteshim-Agan Holding BV, Makhteshim-Agan Italia Srl, Magan Italia Srl against the order of the Court of First Instance (Sixth Chamber) delivered on 26 November 2008 in Case T-393/06 Makhteshim-Agan Holding BV and Others v Commission

(Case C-69/09 P)

(2009/C 82/39)

Language of the case: English

Parties

Appellants: Makhteshim-Agan Holding BV, Makhteshim-Agan Italia Srl, Magan Italia Srl (represented by: K. Van Maldegem, C. Mereu, advocaten)

Other party to the proceedings: Commission of the European Communities

Form of order sought

The appellants claim that the Court should, following an oral hearing:

— set aside the Order of the Court of First Instance in Case T-393/06 and declare the Appellants' application for annulment admissible; and

— annul the Contested Decision; or

— alternatively, refer the case back to the Court of First Instance to rule on the Appellants' application for annulment; and

— order the Commission to pay all the costs of these proceedings (including the costs before the Court of First Instance).

Pleas in law and main arguments

The Appellants submit that the CFI erred in law in rejecting their application for annulment of the decision of the European Commission, expressed in a letter dated 12 October 2006, not to include the active substance azinphos-methyl in Annex I to Council Directive 91/414/EEC [1] of 15 July 1991 concerning the placing of plant protection products on the market (the 'Contested Decision').

In particular, the Appellants contend that the Court of First Instance erred in law in rejecting their application on grounds of admissibility. It wrongly held that the Contested Decision was not a challengeable act pursuant to Article 230 of the EC Treaty.

[1] OJ L 230, p. 1.

COURT OF FIRST INSTANCE

Judgment of the Court of First Instance of 12 February 2009 — Sara Lee/DE NV v OHIM — Cooperativa italiana di ristorazione (PIAZZA del SOLE)

(Case T-265/06) ([1])

(Community trade mark — Opposition proceedings — Application for Community figurative mark PIAZZA del SOLE — Earlier national and international word marks PIAZZA and PIAZZA D'ORO — Relative ground for refusal — Lack of likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 40/94 — Lack of similarity of the signs)

(2009/C 82/40)

Language of the case: French

Parties

Applicant: Sara Lee/DE NV (Utrecht, Netherlands) (represented by: C. Hollier-Larousse, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: A. Folliard-Monguiral, acting as Agent)

Other party to the proceedings before the Board of Appeal of OHIM intervening before the Court of First Instance: Cooperativa italiana di ristorazione Soc. coop. rl (Reggio d'Emilia, Italy) (represented by: D. Caneva, lawyer)

Re:

Action brought against the decision of the Second Board of Appeal of OHIM of 5 July 2006 (Case R 235/2005-2) concerning opposition proceedings between Sara Lee/DE NV and Cooperativa italiana di ristorazione Soc. Coop. rl.

Operative part of the judgment

The Court:

1. *Dismisses the action;*

2. *Orders Sara Lee/DE NV to pay the costs.*

([1]) OJ C 294, 2.12.2006.

Judgment of the Court of First Instance of 20 February 2009 — Commission v Bertolete and Others

(Joined Cases T-359/07 P to T-361/07 P) ([1])

(Appeal — Public service — Contract staff of OIB — Former salaried employees under Belgian law — Change of applicable regime — Commission decisions fixing remuneration — Equal treatment)

(2009/C 82/41)

Language of the cases: French

Parties

Appellant: Commission of the European Communities (represented by: D. Martin and L. Lozano Palacios, acting as Agents)

Other parties to the proceedings: Marli Bertolete (Woluwé-Saint-Lambert, Belgium) and the eight other members of the contract staff of the Commission of the European Communities whose names are included in the annex to the judgment; Sabrina Abarca Montiel (Wauthier-Braine, Belgium) and the 19 other members of the contract staff of the Commission of the European Communities whose names are included in the annex to the judgment; Béatrice Ider (Halle, Belgium); Marie-Claire Desorbay (Meise, Belgium); and Lino Noschese (Braine-le-Château, Belgium) (represented by: L. Vogel, lawyer)

Re:

Three appeals brought against the judgments of the Civil Service Tribunal of the European Union (Second Chamber) of 5 July 2007 in Case F-26/06 *Bertolete and Others* v *Commission* (not yet published in the ECR); Case F-24/06 *Abarca Montiel and Others* v *Commission* (not yet published in the ECR); and Case F-25/06 *Ider and Others* v *Commission* (not yet published in the ECR), seeking to have those judgments set aside.

Operative part of the judgment

The Court:

1. *Sets aside the judgments of the Civil Service Tribunal (Second Chamber) of 5 July 2007 in Case F-26/06 Bertolete and Others v Commission (not yet published in the ECR), Case F-24/06 Abarca Montiel and Others v Commission (not yet published in the ECR) and Case F-25/06 Ider and Others v Commission (not yet published in the ECR);*

2. *Dismisses the actions brought by the applicants at first instance, namely Marli Bertolete and the eight other members of the contract staff of the Commission of the European Communities whose names are included in the annex, Sabrina Abarca Montiel and the 19 other members of the contract staff of the Commission of the European Communities whose names are included in the annex, Béatrice Ider, Marie-Claire Desorbay and Lino Noschese;*

3. *Orders the applicants at first instance and the Commission to bear their own costs.*

(1) OJ C 283, 24.11.2007.

