

A — Proceedings of the Court of First Instance in 2005

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For the Court of First Instance, 2005 was a year marked by several significant developments in terms of the volume and nature of the disputes brought before it.

The statistics for 2005, first of all, show a clear rise in the number of cases disposed of. In 2005 the Court completed 610 cases, which represents an increase of 69 % compared with the previous year. This substantial increase must be viewed in context, as 117 of the cases completed by the Court during 2005 were brought to a close as a result of their transfer to the Civil Service Tribunal. Nevertheless, even if such transfers are left out of account, the number of cases disposed of has still increased significantly (37 %) compared with 2004. It is worthy of note that, as in previous years, the vast majority (83 %) of the cases decided in 2005 were decided by a Chamber of three judges. Of those cases, 10 % were decided by a Chamber of five judges and 1 % by the Court sitting as a single judge. In 2005 the Court delivered its first judgments by a Grand Chamber (composed of 11 judges) in six cases concerning actions for damages against the Community (section III).

Alongside this very marked increase in the number of cases decided, which is to a very great extent attributable to the arrival of 10 new judges in 2004, there was a drop in the number of cases lodged in 2005. There were 469 cases lodged, compared with 536 in 2004, which represents a decrease of 12 %. However, that decrease must be viewed in context as, in 2004, 21 cases were referred by the Court of Justice as a result of the transfer of jurisdiction which allows the Court of First Instance to rule in direct actions brought by the Member States. In fact the number of cases lodged this year is comparable with the number lodged in 2003 (466 cases). Moreover, the volume of litigation on the Community trade mark has stabilised, with 98 cases brought in 2005 (compared with 110 in 2004), which nonetheless represents, like last year, approximately 20 % of the number of cases brought. On the other hand, the number of staff cases continued to rise in absolute terms (151 cases compared with 146 in 2004) and in relative terms (32 % compared with 27 % the previous year).

In short, at the end of 2005, there are 1 033 cases pending, which represents a decrease of 141 cases, or 12 %, compared with the previous year. Following the transfer of 117 cases to the Civil Service Tribunal of the European Union, 152 staff cases are pending before the Court of First Instance, which corresponds to just over a year of the Court's work in this area.

Although the statistics concerning judicial activity for 2005 thus appear to reveal a very encouraging turnover of cases, the average duration of proceedings nonetheless increased fairly significantly in 2005, in that, apart from in staff cases and intellectual property cases, it is now 25.6 months (compared with 22.6 months in 2004).

It must also be borne in mind, when the statistics for this year are analysed, that the creation of the Civil Service Tribunal will, from next year onwards, greatly affect the volume and nature of the litigation before the Court of First Instance, thus allowing it to concentrate more specifically on certain areas of commercial litigation. The Civil Service Tribunal

of the European Union constitutes the first judicial panel to hear and determine at first instance certain classes of action or proceeding brought in specific areas, as permitted by Article 225a EC since the entry into force of the Treaty of Nice. The seven new judges of the Tribunal, attached to the Court of First Instance, took their oath on 5 October 2005. On 2 December 2005 the President of the Court of Justice recorded that the European Union Civil Service Tribunal had been constituted in accordance with law. That decision was published on 12 December 2005 in the *Official Journal of the European Communities* ⁽¹⁾. As a result, on 15 December 2005, in accordance with Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal ⁽²⁾, 117 cases, originally brought before the Court of First Instance, in which the written procedure was not completed by that date, were transferred, by order, to the Civil Service Tribunal.

The establishment of the Civil Service Tribunal also led the Court of First Instance to amend its Rules of Procedure to insert provisions relating to appeals against decisions of the new tribunal ⁽³⁾. This amendment of the Rules of Procedure has, moreover, made it possible both to adapt the provisions relating to legal aid in the light of the provisions of Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes ⁽⁴⁾, and to clarify the scope or adapt the other provisions of the rules, in particular by increasing the flexibility of the expedited procedure provided for by Article 76a of the rules. As regards that provision, in 2005, 12 applications for an expedited procedure were made, which was granted in six cases. Apart from cases removed from the register, the Court of First Instance also disposed of three cases using that procedure in 2005 ⁽⁵⁾. The expedited procedure has once again demonstrated its effectiveness as each of those cases was decided within seven months ⁽⁶⁾.

In addition to the major change represented by the attachment to the Court of First Instance of the first of the judicial panels provided for by the Treaty of Nice, on 6 October 2005 the Court of First Instance turned another important page in its history. Hans Jung left his post as Registrar of the Court of First Instance, which he had held since the establishment of that court in 1989. The formal sitting held in honour of his departure provided an opportunity to pay tribute to his invaluable contribution to the establishment and subsequently the development of the Court of First Instance. It also afforded an opportunity for his successor, Emmanuel Coulon, to take the oath.

Developments in case-law are set out in the following account, covering, in turn, those relating to certain general procedural matters (I), proceedings concerning the legality of measures (II), actions for damages (III) and applications for interim relief (IV).

⁽¹⁾ OJ L 325, 12.12.2005, p. 1.

⁽²⁾ OJ L 333, 9.11.2004, p. 7.

⁽³⁾ Amendment of the Rules of Procedure of the Court of First Instance, adopted on 12 October 2005 (OJ L 298, 15.11.2005, p. 1).

⁽⁴⁾ OJ L 26, 31.1.2003, p. 41.

⁽⁵⁾ Order of 10 January 2005 in Case T-209/04 *Spain v Commission*; judgments of 21 September 2005 in Case T-87/05 *EDP v Commission* and of 23 November 2005 in Case T-178/05 *United Kingdom v Commission*, not yet published in the ECR.

⁽⁶⁾ *Ibid.*

I. **Procedural aspects**

a) *Intervention*

The fourth paragraph of Article 40 of the Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, Article 116(3) of the Rules of Procedure of the Court of First Instance provides that the intervener must accept the case as he finds it at the time of his intervention. Those two provisions, interpretation of which is of some complexity, have given rise to a wealth of case-law ⁽⁷⁾, which has been supplemented by two judgments delivered this year.

For instance, in *VKI v Commission*, the interveners raised arguments which had not been put forward by the Commission, the party they were supporting, and which, if they had been well-founded, would have entailed the annulment of the contested decision, that is to say, the opposite result to that which the Commission sought ⁽⁸⁾. The Court concluded that those arguments altered the framework of the dispute and were, therefore, inadmissible.

Then, in *Regione autonoma della Sardegna v Commission*, certain parties intervening in support of the applicant raised pleas not put forward by the applicant ⁽⁹⁾. The Commission disputed the admissibility of those pleas, arguing that, generally, intervening parties were not entitled to raise pleas different from those relied on by the party in whose support they intervene. However, in its judgment, the Court held that interveners had the right to set out their own pleas 'in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute.' In this case, certain of the interveners' pleas, while different from those relied on by the applicant, were connected to the subject-matter of the dispute and could, therefore, be relied on before the Court.

b) *Raising of an absolute bar to proceedings by the Court of its own motion*

In 2005, the Court applied the principles relating to the raising of an absolute bar to proceedings by the Court of its own motion in a fairly traditional manner.

For instance, in *Freistaat Thüringen v Commission*, an error of fact made by the Commission led the Court to raise of its own motion an absolute bar to proceeding arising from a fail-

⁽⁷⁾ See, for example, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1 and Case T-119/02 *Royal Philips Electronics v Commission* [2003] ECR II-1433, paragraphs 203 and 212.

⁽⁸⁾ Judgment of 13 April 2005 in Case T-2/03 *Verein für Konsumenteninformation v Commission*, not yet published in the ECR.

⁽⁹⁾ Judgment of 15 June 2005 in Case T-171/02 *Regione autonoma della Sardegna v Commission*, not yet published in the ECR.

ure to state reasons ⁽¹⁰⁾. Similarly, in *Suproco v Commission* the Court raised of its own motion two pleas that insufficient reasons were stated for a Commission decision refusing to grant a derogation from certain rules of origin applicable to sugar from the Netherlands Antilles ⁽¹¹⁾. Finally, in *CIS v Commission*, it also raised of its own motion a failure to state reasons for a decision on the withdrawal of assistance from the European Regional Development Fund (ERDF) because the decision did not set out the various facts and arguments necessary to allow the Court to review its lawfulness in the light of the pleas raised by the applicant ⁽¹²⁾.

Moreover, in *Corsica Ferries France v Commission*, the Court held that a breach of the rights of the defence does not fall within the scope of an infringement of essential procedural requirements and, therefore, should not be raised by the Court of its own motion, thus confirming the case-law already reported in the 2004 Annual Report ⁽¹³⁾. Similarly, in its judgment in *Common Market Fertilisers v Commission*, the Court refused to raise of its own motion a plea of illegality against a provision of the customs rules because it was not based on the lack of competence of the author of the contested measure ⁽¹⁴⁾.

c) *Removal of documents from the case file*

In *Gollnisch and Others v Parliament*, the applicants produced before the Court an opinion of the legal service of the Parliament drawn up on behalf of the Bureau of that institution. The Parliament requested the removal of that document from the case file. That request provided an opportunity for the Court, in granting the Parliament's request, to confirm its now settled case-law that it would be contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court by persons other than the services at whose request they were drawn up unless such production has been authorised by the institution concerned or ordered by that Court ⁽¹⁵⁾.

In contrast, in *Entorn v Commission*, the Court rejected a request for removal from the case-file of statements made by a third party to officials from the Unit on Coordination of Fraud Prevention (UCLAF) ⁽¹⁶⁾. According to the Court, the applicant provided a plausible expla-

⁽¹⁰⁾ Judgment of 19 October 2005 in Case T-318/00 *Freistaat Thüringen v Commission*, not yet published in the ECR.

⁽¹¹⁾ Judgment of 22 September 2005 in Case T-101/03 *Suproco v Commission*, not yet published in the ECR.

⁽¹²⁾ Judgment of 22 June 2005 in Case T-102/03 *CIS v Commission*, not yet published in the ECR.

⁽¹³⁾ Judgment of 15 June 2005 in Case T-349/03 *Corsica Ferries France v Commission*, not yet published in the ECR, which cites the judgment of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering v Commission* (under appeal, C-403/04 P and C-405/04 P), not yet published in the ECR, paragraph 425.

⁽¹⁴⁾ Judgment of 27 September 2005 in Joined Cases T-134/03 and T-135/03 *Common Market Fertilisers v Commission* (under appeal, Case C-443/05 P), not yet published in the ECR.

⁽¹⁵⁾ Order of 10 January 2005 in Case T-357/03 *Gollnisch and Others v Parliament*, not yet published in the ECR, which cites the judgments in Case C-445/00 *Austria v Council* [2002] ECR I-9151, paragraph 12, and in Case T-44/97 *Ghignone and Others v Council* ECR-SC I-A-223 and II-1023, paragraph 48.

⁽¹⁶⁾ Judgment of 18 January 2005 in Case T-141/01 *Entorn v Commission* (under appeal, C-162/05 P), not yet published in the ECR.

nation of the fact that it had been able to obtain the document without committing any unlawful acts that might preclude it from being able to rely on the document in the proceedings before the Court.

II. *Proceedings concerning the legality of measures*

In this section an account will be given of the main decisions reached in actions for annulment on the basis of Article 230 EC ⁽¹⁷⁾. It must be observed that there is inevitably a degree of subjectivity in the selection of such decisions for discussion and that, therefore, several subjects tackled by the Court in 2005 will not be discussed individually in this report despite the clarification of the law resulting from some of those decisions. These include decisions on the subject of the ERDF ⁽¹⁸⁾, the European Agricultural Guidance and Guarantee Fund (EAGGF) ⁽¹⁹⁾, the European Social Fund (ESF) ⁽²⁰⁾, the rules governing the use of certain appropriations by the Parliament ⁽²¹⁾ and decisions handed down in the areas of fisheries ⁽²²⁾, plant-protection products ⁽²³⁾, public procurement ⁽²⁴⁾, anti-dumping measures ⁽²⁵⁾, the environment ⁽²⁶⁾ and the approximation of legislation relating to it ⁽²⁷⁾.

A. *Admissibility of actions brought under Article 230 EC*

As in 2004, the Court of First Instance had occasion, in 2005, to examine, either of its own motion or on application by a party, the conditions for the admissibility of actions for annulment ⁽²⁸⁾.

⁽¹⁷⁾ Mention could also be made of certain judgments (and orders) delivered in actions for damages. In the light of the condition that the conduct complained of must be unlawful for the liability of the Community for unlawful acts to arise, those judgments (and orders) sometimes also call into question the legality of measures adopted by the institutions.

⁽¹⁸⁾ Judgments of 18 October 2005 in Case T-60/03 *Regione Siciliana v Commission* and of 31 May 2005 in Case T-272/02 *Comune di Napoli v Commission*, not yet published in the ECR.

⁽¹⁹⁾ *Entorn v Commission*, footnote 16 above.

⁽²⁰⁾ Judgment of 30 June 2005 in Case T-347/03 *Branco v Commission* and order of 13 October 2005 in Case T-249/02 *Fintecna v Commission*, not yet published in the ECR.

⁽²¹⁾ Order in *Gollnisch and Others v Parliament*, footnote 15 above.

⁽²²⁾ Order in *Spain v Commission*, footnote 5 above, and judgment of 19 October 2005 in Case T-415/03 *Cofradía de pescadores de 'San Pedro' de Bermeo and Others v Council*, not yet published in the ECR.