Order of the Court of First Instance of 13 February 2009 — Vitro Corporativo v OHIM — Vallon (√)

(Case T-229/07) (1)

(Community trade mark — Opposition — Withdrawal of the opposition — No need to adjudicate)

(2009/C 82/42)

Language of the case: Spanish

Parties

Applicant: Vitro Corporativo, SA de C.V. (Nuevo Leon, Mexico) (represented by: J. Botella Reyna, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: P. López Fernández de Corres, acting as Agent)

Other party to the proceedings before the Board of Appeal of OHIM intervening before the Court of First Instance: Vallon GmbH (Horb, Germany)

Re:

Action brought against the decision of the First Board of Appeal of OHIM of 7 November 2006 (Case R 1363/2005-1) concerning opposition proceedings between Vitro Corporativo, SA de C.V. and Vallon GmbH.

Operative part of the order

1. *There is no longer any need to adjudicate in the action.*

2. *The applicant is ordered to pay the costs.*

(1) OJ C 199, 25.8.2007.

Order of the Court of First Instance of 10 February 2009 — Okalux v OHIM — Ondex (ONDACELL)

(Case T-126/08) (1)

(Community trade mark — Opposition proceedings — Failure to pay the opposition fee — Decision deeming the opposition non-existent — Action manifestly devoid of any legal basis)

(2009/C 82/43)

Language of the case: German

Parties

Applicant: Okalux GmbH (Marktheidenfeld, Germany) (represented by: M. Beckensträter, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM intervening before the Court of First Instance: Ondex SAS (Chevigny-Saint-Sauveur, France)

Re:

Action brought against the decision of the Fourth Board of Appeal of OHIM of 22 January 2008 (Case R 1384/2007-4) regarding opposition proceedings between Okalux GmbH and Ondex SAS.

Operative part of the order

1. *The action is dismissed.*

2. *Okalux GmbH is ordered to pay the costs.*

(1) OJ C 116, 9.5.2008.

Order of the President of the Court of First Instance of 23 January 2009 — Pannon Hőerőmű v Commission

(Case T-352/08 R)

(Interim measures — State aid — Commission decision declaring State aid granted by Hungary in favour of certain electricity producers by way of electricity purchasing agreements incompatible with the common market — Application for stay of execution — Lack of urgency — Balancing of interests)

(2009/C 82/44)

Language of the case: Hungarian

Parties

Applicant: Pannon Hőerőmű Energiatermelő, Kereskedelmi és Szolgáltató Zrt. (Pannon Hőerőmű Zrt.) (Pécs, Hungary) (represented by: M. Kohlrusz, P. Simon and G. Ormai, lawyers)

Defendant: Commission of the European Communities (represented by: C. Giolito and K. Talabér-Ritz, acting as Agents)

Re:

Application for stay of execution of Article 2 of Commission Decision C(2008) 2223 final of 4 June 2008 on State aid granted by the Republic of Hungary by way of electricity purchasing agreements.

Operative part of the order

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

2. *Costs are reserved.*

Order of the President of the Court of First Instance of 23 January 2009 — Unity OSG FZE v Council and EUPOL Afghanistan

(Case T-511/08 R) ([1])

(Application for interim measures — Public procurement — Rejection of a tender — Application for suspension of operation of a measure — Loss of opportunity — No urgency)

(2009/C 82/45)

Language of the case: English

Parties

Applicant: Unity OSG FZE (Sharjah, United Arab Emirates) (represented by: C. Bryant and J. McEwen, Solicitors)

Defendants: Council of the European Union (represented by: G. Marhic and A. Vitro, Agents) and European Union Police Mission in Afghanistan (EUPOL Afghanistan) (Kabul, Afghanistan)

Re:

Application for suspension of the operation of the decision, taken by EUPOL Afghanistan in the context of a call for tenders, to reject the applicant's tender and to award the contract for the provision of guarding and close protection services in Afghanistan to another tenderer.

Operative part of the order

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

2. *Costs are reserved.*

([1]) OJ C 32, 7.2.2009.

Action brought on 3 October 2008 — CISAC v Commission

(Case T-442/08)

(2009/C 82/46)

Language of the case: English

Parties

Applicant: International Confederation of Societies of Authors and Composers (CISAC) (Neuilly-sur-Seine, France) (represented by: J.-F. Bellis and K. Van Hove, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul Article 3 of the Commission decision of 16 July 2008 relating to a proceeding under Article 81 EC and Article 53 EEA (Case COM/C2/38.698 — CISAC); and

— order the Commission to pay the costs.

Pleas in law and main arguments

By means of this application, the applicant seeks the annulment, pursuant to Article 230 EC, of Article 3 of the Commission decision of 16 July 2008 (Case COM/C2/38.698 — CISAC), determining that 24 of CISAC's EEA based societies engaged in a concerted practice in violation of Article 81 EC and Article 53 EEA 'by coordinating the territorial delineations of the reciprocal representation mandates granted to one another in a way which limits a licence to the domestic territory of each collecting society'.

The applicant submits that the decision limits the finding of infringement to three specific forms of exploitation of performing rights (internet, satellite transmission and cable retransmission), whilst the reciprocal representation agreements generally cover all forms of exploitation of performing rights.

In support of its application, the applicant raises the following two main pleas in law:

(i) According to the applicant's submissions, the Commission made an error of assessment and infringed Article 81 EC as well as Article 253 EC by determining that the parallel territorial delineation resulting from the reciprocal representation agreements concluded by the EEA CISAC members constitutes a concerted practice. The applicant considers that the presence of a territorial delineation clause in all the reciprocal representation agreements concluded by its members is not the product of a concerted practice to restrict competition. Rather, this state of affairs exists because all the societies find it in the interest of their members to include such a clause in their reciprocal representation agreements.

(ii) In the alternative, the applicant claims that if there were a concerted practice on territorial delineations, it would not be restrictive of competition within the meaning of Article 81 EC for two reasons. First, the alleged concerted practice on territorial delineations is not illegal because it concerns a form of competition that is not worthy of protection. Second, even if the alleged practice would be considered to restrict competition, it does not infringe Article 81(1) EC according to the applicant's allegations because it is necessary and proportionate to the legitimate objective.

Action brought on 29 December 2008 — Evropaïki Dynamiki v Commission

(Case T-591/08)

(2009/C 82/47)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis and P. Katsimani, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul EUROSTAT's decision to select the bid of the applicant, filed in response to the open Call for Tenders for the 'Statistical Information Technologies', Lot 2 'SDMX development' and Lot 3 'SDMX support' as second contractor of the cascade mechanism (OJ 2008/S 120-159017) communicated to the applicant by two separate letters dated 17 October 2008 and all further related decisions of EUROSTAT including the one to award the contract to the successful contractor;

— order EUROSTAT to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of EUR 4 326 000;

— order EUROSTAT to pay the applicant's legal and other costs and expenses incurred in connection with this application, even if the current application is rejected.

Pleas in law and main arguments

By means of its application the applicant seeks the annulment pursuant to Article 230 EC of the decisions of EUROSTAT to select the bid of the applicant, filed in response to the open Call for Tenders for the 'Statistical Information Technologies', Lot 2 'SDMX development' and Lot 3 'SDMX support' as second contractor of the cascade mechanism (OJ 2008/S 120-159017) which were communicated to the applicant by two separate letters dated 17 October 2008, as well as the award of damages pursuant to Article 235 EC.

The applicant claims that EUROSTAT committed various manifest errors of assessment, whereas fundamental rules and principles of public procurement have been allegedly infringed by the contracting authority. It is submitted that the evaluation of the applicant's tender was deficient, that EUROSTAT failed to state reasons, denied to address the applicant's detailed administrative appeal and associated observations and that it did not present the results of its internal examination to the applicant.

The applicant further submits that the treatment of the candidates was discriminatory; that the exclusion criteria were not complied with by one of the members of the winning consortium and that Articles 93(1) and 94 of the Financial Regulation were infringed. Moreover, the applicant contends that should the Court find that the defendant infringed the Financial Regulation and/or the principles of transparency and of equal treatment, given the fact that the Court will rule on the application — in all likelihood — after the contract has been fully executed, the applicant requests monetary compensation EUR 4 326 000 from EUROSTAT, corresponding to its estimated gross profit from the public procurement procedure Lot 2 and Lot 3, should it have been awarded the contract.

Action brought on 6 January 2009 — Dredging International and Ondernemingen Jan de Nul v EMSA

(Case T-8/09)

(2009/C 82/48)

Language of the case: English

Parties

Applicant: Dredging International NV (Zwijndrecht, Belgium) and Ondernemingen Jan de Nul NV (Hofstade-Aalst, Belgium) (represented by: R. Martens, lawyer)

Defendant: European Maritime Safety Agency (EMSA)

Form of order sought

— annul EMSA's decision to reject the tender from the Joint Venture Oil Combat (JVOC) constituted by the applicants and to award the contract to the successful contractor;

— declare that the contract signed between EMSA and the successful contractor pursuant to procurement procedure EMSA/NEG/3/2008 is null and void;

— award damages as compensation for the loss that JVOC has incurred as a consequence of the contested decision, provisionally estimated at 725 500 EUR, to be increased by the moratory interest as from the date of the filing of this application;

— order that the Commission pay the costs of the proceedings, including the expenses for legal counsel incurred by JVOC.

Pleas in law and main arguments

In the present case the applicants seek the annulment of the defendant's decision to reject their bid submitted in response to a call for a tender EMSA/NEG/3/2008 (Lot 2: North Sea) regarding the service contracts for stand-by oil recovery vessel(s) ([1]) and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of their claims, the applicants put forward four pleas in law.

First, they argue that by refusing to provide the applicants with the information they requested regarding the reasons for rejection of the bid submitted by them and on the characteristics and relative advantages of the bid of the successful contractor the defendant infringed Article 135(2) of the Regulation ([2]), Article 253 EC and the essential procedural requirements of duty to state reasons and of respect for the rights of defence. The applicants further claim that the defendant failed to suspend the signature of the contract with the successful tenderer pending the exchange of relevant information with the applicants by which it violated Article 105(2) of the financial regulation ([3]) and Article 158a(1) of the Commission Regulation No 2342/2002 ([4]).

Second, the applicants submit that the defendant committed manifest errors of assessment while evaluating the bid submitted by the successful tenderer by which it infringed the principles of equal treatment and non-discrimination as stated in Article 89 of the financial regulation.

Third, the applicants contend that the defendant committed several manifest errors of assessment in its decision to reject the applicants' bid for the reason of non compliance with Article 12.2 of the tender specifications without further examining the applicants' arguments. In the applicants' opinion, the defendant infringed therefore the principles of proportionality, equal treatment and non-discrimination in violation of Article 89(1) of the financial regulation.

Fourth, the applicants claim that in the interpretation given by the defendant to Article 12.2 of tender specifications, the budget ceiling is manifestly unreasonable and does not allow that any confirming tenders are submitted.

([1]) OJ 2008/S 48-065631.