⁽²³⁾ Judgment of 28 June 2005 in Case T-158/03 *Industrias Químicas del Vallés v Commission* (under appeal, Case C-326/05 P), not yet published in the ECR.

⁽²⁴⁾ See, for example, judgment of 6 July 2005 in Case T-148/04 *TQ3 Travel Solutions Belgium v Commission*, not yet published in the ECR.

⁽²⁵⁾ Judgments of 17 March 2005 in Case T-192/98 *Eurocoton v Council*, in Case T-195/98 *Ettlin Gesellschaft für Spinnerei und Weberei and Others v Council* and in Case T-177/00 *Philips v Council*, not published in the ECR.

⁽²⁶⁾ *United Kingdom v Commission*, footnote 5 above.

⁽²⁷⁾ Judgment of 5 October 2005 in Joined Cases T-366/03 and T-235/04 *Land Oberösterreich v Commission* (under appeal, Joined Cases C-439/05 P and C-454/05 P), not yet published in the ECR.

⁽²⁸⁾ For examples of cases where the Court examined the question of its own motion, see the judgments of 14 April 2005 in Case T-88/01 *Sniace v Commission* (under appeal, Case C-260/05 P); in *Land Oberösterreich v Commission*, footnote 27 above, and of 25 October 2005 in Case T-43/04 *Fardoom and Reinard v Commission*, and order of 7 September 2005 in Case T-358/03 *Krahl v Commission*, not yet published in the ECR.

1. Measures against which an action may be brought

In addition to the application of the case-law according to which only a measure which produces binding legal effects may be the subject of an action for annulment ⁽²⁹⁾, this year the Court had occasion to deal with the less common issue of the connection between actions for annulment and contract cases. For instance, in *Helm Düngemittel v Commission*, the Court confirmed that measures adopted by the institutions which form part of a contractual framework from which they are not separable are not one of the measures referred to by Article 249 EC which may be the subject of an action for annulment ⁽³⁰⁾. Basing its view in this case on the contractual nature of the relationship between the applicant and the Commission, the Court dismissed as inadmissible an action for annulment brought against a measure which was not separable from that relationship and refused to reclassify the action as an application made under Article 238 EC (which gives the Community courts jurisdiction to give judgment pursuant to an arbitration clause contained in a contract concluded by the Community).

2. Time limit for bringing an action

Under the fifth paragraph of Article 230 EC, proceedings for annulment must be instituted within two months of the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. According to settled case-law, the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure. Moreover, failing publication or notification, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action. It is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period.

Accordingly, the Court held that where an applicant requests communication of a decision excluding eligible expenditure under a programme implemented under the ERDF more than four months after becoming aware of it, a reasonable time within the meaning of the case-law cited is exceeded ⁽³¹⁾.

⁽²⁹⁾ See, for example, the order of 16 November 2005 in Case T-343/03 *Deutsche Post and Securicor Omega Express v Commission*, not published in the ECR, and judgment of 15 December 2005, in Case T-33/01 *Infront WM v Commission*, not yet published in the ECR. See also, as regards the fact that preparatory measures may not form the subject of an action for their annulment, the order of 22 July 2005 in Case T-376/04 *Polyelectrolyte Producers Group v Council and Commission* (under appeal, Case C-368/05 P), not yet published in the ECR.

⁽³⁰⁾ Order of 9 June 2005 in Case T-265/03 *Helm Düngemittel v Commission*, not yet published in the ECR.

⁽³¹⁾ Order of 27 May 2005 in Case T-485/04 *COBB v Commission*, not published in the ECR.

Then, in *Olsen v Commission* ⁽³²⁾, the Court had an opportunity to add an important rider to the application of those principles to litigation on State aid ⁽³³⁾. In that case, the applicant contested a Commission decision authorising State aid paid to a Spanish competitor. Its action was lodged just over six months after the Kingdom of Spain, the only addressee of the contested decision, was notified of it. As the applicant was not the addressee of the contested decision, the Court held in its judgment that the criterion of notification of the decision is not applicable to it. As to whether, in this case, the criterion of publication or that of the day on which a measure came to the knowledge of an applicant was applicable, the Court cited the case-law according to which, with regard to measures which, in accordance with the established practice of the institution concerned, are published in the *Official Journal of the European Union*, the criterion of the day on which a measure came to the knowledge of an applicant was not applicable; in such circumstances it was the date of publication which marked the starting point of the period prescribed for instituting proceedings ⁽³⁴⁾.

In the area of State aid, decisions by means of which the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure and decides that the measure is compatible with the common market are to be the subject of a summary notice published in the *Official Journal of the European Union* ⁽³⁵⁾. Moreover, in accordance with the recent but established practice of the Commission, the summary notice includes a reference to the website of the Secretariat General of the Commission and the statement that the full text of the decision in question, from which all confidential information has been removed, can be found there in the authentic language version or versions. The fact that the Commission gives third parties full access to the text of a decision placed on its website, combined with publication of a summary notice in the *Official Journal of the European Union* enabling interested parties to identify the decision in question and notifying them of this possibility of access via the Internet, must be considered to be publication for the purposes of Article 230(5) EC. In this case, the applicant could legitimately expect that the contested decision would be published in the *Official Journal of the European Union*. As its application was lodged even before such publication, it was held admissible.

3. Legal interest in bringing proceedings

The applicant's interest in bringing proceedings must be assessed as at the time when the application was lodged ⁽³⁶⁾. However, the Court held in *First Data v Commission* that, in the

⁽³²⁾ Judgment of 15 June 2005 in Case T-17/02 *Olsen v Commission* (under appeal, Case C-320/05 P), not yet published in the ECR.

⁽³³⁾ The same point was made in three orders: of 15 June 2005 in Case T-98/04 *SIMSA and Others v Commission*, not published in the ECR; of 19 September 2005 in Case T-321/04 *Air Bourbon v Commission*, and of 21 November 2005 in Case T-426/04 *Tramarin v Commission*, not yet published in the ECR.

⁽³⁴⁾ Judgment in Case C-122/95 *Germany v Council* [1998] ECR I-973, paragraph 39.

⁽³⁵⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 EC (OJ L 83, 27.3.1999, p. 1).

⁽³⁶⁾ Judgment in Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 30.

interest of the proper administration of justice, that consideration relating to the time when the admissibility of the action is assessed cannot prevent the Court from finding that there is no longer any need to adjudicate on the action in the event that an applicant who initially had a legal interest in bringing proceedings has lost all personal interest in having the contested decision annulled on account of an event occurring after that application was lodged ⁽³⁷⁾. In that case, the applicants contested a decision by which the Commission opposed, on the basis of Article 81 EC, certain rules governing membership of a bank card scheme. Those rules were withdrawn after the action was brought so that, in the view of the Court, the applicants' interest in bringing proceedings, in so far as it had any, had ceased to exist.

The facts of that case, like those of the four other cases brought to a close in 2005, gave the Court an opportunity to apply the established principle that an interest in bringing proceedings cannot be assessed on the basis of a future, hypothetical event. In particular, if the interest which an applicant claims concerns a future legal situation he must demonstrate that the prejudice to that situation is already certain ⁽³⁸⁾.

Thus, in three orders of 10 March 2005, the Court applied those principles in declaring inadmissible for lack of a legal interest in bringing proceedings several actions brought by Italian undertakings contesting a Commission decision declaring incompatible with the common market certain aid to firms in Venice and Chioggia ⁽³⁹⁾. Raising an absolute bar to proceeding of its own motion, the Court found that the applicants had no legal interest in bringing proceedings on the basis essentially of the decision of the Italian Republic not to proceed to recover the aid from the applicants. To substantiate their interest in bringing proceedings the applicants confined themselves to citing future and uncertain circumstances, namely the possibility that the Commission would make a different assessment from that made by the Italian Republic and would require it to recover the alleged aid from the applicant undertakings.

Accordingly, first of all, since it is only in the future and uncertain event of a Commission decision calling into question the implementing decision of the Italian Republic that their legal position would be affected, the applicant undertakings have not demonstrated that there was a vested, present interest in seeking the annulment of the contested decision. Moreover, even in that event, the applicant undertakings would not thereby be deprived of any effective legal remedy, given the possibility they had of bringing actions in the national courts against any decisions of the competent national authority requiring them to return the alleged aid. Secondly, as to the arguments of the applicants regarding the future effects of the contested decision in so far as it declares the aid schemes at issue incompatible with the common market and thus precludes their implementation in the fu-

⁽³⁷⁾ Order of 17 October 2005 in Case T-28/02 *First Data and Others v Commission*, not yet published in the ECR.

⁽³⁸⁾ Judgment in Case T-138/89 *NBV and NVB v Commission* [1992] ECR II-2181, paragraph 33.

⁽³⁹⁾ Orders of 10 March 2005 in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-267/00, T-268/00, T-271/00, T-275/00, T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others v Commission*, not yet published in the ECR; Case T-269/00 *Sagar v Commission* and Case T-288/00 *Gardena Hotels and Comitato Venezia Vuole Vivere v Commission*, not published in the ECR. See, also, order of 20 September 2005 in Case T-258/99 *Makro Cash & Carry Nederland v Commission*, not published in the ECR.

ture, the Court observes that the Commission decision finding that the scheme is incompatible with the common market cannot be regarded as being of individual concern to the potential beneficiaries of an aid scheme, solely by virtue of their objective capacity⁽⁴⁰⁾. Accordingly, any claim that there is an interest in bringing proceedings solely in that capacity would in any event be inoperative for the purposes of assessing the admissibility of these actions.

Again applying the case-law on interest in bringing proceedings, the Court, in its judgment in *Sniace v Commission*, also on State aid, declared inadmissible an action brought by Sniace contesting a decision of the Commission declaring aid it had received incompatible with the common market⁽⁴¹⁾. Sniace disputed the classification of the aid as State aid in the decision, claiming that it affected it adversely in particular because of the risk of legal action and certain effects on its relations with the credit institution which granted the aid. The Court dismissed the action on the basis that the applicant had no legal interest in bringing proceedings, citing the case-law mentioned above according to which if the interest upon which an applicant relies concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain⁽⁴²⁾. The applicant had not shown at all that, first, the alleged risk of legal proceedings was, in this case, vested and present, nor that, second, the classification as State aid could entail the obligation to notify the Commission in future of any measure adopted by that credit institution in favour of the applicant, nor, finally, that the damage, which, according to the applicant, results from the conduct of the administrative procedure, could be linked to the classification as State aid in the contested decision.

4. Standing to bring proceedings

The fourth paragraph of Article 230 EC provides: '[a]ny natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

a) *Direct concern*

In several cases concerning Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding⁽⁴³⁾, the Court held that Members of Parliament acting in their own name (and not on behalf of the party to which they belong) were not directly concerned by a regulation laying down the conditions for the financing

⁽⁴⁰⁾ See, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraph 15, and Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie v Commission* [2001] ECR II-3367, paragraph 77.

⁽⁴¹⁾ *Sniace v Commission*, footnote 28 above.

⁽⁴²⁾ *NBV and NVB v Commission*, footnote 38 above, paragraph 33.

⁽⁴³⁾ OJ L 297, 15.11.2003, p. 1.

of political parties, inter alia because the economic consequences of that regulation did not affect their legal position but only their factual situation ⁽⁴⁴⁾. On the other hand, in two of those cases, the Court held that the regulation at issue, which creates a status for political parties at European level, directly affects certain political groupings. First, the creation of an advantageous legal status from which some political groupings may benefit while others are excluded from it, is likely to affect equality of opportunity between political parties. Second, decisions on the financing of political parties taken in accordance with the criteria established by the contested regulation fall within the limited discretion of the competent authority. Such decisions are thus purely automatic in nature deriving solely from the contested regulation without the application of other intermediary rules ⁽⁴⁵⁾.

Moreover, in its judgment in *Regione Siciliana v Commission*, the Court clarified certain details of the application of the criterion of direct concern where decisions are adopted relating to aid granted by the ERDF ⁽⁴⁶⁾. That judgment marks a certain development in relation to previous decisions made in slightly different contexts ⁽⁴⁷⁾. In that case, the applicant disputed a decision relating to the cancellation of the aid granted to the Italian Republic and then paid to the applicant for the construction of a dam. The Commission argued that the decision was not of direct concern to the applicant as the Member States formed a screen between the Commission and the final beneficiary of the assistance. However the Court dismissed that plea of inadmissibility, citing case-law to the effect that for a person to be directly concerned by a measure that is not addressed to him, the measure must directly affect the individual's legal situation and its implementation must be purely automatic, resulting from Community rules alone to the exclusion of other intermediate rules ⁽⁴⁸⁾.

With regard, first of all, to the alteration of the applicant's legal situation, the Court held that the contested decision had had the initial direct and immediate effect of changing the applicant's financial situation by depriving it of the balance of the assistance remaining to be paid by the Commission and requiring it to repay the sums paid by way of advances. As regards, next, the criterion that the contested decision should be automatically applicable, the Court observed that it is automatically and of itself that the contested decision produces its legal effects on the applicant, that is to say, as a result of Community law alone, and the national authorities enjoy no discretion in their duty to implement the decision. On this occasion the Court dismissed the argument that the national authorities may in theory decide to release the applicant from the financial consequences that the contested decision entails for it directly. A national decision providing funding of that magni-

⁽⁴⁴⁾ Orders of 11 July 2005 in Case T-13/04 *Bonde and Others v Parliament and Council*, not published in the ECR; in Case T-40/04 *Bonino and Others v Parliament and Council*; and in Case T-17/04 *Front national and Others v Parliament and Council* (under appeal, Case C-338/05 P), not yet published in the ECR.

⁽⁴⁵⁾ Orders in *Bonino and Others v Parliament and Council* and *Front national and Others v Parliament and Council*, footnote 44 above.

⁽⁴⁶⁾ *Regione Siciliana v Commission*, footnote 18 above.

⁽⁴⁷⁾ Orders of 6 June 2002 in Case T-105/01 *SLIM Sicilia v Commission* [2002] ECR II-2697, and of 8 July 2004 in Case T-341/02 *Regione Siciliana v Commission* (under appeal, Case C-417/04 P), not yet published in the ECR.

⁽⁴⁸⁾ Judgment in Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43.

tude would remain extraneous to the application in Community law of the contested decision and its effect would be to put the applicant back in the situation it occupied before the contested decision was adopted, by bringing about in its turn a second alteration of the applicant's legal situation which was changed in the first place, and automatically, by the contested decision.

b) *Individual concern*

Applying the principles derived from settled case-law, the Court held that the measures contested in their respective applications were not of individual concern to: non-attached Members of the European Parliament, as regards a change in the conditions of the use of appropriations applying to political groups and non-attached Members ⁽⁴⁹⁾; banana producers, as regards two regulations fixing certain conditions for the importation of those products into the Community ⁽⁵⁰⁾; producers of Italian wine, as regards a regulation amending the system of traditional designations ⁽⁵¹⁾; Italian traders in the sugar sector, as regards a regulation fixing the intervention price for white sugar ⁽⁵²⁾; and the proprietor of a forestry undertaking, as regards a decision approving a rural development programming document for the Republic of Austria ⁽⁵³⁾.

The judgment in *Sniace v Commission*, which gave the Court an opportunity to clarify once again the conditions for the application of the fourth paragraph of Article 230 EC in the area of State aid, calls for further comment ⁽⁵⁴⁾. In that case, Sniace disputed a Commission decision finding measures adopted for the benefit of Lenzing Lyocell, an Austrian company, to be compatible with the common market. The Court raised of its own motion the question of the applicant's standing to bring proceedings over that decision and, in particular, the question whether it was of individual concern to it in the light of the criteria defined for the first time by the Court in its judgment *COFAZ and Others v Commission* ⁽⁵⁵⁾. According to those criteria, in the field of State aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure initiated pursuant to Article 88(2) EC in respect of an individual grant of aid are recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the contested decision. That was not the position in this case. First, the applicant played only a minor role in the course of the administrative procedure, as it lodged no complaint nor any observations which had a significant impact on the conduct

⁽⁴⁹⁾ Order in *Gollnisch and Others v Parliament*, footnote 15 above.

⁽⁵⁰⁾ Judgment of 3 February 2005 in Case T-139/01 *Comafica and Dole Fresh Fruit Europe v Commission*, not yet published in the ECR.

⁽⁵¹⁾ Order of 28 June 2005 in Case T-170/04 *FederDoc and Others v Commission*, not yet published in the ECR.

⁽⁵²⁾ Order of 28 June 2005 in Case T-386/04 *Eridania Sadam and Others v Commission*, not yet published in the ECR.

⁽⁵³⁾ Order of 28 February 2005 in Case T-108/03 *von Pezold v Commission*, not yet published in the ECR.

⁽⁵⁴⁾ *Sniace v Commission*, footnote 28 above.

⁽⁵⁵⁾ Judgment in Case 169/84 *COFAZ and Others v Commission* [1986] ECR 391, paragraph 25.

of the procedure. Second, analysis of the physical characteristics, the price and the manufacturing processes of the products sold by the applicant and Lenzing Lyocell did not lead the Court to find that they were in direct competition, as the applicant did not, moreover, establish that the contested decision was capable of significantly affecting its position on the market.

In a different context, the Court held, in its judgment in *Infront WM v Commission* ⁽⁵⁶⁾, that the applicant, as the holder of the broadcasting rights for an event considered by the United Kingdom to be of national interest within the meaning of Directive 89/552/EEC ⁽⁵⁷⁾, was individually concerned by a Commission decision which made it possible to rely on the measure adopted by the United Kingdom as against broadcasting organisations established in another Member State, as that decision was such as to restrict its freedom to use rights it had previously acquired.

B. Competition rules applicable to undertakings

In 2005 the Court delivered eleven judgments adjudicating on the substantive rules prohibiting anti-competitive agreements, once again essentially in the matter of cartels ⁽⁵⁸⁾. That high number can be contrasted with the single judgment relating to Article 82 EC ⁽⁵⁹⁾ and the three judgments concerning substantive issues relating to merger control ⁽⁶⁰⁾.

1. Scope of the competition rules

In *Piau v Commission*, the Court once again made it clear that the competition rules can, in certain circumstances, apply in the area of sport ⁽⁶¹⁾. In this case, the Commission had rejected, on grounds of lack of Community interest, a complaint by the applicant challenging the Fédération internationale de football association (FIFA) Players' Agents Regula-

⁽⁵⁶⁾ *Infront WM v Commission*, footnote 29 above.

⁽⁵⁷⁾ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23), as amended.

⁽⁵⁸⁾ Judgments of 26 January 2005 in Case T-193/02 *Piau v Commission*, not yet published in the ECR (under appeal, Case C-171/05 P); of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, not published in the ECR (under appeal, Case C-328/05 P); of 18 July 2005 in Case T-241/01 *Scandinavian Airlines System v Commission*; of 27 July 2005 in Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others v Commission*; of 15 September 2005 in Case T-325/01 *DaimlerChrysler v Commission*; of 25 October 2005 in Case T-38/02 *Groupe Danone v Commission* (under appeal, Case C-3/06 P); of 29 November 2005 in Case T-33/02 *Britannia Alloys & Chemicals v Commission*; Case T-52/02 *SNCZ v Commission*; Case T-62/02 *Union Pigments v Commission*; Case T-64/02 *Heubach v Commission*, and of 6 December 2005 in Case T-48/02 *Brouwerij Haacht v Commission*, none yet published in the ECR.

⁽⁵⁹⁾ *Piau v Commission*, footnote 58 above.

⁽⁶⁰⁾ *EDP v Commission*, footnote 5 above; judgments of 14 December 2005 in Case T-209/01 *Honeywell v Commission* and Case T-210/01 *General Electric v Commission*, none yet published in the ECR.

⁽⁶¹⁾ *Piau v Commission*, footnote 58 above.

tions. In its judgment, the Court held that football clubs and the national associations grouping them together are undertakings and associations of undertakings respectively, within the meaning of Community competition law: consequently, FIFA, which brings together national associations, itself constitutes an association of undertakings within the meaning of Article 81 EC. On the basis of that initial finding, the Court held that the Players' Agents Regulations constituted a decision by an association of undertakings. The purpose of the occupation of players' agent was to introduce, on a regular basis, and for a fee, a player to a club with a view to employment or to introduce two clubs to one another with a view to concluding a transfer contract. It was therefore an economic activity involving the provision of services, which did not fall within the scope of the specific nature of sport, as defined by the case-law.

2. Procedure for penalising anti-competitive practices

In ***Sumitomo Chemical and Others v Commission***, the Court held that the fact that the limitation period of five years laid down by the Community rules for punishing infringements of Articles 81 EC and 82 EC has expired does not prevent the Commission from finding an infringement without imposing a fine after the expiry of such a period ⁽⁶²⁾. The Court made it clear that the fact that limitation does not apply in respect of a mere finding of an infringement is not contrary to the principle of legal certainty, the principles common to the Member States or the presumption of innocence. However, the Court also held that if the Commission is lawfully to find an infringement in respect of which the limitation period has expired, it must still establish that it has a 'legitimate interest' in doing so ⁽⁶³⁾. In this instance, the Commission had not considered whether such an interest existed, which justified the annulment of the decision in so far as it concerned the applicants.

3. Points raised on the scope of Article 81 EC

a) Application of Article 81(1) EC

By decision of 10 October 2001, the Commission found that DaimlerChrysler AG had, either itself or through its Belgian and Spanish subsidiaries, infringed the Community competition rules by concluding agreements with its distributors in Germany, Belgium and Spain concerning the retailing of passenger cars of the Mercedes-Benz make. In its judgment in the action brought by DaimlerChrysler, the Court confirmed that the latter had participated, through its Belgian subsidiary, in an 'anti-price-slashing' agreement with its

⁽⁶²⁾ Judgment of 6 October 2005 in Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Others v Commission*, not yet published in the ECR. See, at the material time, Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1). See, thereafter, Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

⁽⁶³⁾ Case 7/82 *GVL v Commission* [1983] ECR 483.

Belgian dealers, but did, however, criticise the Commission's analysis in relation to the German and Spanish markets ⁽⁶⁴⁾.

On the German market, the applicant was, in particular, alleged to have instructed its agents, first, to sell new cars as far as possible only to customers in their own contract territory thus avoiding internal competition and, second, to require payment of a deposit of 15 % of the price of the vehicle for orders for new cars from customers from outside the territory. In its judgment the Court observed that, while the EC Treaty prohibits coordinated anti-competitive conduct by two or more undertakings, conversely unilateral conduct on the part of a manufacturer is not covered by the prohibition. The Court found in this instance that DaimlerChrysler had acted unilaterally. The Commission was thus wrong to take the view that the German agents to which DaimlerChrysler had given instructions bore a commercial risk which meant that they could be classified as independent operators; those agents should, in reality, have been treated in the same way as employees of DaimlerChrysler, integrated in that undertaking and forming an economic unit with it.

As regards the Spanish market, DaimlerChrysler was alleged to have prohibited its dealers from delivering passenger cars to leasing companies having no specified lessee, thus preventing them from building up stock and supplying a vehicle quickly. Nonetheless, the Court found that Spanish law requires that every leasing company must already have identified a lessee for the leasing contract at the time when the vehicle is acquired, irrespective of the disputed provisions of the dealership agreement. It followed that, by virtue of that legislation alone, companies outside the Mercedes-Benz group were in the same position as those within the group: consequently the restrictions on supplying leasing companies in Spain were not restrictions on competition within the meaning of Article 81(1) EC.

b) *Application of Article 81(3) EC*

In ***Piau v Commission*** ⁽⁶⁵⁾, referred to above, the Commission had held that the compulsory nature of the licence required by the FIFA regulations in question might be justified under Article 81(3) EC. In its judgment, the Court pointed out that the requirement to hold a licence in order to carry on the occupation of players' agent was a barrier to access to that economic activity and affected competition: accordingly, it could be accepted only in so far as the conditions set out in Article 81(3) EC were met. The Court found that the Commission had not made a manifest error of assessment in taking the view that the restrictions stemming from the compulsory nature of the licence might benefit from such an exemption. First, the need to raise professional and ethical standards for the occupation of players' agent in order to protect players; second, the fact that competition was not eliminated by the licence system; third, the virtual absence of any national rules; and fourth, the lack of any collective organisation for players' agents were all circumstances which justified the action taken by FIFA.

⁽⁶⁴⁾ *DaimlerChrysler v Commission*, footnote 58 above.

⁽⁶⁵⁾ *Piau v Commission*, footnote 58 above.

c) *Fines*

In the course of 2005 the Court delivered 10 judgments involving the lawfulness or appropriateness of fines for infringements of Article 81 EC ⁽⁶⁶⁾. For the most part those judgments applied principles which are now well established. This part of the report will therefore focus solely on the most salient developments which, once again, concern essentially the application of the guidelines for calculating fines ('the Guidelines') ⁽⁶⁷⁾. It is also possible to detect an appreciable increase in the number of cases concerning the conditions under which the Commission may, following the annulment or amendment of a fine, be required to reimburse interest on the fine paid or bank guarantee charges incurred in order to avoid the immediate payment of the fine ⁽⁶⁸⁾.

— **Guidelines**

In 2005, as in previous years, the Court defined the conditions for applying a number of the rules for calculating fines set out in the Guidelines. In particular, the Court adjudicated on the criteria allowing the Commission, first, to assess the gravity of the infringement, second, to apply differential treatment to co-perpetrators of an infringement and, third, to assess whether there are any aggravating or attenuating circumstances.

Gravity

According to Section 1 A of the Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

The Court has several times had occasion to emphasise the importance of the first criterion (the nature of the infringement) in relation to the criteria of the actual impact of the infringement and the size of the relevant market. The Court therefore held in **Groupe Danone v Commission** that, pursuant to the Guidelines, agreements or concerted practices involving, in particular, price-fixing and customer-sharing may be classified as 'very serious' infringements on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area ⁽⁶⁹⁾.

⁽⁶⁶⁾ *Tokai Carbon and Others v Commission*, footnote 58 above; *Scandinavian Airlines System v Commission*, footnote 58 above; *Brasserie nationale and Others v Commission*, footnote 58 above; *DaimlerChrysler v Commission*, footnote 58 above; *Groupe Danone v Commission*, footnote 58 above; *Britannia Alloys & Chemicals v Commission*, footnote 58 above; *SNCZ v Commission*, footnote 58 above; *Union Pigments v Commission*, footnote 58 above; *Heubach v Commission*, footnote 58 above, and *Brouwerij Haacht v Commission*, footnote 58 above.