([2]) The regulation of the European Maritime Safety Agency adopted on 9 December 2003 laying down detailed rules for the implementation of the financial regulation of 9 December 2003 which applies to the budget of the European Maritime Safety Agency adopted by the Administrative Board on 3 July 2003.

([3]) 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 L 248, p. 1).

([4]) 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 L 357, p. 1).

Action brought on 9 January 2009 — Evropaïki Dynamiki v Commission

(Case T-17/09)

(2009/C 82/49)

Language of the case: English

Parties

Applicant: Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (Athens, Greece) (represented by: N. Korogiannakis, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— annul Commission's decision to reject the bid of the applicant, filed in response to the open Call for Tender VT/2008/019 — EMPL EESSI for the 'Informatics services and products in the contest of the EESSI (Electronic Exchange of Social Security Information) project' ([1]) communicated to the applicant by letter dated 30 October 2008 and all further related decisions including the one to award the contract to the successful contractor;

— order the Commission to pay the applicant's damages suffered on account of the tendering procedure in question for an amount of 883 703,5 EUR;

— order the Commission to pay the applicant's legal costs and expenses incurred in connection with this application, even if current application is rejected.

Pleas in law and main arguments

In the present case the applicant seeks the annulment of the defendant's decision to reject its bid submitted in response to a call for an open tender VT/2008/019 — EMPL CAD A/17543 for the informatics services and products in the context of the EESSI (Electronic Exchange of Social Security Information) project and to award the contract to the successful contractor. The applicant further requests compensation for the alleged damages in account of the tender procedure.

In support of its claims the applicant puts forward four pleas in law.

First, it argues that the winning tenderer enjoyed a privileged treatment from the Commission in the context of numerous other contracts and that it was favoured in the case of the present call for tenders. Further the applicant claims that it was systematically discriminated by the defendant in the same context.

Second, the applicant submits that the Commission failed to observe the rules concerning the exclusion criteria of the tender specifications and therefore infringed Articles 93 and 94 of the financial regulation ([2]) and Articles 133a and 134 of its implementing rules as well as Article 45 of Directive 2004/18/EC ([3]).

Third, the applicant claims that the defendant committed several manifest errors of assessment in evaluation of the applicant's tender by the Evaluation Committee.

Fourth, the applicant contends that the defendant based its evaluation of the applicant's tender on general and arbitrary considerations, failed to motivate its decision and in this context committed several manifest errors of assessment.

([1]) OJ 2008/S 111-148231.

([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 L 248, p. 1).

([3]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114).

Action brought on 19 January 2009 — Stella Kunststofftechnik v OHIM

(Case T-27/09)

(2009/C 82/50)

Language in which the application was lodged: German

Parties

Applicant: Stella Kunststofftechnik GmbH (Eltville, Germany) (represented by: M. Beckensträter, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Stella Pack Sp. z o. o. (Lubartow, Republic of Poland)

Form of order sought

— annul the decision of the Fourth Board of Appeal of 13 November 2008, notified on 19 November 2008, and hold that the application of 22 December 2006 for a declaration of revocation ought to have been dismissed as being inadmissible;

— in the alternative, suspend the decision on the application for a declaration of revocation of 22 December 2006 until the opposition proceedings in opposition B 863177 have been concluded in law, and at the same time annul the decision of 13 November 2008 and that of the Cancellation Division of 27 February 2008;

— order the intervener to pay the recoverable costs, including those of the initial proceedings and of the defendant.

Pleas in law and main arguments

Registered Community trade mark in respect of which a declaration of revocation has been sought: the word mark 'Stella' for goods in Classes 6, 8, 16, 20 and 21 (Community trade mark No 15 479)

Proprietor of the Community trade mark: the applicant

Applicant for the declaration of revocation: Stella Pack Sp. z o. o

Decision of the Cancellation Division: declaration of revocation of the Community trade mark concerned for certain goods in Classes 6, 8, 16 and 20

Decision of the Board of Appeal: dismissal of the applicant's appeal

Pleas in law: Failure to have regard for the conditions governing admissibility in Regulation (EC) No 40/94 [1] and Regulation (EC) No 2868/95 [2] which must automatically be complied with in proceedings for a declaration of revocation.

[1] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
[2] Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

Action brought on 21 January 2009 — Park v OHIM — Bae (PINE TREE)

(Case T-28/09)

(2009/C 82/51)

Language in which the application was lodged: German

Parties

Applicant: Mo-Hwa Park (Hillscheid, Germany) (represented by: P. Lee, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Chong-Yun Bae (Berlin, Germany)

Form of order sought

— annul the contested decision of the Fourth Board of Appeal of OHIM of 13 November 2008 in Case R 1882/2007-4; and

— order the intervener to pay the costs of the proceedings, including those incurred during the appeal proceedings.

Pleas in law and main arguments

Registered Community trade mark in respect of which revocation has been sought: the figurative mark 'PINE TREE' for goods in Class 28 (Community trade mark No 318 857)

Proprietor of the Community trade mark: Chong-Yun Bae

Applicant for the declaration of revocation: the applicant

Decision of the Cancellation Division: declaration of revocation of the Community trade mark concerned

Decision of the Board of Appeal: annulment of the contested decision and rejection of the application for a declaration of revocation of the trade mark concerned

Pleas in law: inadmissibility of the appeal and absence of use of the Community trade mark concerned capable of maintaining in force the right to use it, in accordance with Article 15 and the first sentence of Article 50(1) of Regulation (EC) No 40/94 [1].