⁽⁶⁷⁾ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3)

⁽⁶⁸⁾ Judgment of 21 April 2005 in Case T-28/03 *Holcim (Deutschland) v Commission* (under appeal, Case C-282/05 P), and the order of 4 May 2005 in Case T-86/03 *Holcim (France) v Commission*, neither published in the ECR; order of 20 June 2005 in Case T-138/04 *Cementir — Cementerie del Tirreno v Commission*, and judgment of 14 December 2005 in Case T-135/02 *Greencore Group v Commission*, not yet published in the ECR.

⁽⁶⁹⁾ *Groupe Danone v Commission*, footnote 58 above. See also, to that effect, *Scandinavian Airlines System v Commission*, footnote 58 above.

As regards the second criterion (the impact of the cartel) the Court also held in **Groupe Danone v Commission** that where an agreement having an anti-competitive object is implemented, even if only in part, it cannot be held that the agreement had no impact on the market ⁽⁷⁰⁾. The Court further held that, irrespective of the geographic extent of the infringement and of the proportion which the sales concerned bear to sales made in the whole of the European Community, the absolute value of those sales is also a relevant indication of the gravity of the infringement, since it is an accurate reflection of the economic importance of the transactions which the infringement seeks to remove from normal competition ⁽⁷¹⁾. Finally, in **Scandinavian Airlines System v Commission**, the Court held that, since, for the purpose of assessing the gravity of the infringement, the actual impact of the infringement on the market did not have to be taken into account unless it was measurable, in the case of an overall agreement designed to restrict potential competition, the actual effect of which was *ex hypothesi* difficult to measure, the Commission was not required to show with precision the actual impact of the cartel on the market and to quantify it, but could confine itself to estimates of the probability of such an effect ⁽⁷²⁾.

Differential treatment

The assessment of the gravity of an infringement under the Guidelines is based on a flat-rate approach, in that the basic amount of the fine is in principle independent of the turnover of the undertaking concerned. Section 1 A of the Guidelines nonetheless authorises the Commission to apply differential treatment to undertakings which participated in the infringement by dividing them into a number of categories which correspond to distinct starting amounts. The question of which turnover figure is appropriate in order to apply differential treatment to undertakings has already given rise to case-law, which has been further clarified in 2005 by three cases emphasising the Commission's discretion in that regard.

First, in the '**Specialty graphite**' case, the Commission chose to divide the undertakings according to their worldwide turnover in each of the products concerned by the infringements penalised, in this instance price-fixing without market-sharing ⁽⁷³⁾. The applicants disputed that choice and claimed, in particular, that the Commission should have taken account of their turnover in the European Economic Area (EEA), as in the 'lysine' case ⁽⁷⁴⁾. In its judgment, the Court approved the Commission's approach, however, pointing out that although an approach based on worldwide turnover may be appropriate in the case of a global market-sharing cartel (see the 'graphite electrodes' case ⁽⁷⁵⁾), that does not mean that such an approach must be excluded where there is no market-sharing. It was appropriate in the case in question to take into account total turnover on the markets in ques-

⁽⁷⁰⁾ *Groupe Danone v Commission*, footnote 58 above.

⁽⁷¹⁾ *Ibid.*

⁽⁷²⁾ *Scandinavian Airlines System v Commission*, footnote 58 above.

⁽⁷³⁾ *Tokai Carbon and Others v Commission*, footnote 58 above.

⁽⁷⁴⁾ See, in particular, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597 (under appeal, Case C-397/03 P).

⁽⁷⁵⁾ Judgment of 29 April 2004 in Joined Cases *Tokai Carbon and Others v Commission* T-236/01, T-239/01, T-244/01, T-246/01, T-251/01 and T-252/01, not yet published in the ECR (under appeal in Cases C-289/04 P, C-301/04 P, C-307/04 P and C-308/04 P).

tion (and not on all the products of the undertaking). As regards the comparison with the 'lysine' case, the Court pointed out that the differential treatment was based in that case on the total turnover achieved by the undertakings from all their activities, while in this instance the Commission had used as a basis worldwide turnover from sales of the relevant product.

Second, in **SNCZ v Commission**, the Court held that the Commission had not committed a manifest error of assessment in taking into account, for the purposes of differential treatment, relevant market share and turnover in the market affected, since the total turnover of the undertakings concerned gave only an incomplete picture of the real situation ⁽⁷⁶⁾.

Third, the Commission's discretion in the choice of an appropriate turnover figure was recognised in particularly generous terms in **Scandinavian Airlines System v Commission** since, in that case, the Court inferred from the case-law that, for the purpose of determining the amount of the fine, the Commission 'is free to take into account the turnover figure of its choice, provided it does not appear unreasonable by reference to the circumstances of the case' ⁽⁷⁷⁾. The Commission, by choosing to have taken into account both the total turnover of the undertakings fined and their turnover in the market concerned, could not be found to have made a manifest error of assessment.

Aggravating circumstances

In the course of 2005 the Court expressed its view on aggravating circumstances involving a threat of reprisals aimed at extending a cartel, repeated infringements and the fact that the undertaking fined had acted as ringleader.

According to the fourth indent of Section 2 of the Guidelines, retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement may constitute an aggravating circumstance. In **Groupe Danone v Commission**, the Court approved the Commission's view that where an undertaking which is a member of a cartel forces another member of that cartel to extend the cartel's scope by threatening that member with reprisals if it does not cooperate, that may be treated as an aggravating circumstance. Such conduct has the direct effect of aggravating the damage caused by the cartel. An undertaking which conducts itself in that way must for that reason bear a special responsibility ⁽⁷⁸⁾. However, the Commission had not sufficiently established the causal link between the threats made by Danone, on the one hand, and the extension of the co-operation between Danone and Interbrew, on the other hand. The Court therefore adjusted the fine.

In the first indent of Section 2 of the Guidelines, the Commission also stated that it intended to treat repeated infringement as an aggravating circumstance justifying an increase in the basic amount of the fine. In **Groupe Danone v Commission**, the Commission had considered to be an aggravating circumstance the fact that Danone had already been

⁽⁷⁶⁾ *SNCZ v Commission*, footnote 58 above.

⁽⁷⁷⁾ *Scandinavian Airlines System v Commission*, footnote 58 above.

⁽⁷⁸⁾ *Groupe Danone v Commission*, footnote 58 above.

found to have infringed Article 81 EC on two previous occasions for facts of the same type, although the applicant was known by a different name at the time and the two earlier infringements were in a different sector ⁽⁷⁹⁾. In its judgment, the Court approved the Commission's approach, confirming that the analysis of the gravity of the infringement must take account of any repeated infringements. The Court stated in that regard that, given the objective pursued, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past.

Finally, pursuant to the third indent of Section 2 of the Guidelines, the Court reduced, in the 'specialty graphite' case, the percentage increase imposed by the Commission on SGL Carbon on account of its role as ringleader, since that role was overestimated in relation to the two other members of the cartel ⁽⁸⁰⁾.

Attenuating circumstances

Section 3 of the Guidelines sets out a non-exhaustive list of attenuating circumstances which entail a reduction in the basic amount of the fine. It is noteworthy that, in ***Brasserie nationale and Others v Commission***, the Court held in essence that a situation (legal uncertainty as to the validity of certain contracts) which was not such as to justify a restrictive practice could not be taken into account as an attenuating circumstance warranting a reduction in the fine imposed because of that restrictive practice ⁽⁸¹⁾.

— 10 % ceiling

Regulation No 17 provided, as Article 23(2) of Regulation (EC) No 1/2003 now does, that for each undertaking and association of undertakings participating in an infringement of Article 81 EC or Article 82 EC, the fine is not to exceed 10 % of its total turnover in the preceding business year. Although the application of that rule does not in general give rise to many difficulties, the Court had an opportunity in 2005 to clarify two important points concerning the rule.

First, in the '**Specialty graphite**' case, the Court specified the conditions under which the upper limit of 10 % must be applied where the infringement has been expressly imputed to two companies, one of which is a subsidiary of the other, which separate before the decision imposing the fine is adopted ⁽⁸²⁾. In such a situation, the Court determined that, since the 10 % ceiling refers to the financial year preceding the date of the decision, it aims to protect undertakings 'against excessive fines which could destroy them commercially'. Thus, the turnover refers not to the period of the infringements penalised, but to a period closer to the imposition of the fine (the financial year preceding the imposition of the fine). Accordingly, the 10 % ceiling must be applied

⁽⁷⁹⁾ *Groupe Danone v Commission*, footnote 58 above.

⁽⁸⁰⁾ *Tokai Carbon and Others v Commission*, footnote 58 above.

⁽⁸¹⁾ *Brasserie nationale and Others v Commission*, footnote 58 above.

⁽⁸²⁾ *Tokai Carbon and Others v Commission*, footnote 58 above.

initially to each separate addressee of the decision and it is only if, subsequently, several addressees constitute the ‘undertaking’ (the economic entity responsible for the infringement), again at the date of the decision, that the upper limit may be applied to their cumulative turnover. In other words, if the economic unit formed by the companies has broken up before the decision, each addressee is entitled to have the 10 % ceiling applied individually to it.

Second, in ***Britannia Alloys & Chemicals v Commission***, the Court specified the conditions under which the upper limit applies where the undertaking which committed the infringement has transferred all its activities before the decision penalising the infringement⁽⁸³⁾. Under Article 15(2) of Regulation No 17, the upper limit must be calculated on the basis of turnover in the business year preceding the decision imposing the fine. However, in *Britannia Alloys & Chemicals v Commission*, the applicant had, by the time of the decision, become a non-trading company and was no longer active in the zinc sector. Since its turnover in the business year preceding the decision was therefore nil, the Court ruled that it could not serve as a basis for determining the upper limit provided for by Regulation No 17. The Court held that it is clear from the objectives of the system of which Article 15(2) of Regulation No 17 forms part and from the case-law that the application of the 10 % upper limit presupposes, first, that the Commission has available the turnover for the last business year preceding the date of adoption of the decision and, second, that those data represent a full year of normal economic activity over a period of 12 months. Accordingly, the Commission was obliged, in order to fix the maximum limit of the fine, to refer to the most recent turnover corresponding to a complete year of economic activity. The Commission was therefore entitled, in this instance, to set the upper limit by reference to the business year ending on 30 June 1996, even though the decision penalising the infringement had been taken in December 2001.

— The Leniency Notice

A large number of the cases dealt with in 2005 have again concerned the application of the 1996 Leniency Notice, although there have, as yet, been no cases concerning the 2002 notice⁽⁸⁴⁾.

If an undertaking is to benefit from a reduction in its fine for not contesting the facts, pursuant to the second indent of Section D 2 of the Leniency Notice, it must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections⁽⁸⁵⁾. The Court was prompted to develop these principles in ***Groupe Danone v Commission*** and held that ‘a statement that the facts are not substantially contested, together ... with a series of observations by which the applicant purports to clarify the significance of certain facts but which, in reality, contests those facts,

⁽⁸³⁾ *Britannia Alloys & Chemicals v Commission*, footnote 58 above.

⁽⁸⁴⁾ Commission notice on the non-imposition or reduction of fines in cartel cases (OJ C 207, 18.7.1996, p. 4, ‘the Leniency Notice’), now replaced by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).

⁽⁸⁵⁾ Case T-347/94 *Mayr Melnhof v Commission* [1998] ECR II-1751, paragraph 309.

cannot be considered to facilitate the Commission's task of identifying and penalising the relevant infringement of the competition rules' ⁽⁸⁶⁾. In such circumstances, an undertaking is not entitled to a reduction under Section D 2, second indent, of the Leniency Notice, for not contesting the facts.

In addition, in the ***Specialty graphite*** case, the Court acknowledged that the Commission enjoys a broad discretion in determining the identity of the 'first' undertaking to have provided the Commission with decisive evidence within the meaning of Section B(b) of the Leniency Notice, the Court censuring the Commission only where that discretion is 'manifestly exceeded' ⁽⁸⁷⁾.

Finally, in ***Brouwerij Haacht v Commission***, the Court held that the supply of information, albeit decisive, can justify a reduction in the fine imposed on the undertaking concerned only in so far as the information 'did indeed go beyond what the Commission could require that the applicant supply pursuant to Article 11 of Regulation No 17' ⁽⁸⁸⁾. Since the information supplied by the applicant in this case did not satisfy that requirement, the Commission did not err when it refrained from reducing the applicant's fine on that account.

— Exercise of the Court's unlimited jurisdiction

The Court has unlimited jurisdiction in relation to fines, which allows it to reduce or increase the fines imposed by the Commission. In the course of 2005, the Court exercised its jurisdiction, inter alia, to ensure that appropriate action was taken where the Commission had erred in its assessment ⁽⁸⁹⁾ or to correct an error in the order in which the stages for calculating fines laid down by the Guidelines were applied ⁽⁹⁰⁾.

Developing this area further, the Court went into more detail about when it might exercise its unlimited jurisdiction to take account of facts subsequent to adoption of the contested decision. In ***Scandinavian Airlines System v Commission***, the applicant asked the Court to reduce its fine in order to take account of what it considered to be its exemplary conduct after the decision ⁽⁹¹⁾. In its judgment, the Court nonetheless held that the applicant could not infer from the case-law a principle by virtue of which a fine imposed on an undertaking could be reduced in consideration of conduct adopted by the undertaking after adoption of the decision imposing the fine. On this occasion the Court was concerned to make clear that such a reduction, 'even if it were possible, could in any event be operated by the Community judicature only with great care and in altogether exceptional circumstances, particularly because such a practice could be perceived as an incentive to commit

⁽⁸⁶⁾ *Groupe Danone v Commission*, footnote 58 above.

⁽⁸⁷⁾ *Tokai Carbon and Others v Commission*, footnote 58 above.

⁽⁸⁸⁾ *Brouwerij Haacht v Commission*, footnote 58 above.

⁽⁸⁹⁾ *Tokai Carbon and Others v Commission*, footnote 58 above; and *Groupe Danone v Commission*, footnote 58 above.

⁽⁹⁰⁾ *Groupe Danone v Commission*, footnote 58 above.

⁽⁹¹⁾ *Scandinavian Airlines System v Commission*, footnote 58 above.

infringements while speculating on a possible reduction in the fine by reason of alteration of the undertaking's conduct after the decision'.

4. Points raised on Article 82 EC

In *Piau v Commission* ⁽⁹²⁾, referred to above, the Court held that in the market affected by the FIFA rules in question, which is a market for the provision of services where the buyers are players and clubs and the sellers are agents, FIFA can be regarded as acting on behalf of football clubs, since it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs.

In the Court's view, because the FIFA regulations are binding for national associations that are members of FIFA and the clubs forming them, the clubs have a collective dominant position on the market for the provision of players' agents' services. Consequently, the Court held, contrary to the Commission, that FIFA, which is the emanation of those clubs and operates on this market through them, holds a dominant position on the market for players' agents' services: it is of little significance in this respect that FIFA does not act directly on the market as an economic operator and that its involvement stems from rule-making activity. However, the Court found that the Commission had rightly taken the view that the practices complained of were not an abuse of a dominant position. It followed that the lawfulness of the rejection of the complaint on the ground of lack of Community interest in continuing with the procedure was not affected by the error of law found.

5. Points raised on merger control

Of the four cases concerning the application of Regulation (EEC) No 4064/89, now replaced by Regulation (EC) No 139/2004, three are worthy of mention ⁽⁹³⁾.

In the first place, *EDP v Commission* ⁽⁹⁴⁾ made some important points concerning the burden of proof where it is denied that the commitments proposed by the parties are sufficient and the appraisal of concentrations in a sector which is not open to competition.

Thus, the Court stated that it is for the Commission to demonstrate that the commitments validly submitted by the parties to a concentration do not render that concentration, as modified by the commitments, compatible with the common market. The Court added, however, that the fact that the Commission regards commitments which have been val-

⁽⁹²⁾ *Piau v Commission*, footnote 58 above.

⁽⁹³⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1, corrected version in OJ L 257, 21.9.1990, p. 13, subsequently repealed by Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1)). The only case not covered in this report concerns a decision applying the established case-law on the fact that an individual cannot contest the Commission's refusal to bring infringement proceedings (order of 25 May 2005 in Case T-443/03 *Retecal and Others v Commission*, not yet published in the ECR).

⁽⁹⁴⁾ *EDP v Commission*, footnote 5 above.

idly submitted as insufficient constitutes an improper reversal of the burden of proof only where the Commission bases that finding of their insufficiency, not upon an assessment of the commitments based on objective and verifiable criteria, but rather upon the assertion that the parties have been unable to provide sufficient evidence to allow it to carry out a substantive assessment. Furthermore, the Commission is entitled to reject non-binding commitments, since, in doing so, it does not transfer the burden of proof to the parties but denies the certain and measurable character which the commitments must display.

The Court also stated that in a sector which was not open to competition 'a monopoly represents the ultimate dominant position, which for that reason cannot be strengthened' on the market concerned and that therefore there was no competition that could be impeded by the concentration. In this case, *Energias de Portugal (EDP)*, the incumbent Portuguese electricity company, and *Eni SpA*, an Italian energy company, were jointly to acquire *Gás de Portugal (GDP)*, the incumbent Portuguese gas company. The transaction would have had effects on certain gas markets in particular. Those markets were to be open to competition by 1 July 2004 for non-domestic customers and by 1 July 2007 for all other customers. However, Member States could, in certain circumstances, derogate from particular obligations and postpone implementation of the directive, Portugal being entitled to just such a derogation until 2007. In the Court's view, by basing the prohibition of the concentration on the strengthening of dominant positions having as their consequence a significant impediment to competition on gas markets not open to competition by virtue of the derogation, the Commission had disregarded the effects, and consequently the scope, of that derogation.

Nevertheless, that error was confined to the gas markets alone. The Commission's findings concerning the situation on the electricity markets in Portugal, which were also affected by the transaction concerned, were therefore not undermined. The Court held on this point that the Commission had not made a manifest error of assessment in considering that the concentration would cause the disappearance of an important potential competitor (GDP) on all the electricity markets and that the commitments of the undertakings concerned did not resolve the problems which it had identified. The conclusion concerning the electricity markets was sufficient, on its own, to justify the decision finding the concentration in question to be incompatible with the common market, for which reason the Court did not annul the decision.

In the second place, in ***General Electric v Commission***, the Court made a number of points clarifying the scope of its power to review Commission merger decisions and further explaining the assessment for competition purposes of transactions with conglomerate effects, developing the judgments of the Court of First Instance and subsequently the Court of Justice in *Tetra Laval v Commission* ⁽⁹⁵⁾. The Court laid great stress on the particular importance, first, of effective judicial review when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration and, second, of the quality of the evidence produced by the Commission in cases of conglomerate-type concentrations.

⁽⁹⁵⁾ *General Electric v Commission*, footnote 60 above. See also, Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 and Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987.

The origins of the case lie in a Commission decision of 3 July 2001, by which the Commission declared a merger between the United States companies Honeywell International and General Electric Company (GE) incompatible with the common market; as a result, the merger could not be put into effect in the European Union. In its judgment in *General Electric v Commission*, the Court upheld the Commission's finding that the merger would lead to the creation or strengthening of dominant positions, as a result of which effective competition would be significantly impeded on three markets, the market for jet engines for large regional aircraft, the market for corporate jet aircraft engines and the market for small marine gas turbines. The Court therefore approved the Commission's reasoning that the merger would strengthen the applicant's pre-merger dominance on the worldwide market for jet engines for large regional aircraft. In that respect the Commission's finding that the merger would prevent customers from enjoying the benefits of price competition was well founded. Furthermore, the Court upheld the Commission's rejection of the commitment proposed by the parties to the merger to resolve the competition problems which the merger created on that market. The Court noted on this point that structural commitments proposed by the parties can be accepted by the Commission only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future. Likewise, the Court rejected GE's arguments criticising the Commission's findings relating to the creation of dominant positions on the market for corporate jet aircraft engines and on the market for small marine gas turbines.

Those findings were sufficient for it to be held that the merger was incompatible with the common market. In its judgment the Court did not therefore annul the decision, although the Commission had made certain errors, in particular in the course of its analysis of the conglomerate effects of the merger.

The Court held that the Commission did not make a manifest error of assessment in concluding that prior to the merger GE was in a dominant position on the market for large commercial jet aircraft engines. For that purpose, the Commission could legitimately conclude that GE had used the commercial strength of subsidiaries in its group, in particular that of its aircraft leasing company, GECAS, to secure contracts which it probably would not have won without those companies' involvement. Conversely, the Court held that three separate limbs of the Commission's decision were unlawful.

First of all, the pillar of the contested decision relating to the strengthening of GE's pre-merger dominant position on the market for large commercial jet aircraft engines, resulting from vertical overlap, was not founded. In particular, the Court noted that the effects on the market anticipated by the Commission were caused by certain future behaviour on the part of the merged entity and that therefore the onus was on the Commission to produce convincing evidence as to the likelihood of that behaviour. In some cases, such evidence may consist of economic studies establishing the likely development of the market situation and demonstrating that there is an incentive for the merged entity to behave in a particular way, without prejudice, however, to the principle that the evaluation of evidence should be unfettered. In this case, the Commission had available all the evidence required to assess to what extent the behaviour in question was liable to constitute abuse

of a dominant position prohibited by Article 82 EC and be sanctioned as such. According to the Court, the Commission was therefore wrong not to have taken into account the deterrent effect of Article 82 in assessing the likelihood of the behaviour in question. The Commission's analysis was, on that account, vitiated by an error of law which necessarily entailed a manifest error of assessment.

The Court then went on to hold that the Commission had not established to a sufficient degree of probability that the merged entity would have extended to the markets on which Honeywell was present (avionics and non-avionics products) GE's practices on the market for large commercial jet aircraft engines, by which GE exploited its leasing subsidiary's financial and commercial strength. In any event, the Commission had not adequately established that those practices, assuming that they had been put into effect, would have been likely to create dominant positions on the various avionics and non-avionics markets concerned. Consequently, the Commission had made a manifest error of assessment on this point too.

Finally, the Court held that the Commission had not sufficiently established that the merged entity would have engaged in bundling of GE's engines and Honeywell's avionics and non-avionics products. In the absence of such sales, the mere fact that the merged entity would have had a wider range of products than its competitors was not sufficient to establish that it could have benefited from the creation or strengthening of dominant positions on the different markets concerned. Consequently, the Commission also made a manifest error of assessment on this point.

The third and final judgment in the sphere of merger control (***Honeywell International v Commission***) concerned the same transaction as that at issue in *General Electric v Commission* ⁽⁹⁶⁾. Less wide ranging than the latter judgment, it nonetheless gave the Court an opportunity to apply the rule that, where the operative part of a decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. Consequently, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because it could not have had a decisive effect on the operative part adopted by the Commission. Applying that rule to Honeywell's action, the Court dismissed the action on the ground that there was no effective plea in law. The applicant had not contested all the pillars of reasoning, each of which constituted a sufficient legal and factual basis for the contested decision. It followed that its action could not have resulted in the annulment of the contested decision, even if all the pleas validly submitted by the applicant had been well founded.

C. State aid

1. Basic rules

a) Constituent elements

There has been no decision of the Court this year which has made any significant contribution to the clarification of the constituent elements of the definition of State aid. How-

⁽⁹⁶⁾ *Honeywell v Commission*, footnote 60 above.

ever, in several cases, the Court has annulled Commission decisions for errors of fact or assessment, or for failure to state reasons.

For instance, in *Freistaat Thüringen v Commission*, the Court raised several failures to state reasons and several factual errors made by the Commission in its examination of certain measures for the benefit of a German company ⁽⁹⁷⁾. Those errors led it to annul the contested decision in part, where necessary raising of its own motion a plea of failure to state reasons.

Similarly, in its judgment in *Confédération nationale du Crédit mutuel v Commission*, the Court annulled, for failure to state reasons, a Commission decision finding that measures adopted by the French Republic involving the collection and management of regulated savings under the 'Livret bleu' system constituted State aid that is incompatible with the common market ⁽⁹⁸⁾. Having found that the operative part of the decision did not make it possible to ascertain the State measure or measures held by the Commission to constitute aid, the Court examined the reasons stated for the decision. Following that examination, it concluded that the analysis, by the decision, of the conditions which must be satisfied for State intervention to be treated as aid did not enable the measures found by the Commission to have conferred aid on Crédit Mutuel to be identified exactly. For example, the Court pointed out several ambiguities in the decision as regards the classification of the tax advantage granted to savers using the 'Livret bleu'. The analysis of the decision did not enable it to be determined clearly whether the Commission considered that the tax exemption constituted a transfer of State resources, while leaving the possibility of such an interpretation open. The Court thus held that it was not in a position to exercise its power to review the appraisal of the 'Livret bleu' system by the Commission.

b) *Decision taken following a request to do so by a Member State*

The judgment in *Regione autonoma della Sardegna v Commission* ⁽⁹⁹⁾ is the first in which the Court reviewed the legality of a decision taken by the Commission after being requested to do so within two months.

In 1998, the Italian authorities notified the Commission of a planned aid scheme for restructuring small agricultural enterprises in difficulty envisaged by the Region of Sardinia, for a total amount of approximately EUR 30 million. The Commission decided in 2001 that the planned scheme was incompatible with the common market. The Region of Sardinia applied to the Court for the annulment of the Commission decision, taking issue inter alia with the finding that it was not certain that the scheme would benefit only enterprises in difficulty nor that it would restore their viability without unduly distorting competition.

⁽⁹⁷⁾ *Freistaat Thüringen v Commission*, footnote 10 above.

⁽⁹⁸⁾ Judgment of 18 January 2005 in Case T-93/02 *Confédération nationale du Crédit mutuel v Commission*, not yet published in the ECR.

⁽⁹⁹⁾ *Regione autonoma della Sardegna v Commission*, footnote 9 above.

Article 7(1) and (7) of Regulation (EC) No 659/1999 ⁽¹⁰⁰⁾ essentially provides, first, that the formal investigation procedure in the area of State aid is to be closed, as a rule, by means of a decision, and, second, that, should the Member State concerned so request, the Commission is, within two months, to take a decision on the basis of the information available to it. In the present case, the Court found that following the suggested period of 18 months during which the Commission is to endeavour to adopt a decision, the Italian Republic requested the Commission to make a decision within two months. In such a case, the Commission must make a decision in the light of the information available to it, and adopt a negative decision if it is not sufficient to establish that the project under consideration is compatible with the common market. In this case the Commission was entitled to take the view that it was not certain that the benefit of the planned aid would be reserved for enterprises in difficulty. It also sought to obtain information which would enable it to assess the effects of the plan on the enterprises intended to benefit and on competition, but the Italian authorities failed to provide such information. The information available to the Commission was thus not sufficient to establish that the project was compatible with the common market, and it was entitled to adopt a negative decision.

c) *Guidelines*

Although, under Article 87 EC, any aid granted by a State which distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States, certain aid may nonetheless be declared compatible with the common market under the conditions established by the Treaty and rules set by the Commission in certain cases in order to bring the exercise of its discretion within guidelines applicable to various types of aid. In particular, the Commission defined, in guidelines often relied upon before the Court, the conditions under which State aid for rescuing and restructuring firms in difficulty may be declared to be compatible with the common market ⁽¹⁰¹⁾. Those conditions include the limitation of aid to the minimum necessary to permit restructuring.