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

Action brought on 21 January 2009 — Engelhorn v OHIM — The Outdoor Group (peerstorm)

(Case T-30/09)

(2009/C 82/52)

Language in which the application was lodged: German

Parties

Applicant: Engelhorn KGaA (Mannheim, Germany) (represented by: W. Göpfert, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: The Outdoor Group Limited (Northampton, United Kingdom)

Form of order sought

— annul Decision R-167/2008-5 of the Fifth Board of Appeal of OHIM of 28 October 2008; and

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

Pleas in law and main arguments

Applicant for a Community trade mark: the applicant.

Community trade mark concerned: the word mark 'peerstorm' for goods and services in Class 25 (Community trade mark application No 4 115 382)

Proprietor of the mark or sign cited in the opposition proceedings: The Outdoor Group Limited

Mark or sign cited in opposition: the word mark 'PETER STORM' for goods in Class 25 (Community trade mark No 833 566) and the British trade mark 'PETER STORM' for goods in Class 18

Decision of the Opposition Division: opposition rejected

Decision of the Board of Appeal: annulment of the decision of the Opposition Division and rejection of the application for a Community trade mark

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 40/94 ([1]) as there is no likelihood of confusion between the opposing trade marks, and infringement of Rule 22 of Regulation (EC) No 2868/95 ([2]) inasmuch as use preserving the right to use the trade mark cited in opposition has not been sufficiently proven.

([1]) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
([2]) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

Action brought on 26 January 2009 — Portuguese Republic v Commission of the European Communities

(Case T-33/09)

(2009/C 82/53)

Language of the case: Portuguese

Parties

Applicant: Portuguese Republic (represented by: L. Inez Fernandes and J. A. de Oliveira, Agents)

Defendant: Commission of the European Communities

Forms of order sought

— as the main plea, annul Decision C(2008) 7419 of 25 November 2008, by which the Commission required the Portuguese Republic to make the penalty payment imposed on it by the judgment of the Court of Justice in Case C-70/06 with effect from 10 January 2008;

— in the alternative, annul the decision referred to in so far as its effects extend beyond 29 January 2008;

— order the Commission of the European Communities to pay all the costs or, if the amount of the penalty payment is merely reduced by the Court of Justice, order each party to bear its own costs.

Pleas in law and main arguments

The applicant seeks annulment of the decision at issue, pursuant to Article 230 EC, on the ground that the Commission has infringed the EC Treaty or the legal rules relating to its application.

The Commission infringed the EC Treaty or the legal rules relating to its application by requiring the applicant to make the daily penalty payment imposed on it by the Court of Justice in Case C-70/06 in respect of the period between 10 January and 17 July 2008, when the applicant had already fully complied with its obligation to transpose Directive 89/665/EEC ([1]).

When the Court of Justice delivered its judgment in Case C-70/06 on 10 January 2008, ordering the applicant to make a penalty payment for every day of delay in implementing the measures necessary to comply with its judgment in Case C-275/03 *Commission* v *Portugal* [2004] ECR I-0000 — requiring the repeal of Decree-Law No 48051 of 21 November 1967 which makes the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud — the Portuguese Republic had already approved Law No 67/2007. That law repeals the decree-law referred to and approves the new system for the non-contractual liability of the State and other public bodies, and had been published by the Portuguese Republic on 31 December 2007 in the *Diário da República* (The Portuguese Official Journal), First Series, No 251. That law entered into force 30 days after its publication, that is to say on 30 January 2008.

On 4 January 2008, the applicant notified that fact to the Court of Justice and requested that a copy of Law No 67/2007 be added to the file in Case C-70/06. However, due to the advanced stage of the proceedings, the Court of Justice could no longer take the fact in question into account, and delivered its judgment on 10 January 2008.

Accordingly, the applicant submits that the penalty payment claimed may only relate to the period until 9 January 2008 or, in the worst case until 29 January 2008, as the date on which Law No 67/2007 entered into force does not coincide with the date of its publication. The Commission's claim is therefore completely unfounded in so far as it relates to subsequent periods.

([1]) Council Directive 89/665/EEC 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 (OJ 1989 L 395, p. 33).

Action brought on 23 January 2009 — dm-drogerie markt v OHIM — Distribuciones Mylar (dm)

(Case T-36/09)

(2009/C 82/54)

Language in which the application was lodged: English

Parties

Applicant: dm-drogerie markt GmbH + Co. KG (Karlsruhe, Germany) (represented by: O. Bludovsky and C. Mellein, lawyers)

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

Other party to the proceedings before the Board of Appeal: Distribuciones Mylar, SA (Gelves, Spain)

Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 October 2008 in case R 228/2008-1 and, by way of correction, reject the opposition entirely;

— Alternatively, annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 October 2008 in case R 228/2008-1 and remit the case to OHIM;

— Alternatively, annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 October 2008 in case R 228/2008-1; and

— Order the other party to the proceedings before the Board of Appeal to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: The word mark 'dm', for goods in classes 1, 3-6, 8-11, 14, 16, 18, 20-22, 24-32, 34 and for services in class 40

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited: Spanish trade mark registration No 2 561 742 of the figurative mark 'DM' for goods and services in classes 9 and 39

Decision of the Opposition Division: Partially allowed the opposition

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Articles 57 and 59 of Council Regulation 40/94 as the Board of Appeal erred in its finding that the letter of the defendant of 8 June 2007 did not suspend the appeal period; Infringement of Article 8(1)(b) of Council Regulation 40/94 as the Board of Appeal wrongly assessed that there was a likelihood of confusion between the trade marks concerned due to the similarity of the goods covered; Infringement of Rules 17(2) and (4) of Commission Regulation No 2868/95 ([1]), as the Board of Appeal failed to find that the other party to the proceedings before the Board of Appeal failed to state the essential details of the opposition.

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

Action brought on 26 January 2009 — Advance Magazine Publishers v OHIM — Selecciones Americanas (VOGUE CAFÉ)

(Case T-40/09)

(2009/C 82/55)

Language in which the application was lodged: English

Parties

Applicant: Advance Magazine Publishers, Inc. (New York, United States) (represented by: T. Alkin, Barrister)

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

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

Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 19 November 2008 in case R 280/2008-4 insofar as it relates to the opposition based on Spanish trade marks registration No 255 186 and 2 529 728;

— Alter the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 19 November 2008 in case R 280/2008-4 such that consideration of the opposition is suspended pending the outcome of the opposition for Community trade mark application No 3 064 219; and

— Order the other party to the proceedings before the Board of Appeal to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: The word mark 'VOGUE CAFÉ', for goods and services in classes 21, 25 and 43

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited: Spanish trade mark registration No 255 186 of the figurative mark 'Vogue Juan Fort, S.A. — Badalona' for goods in class 25; Spanish trade mark registration No 2 529 728 of the figurative mark 'VOGUE studio' for goods in class 25; Community trade mark application No 3 064 219 of the figurative mark 'VOGUE' for goods and services in classes 25, 35 and 39.

Decision of the Opposition Division: Allowed the opposition for the goods applied for in class 25

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Article 43(2) of Council Regulation 40/94 and/or of Rule 22(3) of Commission Regulation No 2868/95 ([1]) as the Board of Appeal erred in its finding the evidence submitted by the other party to the proceedings before the Board of Appeal was capable of proving use of Spanish trade mark registration No 255 186; Infringement of Article 8(1)(b) of Council Regulation 40/94 as the Board of Appeal wrongly assessed that there was a likelihood of confusion between the Community trade mark concerned and Spanish trade mark registration No 2 529 728; Infringement of Rules 20(7) of Commission Regulation No 2868/95 as the Board of Appeal stated inapplicable grounds for refusing to grant a suspension of proceedings pending determination of the opposition to Community trade mark application No 3 064 219.

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

Action brought on 27 January 2009 — Hipp & Co v OHIM — Nestlé (Bebio)

(Case T-41/09)

(2009/C 82/56)

Language in which the application was lodged: English

Parties

Applicant: Hipp & Co (Sachseln, Switzerland) (represented by: A. Bognár and M. Kinkeldey, lawyers)

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

Other party to the proceedings before the Board of Appeal: Sociéte des Produits Nestlé, S.A. (Vevey, Switzerland)

Form of order sought

— Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 November 2008 in case R 1790/2007-2; and

— Order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: The word mark 'Bebio', for goods in classes 5, 29, 30 and 32

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited: International trade mark registration No 187 436 of the word mark 'BEBA' for goods in classes 5, 29 and 30; Community trade mark registration No 3 043 387 of the word mark 'BEBA' for goods in classes 5, 29 and 30

Decision of the Opposition Division: Partially upheld the opposition

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation 40/94 as the Board of Appeal wrongly assessed that there was a likelihood of confusion between the trade marks concerned

Action brought on 9 February 2009 — Commission v Antiche Terre

(Case T-51/09)

(2009/C 82/57)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: A. Dal Ferro, lawyer, V. Joris, Agent)

Defendant: Antiche Terre scarl Società Agricola Cooperativa (Arezzo, Italy)

Forms of order sought

— Order the defendant to repay the principal sum of EUR 479 332,40, together with the interest accrued at the rate set out in Article 5.4.3 of the general conditions of the Contract (ECB rate + 2 %) from the date of receipt of the sums (from 4 December 1997 for the sum of EUR 461 979,00, and from 18 December 1997 for the sum of EUR 17 353,40) until 1 April 2003, in addition to the interest accrued at the same rate from 4 January 2004 until the date of final settlement, less the sum of EUR 461 979 called on and paid on 25 January 2005;

— In the alternative, order the defendant to repay the principal sum of EUR 479 332,40, together with the interest accrued at the Italian statutory rate from 4 January 2004 until the date of final settlement, less the sum of EUR 461 979 called on and paid on 25 January 2005;

— In any event, order Antiche Terre Società Agricola Cooperativa to pay the costs.

Pleas in law and main arguments

By the present action, brought under Article 238 EC, the Commission seeks the repayment of the sums advanced to the limited liability cooperative Antiche Terre scarl Società Agricola Cooperativa ('Antiche Terre'), in the context of the THERMIE programme, for the creation of an installation producing electricity (10 MWe) through an innovative biomass combustion process. The reference contract (No BM/188/96) was drawn up between the Commission, Antiche Terre (as coordinator) and two other companies having their seats in Finland and Spain respectively.

Antiche Terre built up a number of significant delays in commencing its own task, and it requested several extensions so as to be able to complete its work, which it obtained. It also proposed a substantial change to the installation, which would have meant abandoning the innovative biomass combustion process and producing energy in substantially smaller quantities than had been estimated.

The Commission was unable to authorise such a fundamental change to the project, which would have had no chance of funding under the THERMIE programme.

Consequently, since it was found that Antiche Terre would not have completed the installation in accordance with the terms of the project originally submitted, the Commission was forced to withdraw from contract BM/188/96, making it clear moreover that the failure to complete the original project could have entailed the repayment in whole or in part of the advance paid to Antiche Terre.