Those rules were at issue inter alia in *Regione autonoma della Sardegna v Commission* ⁽¹⁰²⁾ but this report will concentrate on *Corsica Ferries France v Commission*, in which the Court held that the Commission had made an erroneous appraisal of the question whether the aid was limited to the minimum, a defect which rendered its decision unlawful ⁽¹⁰³⁾. Although the Commission was under a duty to take into account the whole of the net proceeds of disposal realised in implementation of the restructuring plan, it left out of its calculation a sum of EUR 10 million which represented the net proceeds of disposal of the fixed assets of the Société nationale maritime Corse-Méditerranée. The Court observed

⁽¹⁰⁰⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽¹⁰¹⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

⁽¹⁰²⁾ *Regione autonoma della Sardegna v Commission*, footnote 9 above.

⁽¹⁰³⁾ *Corsica Ferries France v Commission*, footnote 13 above.

that although the Commission was, in principle, entitled in the exercise of its broad discretion to proceed on the basis of an approximate evaluation of the net proceeds of the disposal of assets under the restructuring plan, that was not the case here since it had the information necessary to assess the aid exactly.

d) *Abuses*

The EC Treaty prohibits not only aid incompatible with the common market but also misuse of aid. That term is clarified in Article 1(g) of Regulation (EC) No 659/1999 which defines it as 'aid used by the beneficiary in contravention of a decision [not to raise objections, a positive decision, a negative decision or a conditional decision of the Commission]'. In 2005 the Court applied that definition in two cases.

First, in *Saxonia Edelmetalle v Commission* ⁽¹⁰⁴⁾ the Commission had initially authorised the payment of aid to several firms in the former German Democratic Republic. However, five years later the Commission found that the aid had been misused within the meaning of Article 88(2) EC, a finding which was contested by one of the two applicants. In its judgment the Court held that the Commission did not make a manifest error of assessment in adopting the decision without ascertaining what the sums at issue had actually been used for. Although they had been requested to provide a large amount of information about the matter the German authorities had furnished only incomplete replies which could be interpreted in two ways, both of which suggested a finding of misuse of aid. Although it is generally for the Commission to establish that the aid it previously authorised has been misused, it nonetheless falls to the Member State to provide all the evidence requested by the Commission following a request to provide information, in the absence of which the Commission is empowered to adopt a decision closing the formal examination procedure on the basis of the information available.

Then, in *Freistaat Thüringen v Commission*, the Court annulled part of a Commission decision finding that aid had been misused ⁽¹⁰⁵⁾. According to the Court, in order to prove that aid granted under an authorised aid scheme was misused, the Commission must establish that the aid was used in contravention of national rules governing that scheme or additional conditions which were accepted by the Member State at the time the scheme was approved. On the other hand, the breach of a mere additional condition unilaterally imposed by the dispenser of the aid without being expressly provided for by such national rules, as approved by the Commission, cannot be considered sufficient to constitute misuse of aid within the meaning of the first subparagraph of Article 88(2) EC. In this case the Court therefore annulled the Commission decision finding aid granted in breach of a criterion unilaterally fixed by the *Land of Thuringia* to have been misused.

⁽¹⁰⁴⁾ Judgment of 11 May 2005 in Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle v Commission*, not yet published in the ECR.

⁽¹⁰⁵⁾ *Freistaat Thüringen v Commission*, footnote 10 above.

e) *Recovery*

Where it finds that aid is incompatible with the common market, the Commission may order the Member State to recover it from the recipient. The cancellation of unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previously existing situation on the market ⁽¹⁰⁶⁾. According to the case-law, that objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, in other words, the undertakings which have actually benefited from it ⁽¹⁰⁷⁾. However, ascertaining who was the recipient is sometimes difficult in situations where company shares or assets of the undertaking which originally received the aid have been transferred. These complex questions have spawned a substantial body of litigation, illustrated by three cases brought to a close by the Court of First Instance in 2005. Those cases clarified the concept of actually benefiting from aid where aid was granted to a group of firms dissolved before the adoption of the contested decision (*Saxonia Edelmetalle v Commission*), or to a joint venture whose assets were partly transferred before the adoption of the contested decision (*Freistaat Thüringen v Commission* and *CDA Datenträger Albrechts v Commission*).

First, in *Saxonia Edelmetalle v Commission*, the Court clarified the obligations incumbent on the Commission in order to determine who received the aid to be recovered ⁽¹⁰⁸⁾. In this case the aid had originally been granted to a group of firms which no longer existed at the time of the decision, so that the Commission decided to recover the aid from all the firms which were then part of the group without first examining the extent to which they were able to benefit from the aid. The Commission also found that the funds paid over were held by the group's holding company. In those circumstances, the Court held that the Commission could not treat the subsidiaries of that holding as the recipients of the misused aid at issue because they did not actually benefit from it. The Commission was not entitled to take the view that it was not required to examine the extent to which the various firms in the group benefited from the misused aid.

The Court was careful to make clear, however, that, in the light of the circumstances of the case, the Commission was not required to establish, in the contested decision, the extent to which each firm benefited from the amount at issue, but could confine itself to asking the German authorities to recover the aid from its recipient(s), that is to say, from the firm or firms which actually benefited from it. It therefore fell to the Federal Republic of Germany, in the exercise of its Community obligations, to proceed to recover the sum in question. Moreover, should the Member State encounter unforeseen difficulties in implement-

⁽¹⁰⁶⁾ Judgments in Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 20; in Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraph 65; and in Case C-277/00 *Germany v Commission* [2003] ECR I-3925, paragraphs 73 and 74.

⁽¹⁰⁷⁾ By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, to that effect, Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22; in Case C-457/00 *Belgium v Commission* [2003] ECR I-6931, paragraph 55; and *Germany v Commission*, footnote 106 above, paragraph 75).

⁽¹⁰⁸⁾ *Saxonia Edelmetalle v Commission*, footnote 104 above.

ing an order for recovery, it may submit those problems for consideration by the Commission. In such a case the Commission and the Member State concerned must, in accordance with the duty of genuine cooperation stated in particular in Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid ⁽¹⁰⁹⁾.

Secondly and thirdly, in *Freistaat Thüringen v Commission* and *CDA Datenträger Albrechts v Commission* ⁽¹¹⁰⁾ a large number of financial facilities were granted by banks to German public bodies with a view to the construction of a manufacturing plant for compact discs in Albrechts. The plant was the property of a joint venture, the share capital of which was subsequently transferred several times. In addition, following a period of restructuring necessitated by difficulties in the operation of the plant, some of the assets (fixed and current assets, technical know-how and marketing organisation) were purchased by a third company (CDA) while the land on which the company operated, the buildings, the technical infrastructure and the logistical installations remained the property of the joint venture ('LCA'). CDA and LCA then concluded an agreement on the exchange of services. However, as the Commission took the view that the various measures taken by the German authorities constituted State aid incompatible with the common market, it ordered recovery from inter alia LCA and CDA on the ground that those undertakings had continued the business of the original recipient using its production plant.

As regards the two measures in favour of one of the two original owners of the joint venture which owned the plant intended to finance its construction, the Court held that the Commission was, in principle, right to order recovery from LCA ⁽¹¹¹⁾.

However, as regards other aid paid to the group owning the recipient joint venture which was not intended for its restructuring, there is no possibility that it actually benefited from it. Accordingly, LCA could not be regarded as a recipient. Similarly, as regards the aid intended for the joint venture but diverted to companies in the same group, the Commission, when it adopted the contested decision, had at its disposal a body of valid and consistent evidence that the joint venture did not actually benefit from a large proportion of the aid intended for the establishment, consolidation and restructuring of the CD plant. Moreover, that evidence made it possible to determine, at least approximately, the scale of the diversion.

As for the order for recovery from CDA, the Commission justified this essentially on the basis that there was an intention to evade the consequences of its decision. However, in the view of the Court, the existence of such an intention had not been established, still less because the assets were taken over at a market price. As regards the Commission's argument that LCA, which was in liquidation, was viewed as an 'empty shell' from which aid

⁽¹⁰⁹⁾ See, inter alia, Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 58; and Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraph 50.

⁽¹¹⁰⁾ Judgments in *Freistaat Thüringen v Commission*, footnote 10 above, and of 19 October 2005 in Case T-324/00 *CDA Datenträger Albrechts v Commission*, not yet published in the ECR.

⁽¹¹¹⁾ Relying on the judgment in *Belgium v Commission*, footnote 107 above, paragraphs 55 to 62.

could not be recovered, the Court countered that restoration of the previous situation and removal of the distortion of competition resulting from aid unlawfully paid may, in principle, be achieved by the registration as one of the liabilities of the undertaking in liquidation of an obligation relating to repayment of the aid concerned. According to the case-law, such registration would be sufficient to ensure the implementation of a decision ordering the recovery of State aid incompatible with the common market ⁽¹¹²⁾.

2. Procedural matters

a) *Right of interested parties to submit observations*

The procedure for reviewing State aid is, given its general structure, a procedure initiated against the Member State responsible for granting the aid ⁽¹¹³⁾ and not against the recipient or recipients of aid ⁽¹¹⁴⁾. Article 88(2) EC does not require individual notice to be given to particular persons. The Commission is merely required to take steps to ensure that all persons who may be concerned are notified and given an opportunity to put forward their arguments ⁽¹¹⁵⁾. In practice the persons concerned serve as sources of information for the Commission in the administrative procedure initiated under Article 88(2) EC ⁽¹¹⁶⁾.

The Court pointed out in *Saxonia Edelmetalle v Commission*, that the mere fact of being informed of the opening of a formal procedure is not sufficient to enable a party to submit its observations effectively ⁽¹¹⁷⁾. In the light of Article 6(1) of Regulation No 659/1999, the Court held that the decision to open the formal investigation procedure, despite the necessarily temporary nature of the assessment it entails, should be sufficiently precise to enable the parties concerned to participate in an effective manner in the formal investigation procedure during which they will have the opportunity to put forward their arguments. However, in the present case, the applicants had not pleaded that the decision to open the procedure did not contain sufficient reasons to enable them to exercise effectively their right to submit observations and, in any event, by means of its notice in the *Official Journal of the European Communities*, the Commission had enabled the applicants to exercise effectively their right to submit observations.

⁽¹¹²⁾ See, to that effect, Case 52/84 *Commission v Belgium* [1986] ECR 89, paragraph 14, and Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraphs 60 and 62.

⁽¹¹³⁾ Judgments in Case 234/84 *Belgium v Commission 'Meura'* [1986] ECR 2263, paragraph 29, and in Case T-109/01 *Fleuren Compost v Commission* [2004] II-127, paragraph 42.

⁽¹¹⁴⁾ Judgments in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] I-7869, paragraph 83, and in *Fleuren Compost v Commission*, footnote 113 above, paragraph 44.

⁽¹¹⁵⁾ Judgments in Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 17, and in Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405, paragraph 59.

⁽¹¹⁶⁾ Judgment in Case T-266/94 *Skibsværftsforeningen and Others v Commission* [1996] ECR II-1399, paragraph 256.

⁽¹¹⁷⁾ *Saxonia Edelmetalle v Commission*, footnote 104 above.

b) *Reliance before the Court on facts not mentioned during the administrative phase before the Commission*

In *Saxonia Edelmetalle v Commission*, one of the applicants relied before the Court on several facts which were not brought to the attention of the Commission in the administrative procedure ⁽¹¹⁸⁾. The Court upheld the objections of the Commission which argued that those facts were inadmissible. In that regard, the Court relied on the principle that in an action for annulment under Article 230 EC, the legality of a Community measure is to be assessed on the basis of elements of fact and law existing at the time the measure was adopted. In particular, the assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made ⁽¹¹⁹⁾. The Court concluded that an applicant who has participated in the investigation procedure provided for by Article 88(2) EC, cannot rely on factual arguments of which the Commission was unaware and of which it did not inform the Commission in the investigation procedure.

While pointing out that that bar does not necessarily apply by extension to all cases where an undertaking has not participated in the investigation procedure provided for by Article 88(2) EC the Court observes that, in this case, the applicant did not exercise its right to participate in the investigation procedure, although it is common ground that it was referred to specifically several times in the decision to open the investigation procedure. In those circumstances, factual arguments of which the Commission was unaware at the time it adopted the contested decision cannot be raised for the first time before the Court of First Instance as a means of contesting that decision.

That same question arose essentially in *Freistaat Thüringen v Commission* ⁽¹²⁰⁾. In that case, the Court held that where the Member States and other parties concerned consider that certain facts alleged in the decision to open the formal examination procedure are incorrect they must inform the Commission thereof during the administrative procedure as they will otherwise be unable to dispute those facts in the course of the litigation. In the absence of information to the contrary from the parties concerned, the Commission is entitled to base its decision on the facts, even if incorrect, available to it at the time it adopts its final decision, where the facts concerned were the subject of a request by the Commission to the Member State to provide the necessary information. Where, however, the Commission fails to request the Member State to provide it with information on the facts it intends to rely on, it cannot, subsequently, justify any errors of fact by arguing that it was entitled, at the time it adopted its decision closing the formal examination procedure, to rely only on the information available to it at that time.