The Commission therefore asked Antiche Terre on a number of occasions to repay the sums advanced, in the amount of EUR 479 332,40, but it did not receive any payment. After calling on the guarantee, and after further requests for repayment of the balance, the Commission therefore brings the present action before the Court of First Instance.

Action brought on 11 February 2009 — Nycomed Danmark v EMEA

(Case T-52/09)

(2009/C 82/58)

Language of the case: English

Parties

Applicant: Nycomed Danmark ApS (Roskilde, Denmark) (represented by: C. Schoonderbeek, H. Speyart van Woerden, lawyers)

Defendant: European Medicines Agency

Form of order sought

— annul the contested decision;

— order the EMEA to pay its own costs and those of Nycomed.

Pleas in law and main arguments

By means of the present application, the applicant seeks the annulment, pursuant to Article 230 EC and to Article 73a of Regulation (EC) No 726/2004 ([1]), as amended by Regulation (EC) No 1901/2006 ([2]) of the European Parliament and of the Council, of the decision 'EMEA-000194-IPI01-07' of 28 November 2008 of the European Medicines Agency ('EMEA') rejecting its application for a product specific waiver provided for in Article 11(1)(b) of the aforementioned regulation.

The applicant applied for such a waiver in respect of an ultrasound echocardiographic imaging agent to be marketed under the brand name Imagify, intended to diagnose coronary artery disease ('CAD') in adults. Through its contested decision, the EMEA denied that waiver to the applicants on the grounds that the disease or condition for which the medicinal product is intended is not CAD but myocardial perfusion defects, which also occur in children.

The applicant claims that the contested decision is unlawful in that it is based on an interpretation and application of the concept of 'disease or condition for which the medicinal product is intended' within the meaning of Article 11(1)(b) of Regulation (EC) No 1901/2006 which according to the applicant is incorrect in that it does not take into account the therapeutic indication applied for in the concomitant Community market authorisation application and that myocardial perfusion defects are not a disease or condition, but a sign of various diseases.

The applicant further submits that the contested decision is unlawful in that it is an attempt by the EMEA to misuse its powers pursuant to Articles 11(1)(b) and 25 of Regulation (EC) No 1901/2006 in order to attain the aim which is not contemplated by those provisions, namely, the obligation to propose a paediatric investigation plan for indications which are not covered by the concomitant Community market authorisation application.

(1) Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

(2) Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004 (OJ 2006 L 378, p. 1).

Action brought on 11 February 2009 — Schemaventotto v Commission

(Case T-58/09)

(2009/C 82/59)

Language of the case: Italian

Parties

Applicant: Schemaventotto SpA (Milan, Italy) (represented by: M. Siragusa, G. Scassellati Sforzolini, G.C. Rizza, M. Piergiovanni, lawyers)

Defendant: Commission of the European Communities

Forms of order sought

— Annul the decision(s) contained in the letter of 13 August 2008, File No C(2008) 4494, from Commissioner Kroes, for and on behalf of the European Commission, to the Italian authorities, and relating to a proceeding under Article 21 of [Regulation No 139/2004] on the control of concentrations between undertakings (Case COMP/M.4388 — *Abertis* v *Autostrade*); and

— Order the Commission to pay the costs incurred by the applicant in the present proceedings.

Pleas in law and main arguments

The present action contests the decision contained in Commissioner Kroes' letter of 13 August 2008, by which — according to the applicant — the Commission notified the Italian authorities of its intention not to pursue Case COMP/M.4388 *Abertis* v *Autostrade* under Article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Regulation'). Indeed, the Commission approves the regulatory measures relating to the authorisation procedures for the 'transfer' of motorway concessions (Ministerial Directive of 2007 and Decree of 2008). However, in the above-mentioned letter, the Commission reserves its position as to whether the Italian regulatory framework relating to the authorisation procedure for the transfer of motorway concessions is compatible with the rules governing the internal market.

In support of its claims, the applicant alleges infringement of Article 21 of the regulation on concentrations, on the following grounds:

— The Commission may in no circumstances refer to amendments made to the relevant regulatory framework after 31 January 2007, the date of the preliminary assessment. Since the Commission's powers of assessment under Article 21(4) of the Regulation are closely linked to the context of the assessment of a specific concentration with a Community dimension, with which the national measures at issue are concerned, subsequent amendments to the regulations could not have any effects on the earlier conduct of the Italian authorities, which led the parties to abandon the transaction in December 2006, three months after it was authorised under Article 6(1)(b) of the Regulation.

— The applicant alleges that the Commission acted *ultra vires* or misused its powers, in so far as the legal basis chosen for the contents of the specific Decision 'not to pursue' the Italian measures at issue is inadequate. It is submitted in that connection that, by deciding that the amendments which had meanwhile been made to the regulatory framework would ensure that there would be no grounds in future for the misgivings expressed in its preliminary assessment of 31 January 2007, the Commission has adopted under Article 21 of the Regulation a type of decision which that provision does not envisage. In fact, the Commission has used the powers conferred upon it under Article 21 to declare compatible with Community law certain measures of general application adopted by a Member State, which have nothing to do with the specific concentration which Italy's adoption of the national measures at issue was intended to block.

— By considering that the Italian regulatory framework, as amended, has been made compatible with Community law, the Commission has failed to take into account the fresh uncertainties which have arisen in the Italian legal system as a result of those national measures, which have certainly not helped to establish a favourable environment for any future concentrations concerning the Italian market in motorway concessions. In addition, the regulations adopted by the Italian Administration in 2007 and 2008 must in any event also be said to be contrary to Article 21 [of the Regulation] in so far as they impose more extensive obligations for a 'transfer' of a motorway concession than those to which the interested parties would otherwise be subject.