⁽¹¹⁸⁾ *Saxonia Edelmetalle v Commission*, footnote 104 above.

⁽¹¹⁹⁾ Judgments in *British Airways and Others v Commission*, footnote 115 above, paragraph 81, and in Case T-110/97 *Kneissl Dachstein v Commission* [1999] ECR II-2881, paragraph 47.

⁽¹²⁰⁾ *Freistaat Thüringen v Commission*, footnote 10 above.

D. Community trade mark

In 2005 a great many cases again concerned Council Regulation (EC) No 40/94 of 20 December 1994 on the Community trade mark ⁽¹²¹⁾. The 94 trade mark cases completed thus account for 15 % of the cases disposed of by the Court in 2005.

Under Regulation (EC) No 40/94, registration of a Community trade mark can be refused on the basis of absolute grounds for refusal and on account of relative grounds for refusal.

1. Absolute grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in only three of the total of 17 judgments in cases concerning absolute grounds for refusal of registration ⁽¹²²⁾. In 2005 the case-law dealt essentially with the absolute grounds for refusal based on (i) the fact that the sign in question is not capable of being represented graphically (Articles 4 and 7(1)(a) of Regulation (EC) No 40/94), (ii) lack of distinctive character of the sign for which registration is sought or the fact that it is descriptive (Article 7(1)(b) and (c) of Regulation (EC) No 40/94), or (iii) the fact that the sign is contrary to public policy or to accepted principles of morality (Article 7(1)(f) of Regulation (EC) No 40/94).

a) Signs not capable of being represented graphically

Article 7(1)(a) of Regulation (EC) No 40/94 prohibits the registration of signs which do not conform to the requirements of Article 4 of that regulation. Article 4 provides that 'a Community trade mark may consist of any signs capable of being represented graphically ... provided that such signs are capable of distinguishing the goods or services of one under-

⁽¹²¹⁾ OJ L 11, 14.1.1994, p. 1.

⁽¹²²⁾ Judgments of 12 January 2005 in Case T-334/03 *Deutsche Post Euro Express v OHIM (Europremium)* (under appeal, Case C-121/05 P); of 14 April 2005 in Case T-260/03 *Celltech v OHIM (Celltech)* (under appeal, Case C-273/05 P); and of 25 October 2005 in Case T-379/93 *Peek & Cloppenburg v OHIM (Cloppenburg)*, none yet published in the ECR. The 14 judgments which did not result in annulment were the judgments of 12 January 2005 in Joined Cases T-367/02 to T-369/02 *Wieland-Werke v OHIM (SnTEM, SnPUR, SnMIX)*; of 19 January 2005 in Case T-387/03 *Proteome v OHIM (Bioknowledge)*; of 11 May 2005 in Joined Cases T-160/02 to T-162/02 *Naipes Heraclio Fournier v OHIM — France Cartes (Sword in a pack of cards, Jack of clubs and King of swords)* (under appeal, Case C-311/05 P); of 7 June 2005 in Case T-316/03 *Münchener Rückversicherungs-Gesellschaft v OHIM (MunichFinancialServices)*; of 8 June 2005 in Case T-315/03 *Wilfer v OHIM (Rockbass)* (under appeal, Case C-301/05 P); of 22 June 2005 in Case T-19/04 *Metso Paper Automation v OHIM (Paperlab)*; of 13 July 2005 in Case T-242/02 *Sunrider v OHIM (TOP)*; of 8 September 2005 in Joined Cases T-178/03 and T-179/03 *CeWe Color v OHIM (DigiFilm and DigiFilmMaker)*; of 13 September 2005 in Case T-140/02 *Sportwetten v OHIM — Intertops Sportwetten (Intertops)*; of 15 September 2005 in Case T-320/03 *Citicorp v OHIM (Live Richly)*; of 27 September 2005 in Case T-123/04 *Cargo Partner v OHIM (Cargo Partner)*; of 27 October 2005 in Case T-305/04 *Eden v OHIM (Smell of ripe strawberries)*, none yet published in the ECR; judgment of 30 November 2005 in Case T-12/04 *Almdudler-Limonade v OHIM (Shape of a lemonade bottle)*, not published in the ECR; judgments of 15 December 2005 in Case T-262/04 *BIC v OHIM (Shape of a flint lighter)* and in Case T-263/04 *BIC v OHIM (Shape of an electronic lighter)*, not yet published in the ECR.

taking from those of other undertakings'. In **Eden v OHIM (Smell of ripe strawberries)**, the Court applied those provisions in order to adjudicate, for the first time, on an application for an olfactory mark. It was held in the judgment that the Board of Appeal had lawfully refused to register an olfactory mark, which was not perceived visually, was described by the words 'smell of ripe strawberries' and was accompanied by a colour image depicting a strawberry ⁽¹²³⁾. In fact, a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective. However, that was not the case in this instance, even though the applicant had also submitted a figurative element, since the image of a strawberry forming part of the trade mark application represented only the fruit, which emits a smell supposedly identical to the olfactory sign at issue, and not the smell claimed.

b) *Lack of distinctiveness or fact that the sign is descriptive*

Under Article 7(1) of Regulation (EC) No 40/94, trade marks are not to be registered if they are devoid of distinctive character (subparagraph (b)) or if they consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, time of production of the goods or of rendering of the service, or other characteristics of the goods or service (subparagraph (c)). Article 7(1)(c) of Regulation (EC) No 40/94 prohibits the signs and indications referred to from being reserved to one undertaking alone because they have been registered as trade marks. That provision therefore pursues an aim in the public interest, which requires that such signs and indications may be freely used by all.

The Court held in three cases that the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) had erred in holding the signs at issue to be distinctive or descriptive.

First of all, in **Celltech v OHIM (Celltech)**, the Court found that the Board of Appeal had not demonstrated that the word mark Celltech (in the sense of 'cell technology') was descriptive of the goods and services concerned, which were in the pharmaceutical field ⁽¹²⁴⁾. It had not been explained in what way those terms gave any information about the intended purpose and nature of the goods and services referred to in the application for registration, in particular about the way in which those goods and services were applied to cell technology or how they resulted from it. Since the Board of Appeal had also failed to demonstrate that the word mark at issue was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation (EC) No 40/94, the Court annulled the Board of Appeal's decision.

⁽¹²³⁾ *Eden v OHIM (Smell of ripe strawberries)*, footnote 122 above.

⁽¹²⁴⁾ *Celltech v OHIM (Celltech)*, footnote 122 above.

Second, in ***Deutsche Post Euro Express v OHIM (Europremium)***, the Board of Appeal had been of the view that the mark Europremium was likely to be perceived by consumers as an indication of the notable quality and European origin of the goods and services covered by the trade mark application ⁽¹²⁵⁾. The Court annulled the Board's decision, holding that the words 'euro' and 'premium' comprising the sign were not descriptive of the goods and services claimed by the applicant, namely goods and services relating to postal transport. Since, moreover, the sign Europremium, taken as a whole, did not enable the relevant public to establish a direct and concrete link to the goods and services concerned, the Board of Appeal's decision had to be annulled.

Finally, in ***Peek & Cloppenburg v OHIM (Cloppenburg)***, the Board of Appeal had held that registration of the word mark Cloppenburg for 'retail trade services' was precluded by an absolute ground for refusal, since the mark denoted, in particular, a German town ⁽¹²⁶⁾. The Court, sitting in Chamber in extended composition, nonetheless held that Article 7(1)(c) of Regulation (EC) No 40/94 did not in principle preclude the registration of geographical names which were unknown to the relevant class of persons — or at least unknown as the designation of a geographical location — or of names in respect of which, because of the type of place they designated, it was unlikely that such persons would have believed that the category of goods concerned originated there or was conceived of there. In this case the grounds set out in the contested decision for the purpose of showing that average consumers in Germany knew the sign as a geographical location were not persuasive. In addition, the Board of Appeal had not demonstrated to the required legal standard that there existed, in the eyes of the public concerned, any link between the town or region of Cloppenburg and the category of services concerned, or that the word 'Cloppenburg' might reasonably have been supposed, in the eyes of that public, to designate the geographical origin of the category of services at issue. The Court therefore annulled the Board of Appeal's decision.

Conversely, the following signs were found to be descriptive or devoid of distinctiveness: SnTEM, SnPUR and SnMIX for metallic semi-finished products ⁽¹²⁷⁾; the word mark Bio-knowledge for products containing, or giving access to, information relating to organisms ⁽¹²⁸⁾; a number of figurative signs directly evoking card games for playing cards ⁽¹²⁹⁾; the word mark MunichFinancialServices for financial services ⁽¹³⁰⁾; the word mark Rock-

⁽¹²⁵⁾ *Deutsche Post Euro Express v OHIM (Europremium)*, footnote 122 above.

⁽¹²⁶⁾ *Peek & Cloppenburg v OHIM (Cloppenburg)*, footnote 122 above.

⁽¹²⁷⁾ *Wieland-Werke v OHIM (SnTEM, SnPUR, SnMIX)*, footnote 122 above.

⁽¹²⁸⁾ *Proteome v OHIM (Bioknowledge)*, footnote 122 above.

⁽¹²⁹⁾ *Naipes Heraclio Fournier v OHIM — France Cartes (Sword in a pack of cards, Jack of clubs and King of swords)*, footnote 122 above.

⁽¹³⁰⁾ *Münchener Rückversicherungs-Gesellschaft v OHIM (MunichFinancialServices)*, footnote 122 above.

bass for musical instruments and accessories ⁽¹³¹⁾; the word mark Paperlab for computer equipment and measuring installations for surveying and testing of paper ⁽¹³²⁾; the word marks DigiFilm and DigiFilmMaker for apparatus for recording, storing and processing digital data ⁽¹³³⁾; the word mark Live Richly for financial and monetary services ⁽¹³⁴⁾; the word mark Cargo Partner for services for the transport, packaging and storage of goods ⁽¹³⁵⁾; the shape of a transparent lemonade bottle with stippled upper and lower parts ⁽¹³⁶⁾; and two shapes of lighters for an electronic lighter and a flint lighter, respectively ⁽¹³⁷⁾. The word mark TOP was also found to be devoid of distinctive character, since it could not be regarded as appropriate for the purpose of identifying the commercial origin of the goods which it designated and, therefore, of performing the essential function of a trade mark ⁽¹³⁸⁾.

c) *Trade mark contrary to public policy or to accepted principles of morality*

Article 7(1)(f) of Regulation No 40/94 provides that ‘trade marks which are contrary to public policy or to accepted principles of morality’ are not to be registered. In **Sportwetten v OHIM — Intertops Sportwetten (Intertops)**, the applicant had sought a declaration of invalidity under that provision in respect of a figurative mark registered for betting services and OHIM had rejected its application ⁽¹³⁹⁾. The applicant based its arguments on the fact that, pursuant to national legislation authorising only undertakings licensed by the competent authorities to offer services connected with gambling, the proprietor of the mark was prohibited, in Germany, from offering the services in question and from advertising them. That contention gave the Court an opportunity to point out that it was the trade mark itself, namely the sign in relation to the goods or services as they appeared upon registration of the trade mark, which was to be assessed in order to determine whether it was contrary to public policy or accepted principles of morality; consequently the fact that the proprietor of the mark was prohibited, in Germany, from offering the services in question and from advertising them could not be regarded as relating to the intrinsic qualities of that trade mark and have the effect of rendering the trade mark itself contrary to public policy or accepted principles of morality.

⁽¹³¹⁾ *Wilfer v OHIM (Rockbass)*, footnote 122 above.

⁽¹³²⁾ *Metso Paper Automation v OHIM (Paperlab)*, footnote 122 above.

⁽¹³³⁾ *CeWe Color v OHIM (DigiFilm and DigiFilmMaker)*, footnote 122 above.

⁽¹³⁴⁾ *Citicorp v OHIM (Live Richly)*, footnote 122 above.

⁽¹³⁵⁾ *Cargo Partner v OHIM (Cargo Partner)*, footnote 122 above.

⁽¹³⁶⁾ *Almdudler-Limonade v OHIM (Shape of a lemonade bottle)*, footnote 122 above.

⁽¹³⁷⁾ *BIC v OHIM (Shape of a flint lighter)*, footnote 122 above, and *BIC v OHIM (Shape of an electronic lighter)*, footnote 122 above.

⁽¹³⁸⁾ *Sunrider v OHIM (TOP)*, footnote 122 above.

⁽¹³⁹⁾ *Sportwetten v OHIM — Intertops Sportwetten (Intertops)*, footnote 122 above.

2. Relative grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in nine of the 42 judgments examining the Boards' assessment of relative grounds for refusal of registration ⁽¹⁴⁰⁾. The main points made by those judgments concern, first, the comparison of word marks and complex figurative marks and, second, the protection conferred where genuine use has been made of a trade mark.