Order of the Court of First Instance of 6 February 2009 — Air One v Commission

(Case T-344/02) ([1])

(2009/C 82/60)

Language of the case: Italian

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

([1]) OJ C 31, 8.2.2003.

Order of the Court of First Instance of 29 January 2009 — EMSA v Portugal

(Case T-4/08) ([1])

(2009/C 82/61)

Language of the case: Portuguese

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

([1]) OJ C 183, 19.7.2008.

EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Judgment of the Court of First Instance (First Chamber) of 17 February 2009 — Liotti v Commission

(Case F-38/08) ([1])

(Staff case — Officials — Appraisal — Career development report — 2006 appraisal procedure — Appraisal rules applied by the reporting officers)

(2009/C 82/62)

Language of the case: French

Parties

Applicant: Amerigo Liotti (Senningerberg, Luxembourg) (represented by: F. Frabetti, lawyer)

Defendant: Commission of the European Communities (represented by: B. Eggers and K. Herrmann, Agents)

Re:

Annulment of the applicant's career development report in respect of 2006.

Operative part of the judgment

The Court:

1. *Annuls Mr Liotti's career development report in respect of the period from 1 January to 31 December 2006;*
2. *Orders the Commission of the European Communities to pay the costs.*

([1]) OJ C 158, 21.6.2008, p. 26.

Judgment of the Civil Service Tribunal (First Chamber) of 17 February 2009 — Stols v Council

(Case F-51/08) ([1])

(Staff case — Officials — Promotion — 2007 promotion procedure — Consideration of comparative merits — Manifest error of assessment)

(2009/C 82/63)

Language of the case: French

Parties

Applicant: Willem Stols (Halsteren, Netherlands) (represented by: S. Rodrigues and C. Bernard-Glanz, lawyers)

Defendant: Council of the European Union (represented by: Mr Bauer and Ms Balta, Agents)

Re:

The annulment of the Appointing Authority's decision not to include the applicant on the list of those promoted to grade AST 11 under the 2007 promotion procedure.

Operative part of the judgment

The Tribunal:

1. *Annuls the decisions of 16 July 2007 and of 5 February 2008 by which the Council of the European Union refused to promote Mr Stols to grade AST 11 under the 2007 promotion procedure;*
2. *Orders the Council of the European Union to pay the costs.*

([1]) OJ C 183, 19.7.2008, p. 34.

Order of the Civil Service Tribunal (First Chamber) of 3 February 2009 — Cavalhal Garcia v Council

(Case F-40/08) ([1])

(Staff case — Former officials — Remuneration — Education allowance — Refusal to grant — Action out of time — Manifest inadmissibility)

(2009/C 82/64)

Language of the case: Portuguese

Parties

Applicant: Daniela Paula Cavalhal Garcia (Sines, Portugal) (represented by: Antas da Cunha, lawyer)

Defendant: Council of the European Union (represented by: M. Bauer and J. Monteiro, Agents)

Re:

Annulment of the Council's decision removing the right to the education allowance as regards the applicant's daughter.

Operative part of the order

1. *The action is dismissed as manifestly inadmissible.*
2. *Ms Carvalhal Garcia is to pay all the costs.*

([1]) OJ C 183, 19.7.2008, p. 33.

Action brought on 6 February 2009 — Vicente Carbajosa and Others v Commission

(Case F-9/09)

(2009/C 82/65)

Language of the case: French

Parties

Applicant: Isabel Vicente Carbajosa (Brussels, Belgium) (represented by: S. Orlandi, A. Coolen, J.-N. Louis, E. Marchal, lawyers)

Defendant: Commission of the European Communities

Subject-matter and description of the proceedings

Application for annulment of the decision adopting and publishing the competition notices EPSO/AD/116/08 and EPSO/AD/117/08 and the decisions relating to the correction of the pre-selection tests and the written tests and the awarding of marks for the oral tests.

Form of order sought

The applicant claims that the Tribunal should:

— Annul the Commission's decisions publishing and fixing the conditions for admission to and the conduct of the tests in competitions EPSO/AD/116/08 and EPSO/AD/117/08;

— Annul the decisions of the selection boards for competitions EPSO/AD/116/08 and EPSO/AD/117/08 relating to the correction of the pre-selection tests and the written tests and the awarding of marks for the oral tests;

— Order the Commission of the European Communities to pay the costs.

Action brought on 3 February 2009 — Moschonaki v European Foundation for the Improvement of Living and Working Conditions

(Case F-10/09)

(2009/C 82/66)

Language of the case: French

Parties

Applicant: Chrysanthe Moschonaki (Brussels, Belgium) (represented by: N. Lhoëst, lawyer)

Defendant: European Foundation for the Improvement of Living and Working Conditions (Eurofound)

Subject-matter and description of the proceedings

First, application for annulment of the decision rejecting the applicant's complaint of psychological harassment against the head of Human Resources and, secondly, application for an order that the defendant must pay the applicant compensation for the harm suffered.

Form of order sought

The applicant claims that the Tribunal should:

— Annul the decision of the Director of the Foundation of 29 February 2008 rejecting the applicant's complaint of harassment against the head of Human Resources;

— So far as necessary, annul the express decision of the Foundation of 24 October 2008 rejecting the complaint brought by the applicant under Article 90(2) on 27 June 2008;

— order the Foundation to pay the applicant compensation assessed provisionally at EUR 100 000;

— order the defendant to pay the costs.