⁽¹⁴⁰⁾ Judgments of 20 April 2005 in Case T-211/03 *Faber Chimica v OHIM — Nabersa (Faber)* and Case T-318/03 *Atomic Austria v OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)*; of 4 May 2005 in Case T-22/04 *Reemark v OHIM — Bluenet (Westlife)*; of 15 June 2005 in Case T-184/04 *Spa Monopole v OHIM — Spaform (Spaform)* and Case T-7/04 *Shaker v OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)* (under appeal, Case C-334/05 P); of 7 July 2005 in Case T-385/03 *Miles International v OHIM — Biker Miles (Biker Miles)*; of 14 July 2005 in Case T-126/03 *Reckitt Benckiser (España) v OHIM — Aladin (Aladin)*; of 5 October 2005 in Case T-423/04 *Bunker & BKR v OHIM — Marine Stock (BKR)*, and of 17 November 2005 in Case T-154/03 *Biofarma v OHIM — Bausch & Lomb Pharmaceuticals (ALREX)*, none yet published in the ECR. The 33 judgments which did not result in annulment are the judgments of 1 February 2005 in Case T-57/03 *SPAG v OHIM — Dann and Backer (Hooligan)*; of 15 February 2005 in Case T-296/02 *Lidl Stiftung v OHIM — REWE-Zentral (Lindenhof)*; Case T-169/02 *Cervecería Modelo v OHIM — Modelo Continente Hipermercados (Negra Modelo)*; of 1 March 2005 in Case T-185/03 *Fusco v OHIM — Fusco International (Enzo Fusco)*; Case T-169/03 *Sergio Rossi v OHIM — Sissi Rossi (Sissi Rossi)* (under appeal, Case C-214/05 P), none yet published in the ECR; of 8 March 2005 in Case T-32/03 *Leder & Schuh v OHIM — Schuhpark Fascies (JELLO Schuhpark)*, not published in the ECR; of 9 March 2005 in Case T-33/03 *Osoetspa v OHIM — Distribution & Marketing (Hai)*; of 16 March 2005 in Case T-112/03 *L'Oréal v OHIM — Revlon (Flexi Air)* (under appeal, Case C-235/05 P), not yet published in the ECR; of 13 April 2005 in Case T-353/02 *Duarte y Beltrán v OHIM — Mirato (Intea)*; Case T-286/03 *Gillette v OHIM — Wilkinson Sword (Right Guard Xtreme sport)*, not published in the ECR; of 20 April 2005 in Case T-273/02 *Krüger v OHIM — Calpis (CALPICO)*; of 21 April 2005 in Case T-269/02 *PepsiCo v OHIM — Intersnack Knabber-Gebäck (Ruffles)*; Case T-164/03 *Ampafrance v OHIM — Johnson & Johnson (monBeBé)*; of 4 May 2005 in Case T-359/02 *Chum v OHIM — Star TV (Star TV)*; of 11 May 2005 in Case T-31/03 *Grupo Sada v OHIM — Sada (Grupo Sada)*; Case T-390/03 *CM Capital Markets v OHIM — Caja de Ahorros de Murcia (CM)*; of 25 May 2005 in Case T-352/02 *Creative Technology v OHIM — Vila Ortiz (PC WORKS)* (under appeal, Case C-314/05 P); Case T-67/04 *Spa Monopole v OHIM — Spa-Finders Travel Arrangements (Spa-finders)*; Case T-288/03 *TeleTech Holdings v OHIM — Teletech International (Teletech Global Ventures)* (under appeal, Case C-312/05 P); of 7 June 2005 in Case T-303/03 *Lidl Stiftung v OHIM — REWE-Zentral (Salvita)*; of 22 June 2005 in Case T-34/04 *Plus v OHIM — Bälz et Hiller (Turkish Power)* (under appeal, Case C-324/05 P); of 28 June 2005 in Case T-301/03 *Canali Ireland v OHIM — Canal Jean (Canal Jean CO New York)*; of 13 July 2005 in Case T-40/03 *Murúa Entren v OHIM — Bodegas Murúa (Julián Murúa Entrena)*; of 14 July 2005 in Case T-312/03 *Wassen International v OHIM — Stroschein Gesundkost (Selenium-ACE)*; of 22 September 2005 in Case T-130/03 *Alcon v OHIM — Biofarma (Travatan)* (under appeal, Case C-412/05 P); of 27 October 2005 in Case T-336/03 *Éditions Albert René v OHIM — Orange (Mobilix)*; of 23 November 2005 in Case T-396/04 *Sofass v OHIM — Sodipan (Nicky)*; of 24 November 2005 in Case T-346/04 *Sadas v OHIM — LTJ Diffusion (Arthur et Felicie)*; Case T-3/04 *Simonds Farsons Cisk v OHIM — Spa Monopole (Kinji by Spa)*; Case T-135/04 *GfK v OHIM — BUS (Online Bus)*; of 8 December 2005, in Case T-29/04 *Castellblanch v OHIM — Champagnes Roederer (Cristal Castellblanch)*, none yet published in the ECR; of 14 December 2005 in Case T-169/04 *Arysta Lifescience v OHIM — BASF (Carpovirusine)*; and of 15 December 2005 in Case T-384/04 *RB Square Holdings Spain v OHIM — Unelko (cleanx)*, not published in the ECR.

a) *Complex figurative marks and word marks*

In four of the cases in which the Court annulled decisions of the Boards of Appeal, it was because of one or more errors in the Board of Appeal's assessment of the likelihood of confusion between word marks and complex figurative marks, consisting of two or more categories of mark, combining, for example, letters and a graphic element.

For example, in ***Faber Chimica v OHIM — Nabersa (Faber)***, the Court held that OHIM had erred in finding visual similarity between the word mark *naber* and a complex figurative mark which, although it included the word element 'faber', also included a significant figurative element consisting of an invented construction requiring a conceptual effort of construction ⁽¹⁴¹⁾. In its judgment the Court also decided that there was a phonetic difference between the two marks and consequently, following an overall assessment taking account, in particular, of the fact that the relevant public was a specialised public, the Court found that the marks at issue were not similar.

Likewise, in ***Shaker v OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)***, the Court rejected the Board of Appeal's assessment holding, contrary to the Board, that in a complex figurative mark composed, among other things, of a round dish decorated with lemons and the word *Limoncello*, the figurative element was dominant and had nothing in common with the earlier word mark *Limonchelo* ⁽¹⁴²⁾.

In another case, ***Miles Handelsgesellschaft International v OHIM — Biker Miles (Biker Miles)***, the Board of Appeal had erred in finding that certain figurative elements (particularly a road with a circle round it) and the verbal element ('biker') were significant in respect of the overall impression produced by a figurative mark, whilst the dominant element in that figurative mark was, in fact, another verbal element ('miles'), which gave rise to confusion with the earlier word mark *Miles* ⁽¹⁴³⁾.

Lastly, in ***Bunker & BKR v OHIM — Marine Stock (BKR)***, the Board of Appeal had correctly identified the dominant element of a composite figurative mark (B.K.R.) but had, however, erred in its assessment of the mark's visual and aural similarity with an earlier word mark (BK Rods) ⁽¹⁴⁴⁾.

b) *Scope of the protection conferred by genuine use of the trade mark*

Under Article 43(2) of Regulation (EC) No 40/94, if the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition must furnish proof that, during the period of five years preceding the date of publication of the Community

⁽¹⁴¹⁾ *Faber Chimica v OHIM — Nabersa (Faber)*, footnote 140 above.

⁽¹⁴²⁾ *Shaker v OHIM — Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)*, footnote 140 above.

⁽¹⁴³⁾ *Miles International v OHIM — Biker Miles (Biker Miles)*, footnote 140 above.

⁽¹⁴⁴⁾ *Bunker & BKR v OHIM — Marine Stock (BKR)*, footnote 140 above.

trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. Article 43(2) also provides '[i]f the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services'. Article 43(3) of Regulation (EC) No 40/94 applies those principles to earlier national marks.

Three judgments delivered in 2005 looked in greater detail at the meaning of genuine use and the scope of the protection conferred by such use.

First, concerning genuine use, the Court confirmed in its judgments in **GfK v OHIM and Castellblanch v OHIM** that proof of such use 'also includes proof of use of the earlier mark in a form that differs in respect of elements which do not alter the distinctive character of that trade mark in the form registered' ⁽¹⁴⁵⁾.

Second, in **Reckitt Benckiser (España) v OHIM — Aladin (Aladin)**, the Court defined the scope of products protected where there has been genuine use of the mark in relation to part only of the goods or services ⁽¹⁴⁶⁾. The Court interpreted the reference in Article 43(2) of Regulation (EC) No 40/94 to use in part as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Therefore, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

By providing, in this instance, undisputed proof of genuine use of the mark in respect of a 'product for polishing metals consisting of cotton impregnated with a polishing agent (magic cotton)', which is a 'polish for metals' within the meaning of the sub-category of goods to which the earlier mark relates, the applicant had properly established that the mark had been put to genuine use for that sub-category as a whole. As a consequence, in deeming, for the purposes of the examination of the opposition, the earlier mark to be registered solely for a 'product for polishing metals consisting of cotton impregnated with a polishing agent (magic cotton)', the Board of Appeal had applied Article 43(2) and 3 of Regulation (EC) No 40/94 incorrectly.

⁽¹⁴⁵⁾ *GfK v OHIM — BUS (Online Bus)*, footnote 140 above, and *Castellblanch v OHIM — Champagne Roederer (Cristal Castellblanch)*, footnote 140 above.

⁽¹⁴⁶⁾ *Reckitt Benckiser (España) v OHIM — Aladin (Aladin)*, footnote 140 above.

3. Formal and procedural issues

a) Procedure before the Board of Appeal

Language of proceedings in *ex parte* proceedings

Article 115(4) of Regulation (EC) No 40/94, which lays down the rules governing the language of *ex parte* proceedings before OHIM, states that the language of proceedings is to be the language used for filing the application for a Community trade mark. The same provision confers on OHIM the right to send written communications to the applicant in the second language indicated by the latter if the application for a Community trade mark was filed in a language other than the languages of OHIM. According to the case-law, the proceedings comprise all such acts as must be carried out in processing an application and therefore the term ‘procedural documents’ covers, for the purposes of Article 115(4) of Regulation (EC) No 40/94, any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing, be they notifications, requests for correction, clarification or other documents. All such documents must therefore be drawn up by OHIM in the language used for filing the application ⁽¹⁴⁷⁾.

In ***Sunrider v OHIM (TOP)***, the Court held that OHIM had infringed Article 115(4) of Regulation (EC) No 40/94 by sending a number of documents to the applicant in English even though the application had been filed in Greek and English had been indicated only as the second language ⁽¹⁴⁸⁾. The Court refused, however, to annul the Board of Appeal’s decision, since it was clear from the documents produced by the applicant that it had been able to understand fully the communications concerned and that consequently its rights of defence had not been prejudiced.

Rules of evidence

— Facts and evidence submitted in *ex parte* proceedings before the Board of Appeal

Under the third sentence of Article 59 of Regulation (EC) No 40/94, in appeals against decisions of the examiners, a written statement setting out the grounds of appeal must be filed within four months after the date of notification of the decision.

In ***Wilfer v OHIM (Rockbass)***, the Court held that Article 59 could not be construed as preventing new facts or evidence submitted during the hearing of an appeal on an absolute ground for refusal from being taken into account after the expiry of the prescribed period within which the grounds of appeal must be presented. In the Court’s view, Article 74(2) of Regulation (EC) No 40/94, which provides that OHIM may disregard facts or evidence which are not

⁽¹⁴⁷⁾ Case C-361/01 P *Kik v OHIM* [2003] ECR I-8283.

⁽¹⁴⁸⁾ *Sunrider v OHIM (TOP)*, footnote 122 above.

submitted in due time by the parties concerned, allows the Board of Appeal discretion in taking into account additional evidence produced after that period has expired ⁽¹⁴⁹⁾. However, although the Board of Appeal had wrongly refrained from examining a statement produced by the applicant nine days before the Board of Appeal adopted its decision, the Court did not annul the decision, since the statement concerned did not contain any new arguments or new evidence that was likely to affect the substance of the contested decision.

— Request for proof of genuine use of the earlier mark

Pursuant to Article 43(2) and (3) of Regulation (EC) No 40/94, for the purposes of examining an opposition introduced under Article 42 of that regulation, the earlier mark is presumed to have been put to genuine use as long as the applicant does not request proof of such use. The presentation of such a request therefore has the effect of shifting the burden of proof to the opponent to demonstrate genuine use (or the existence of proper reasons for non-use) if his opposition is not to be dismissed. For that to occur, the request must be made expressly and in sufficient time to OHIM.

In ***L'Oréal v OHIM — Revlon (Flexi Air)***, the Board of Appeal had held that L'Oréal's request for proof of genuine use of an earlier mark relied on by Revlon, the opponent, had not been submitted within the time limit set and did not need to be taken into account for the decision on the opposition ⁽¹⁵⁰⁾. The Court upheld that finding, noting that genuine use of the earlier mark was a matter which, once raised by the applicant for the trade mark, had to be settled before a decision was given on the opposition proper. Furthermore, the fact that the Board of Appeal had not mentioned the request for proof of genuine use, although it had been repeated by the applicant before it, could not justify annulment of the contested decision, since the factual situation had remained identical to that on which the Opposition Division had been required to rule: consequently the Board of Appeal was lawfully entitled to hold, like the Opposition Division, that the request made subsidiarily before it had not been submitted in time.

— Freedom as to the form of evidence

The Court made some important points on the freedom as to the form of evidence before the Boards of Appeal. In ***Atomic Austria v OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)***, OHIM had rejected an opposition on the basis that the certificates showing that the opponent's marks were registered were not accompanied by proof that the marks concerned had been renewed ⁽¹⁵¹⁾. The Court held that, on the one hand, an opponent is free to choose the evidence he considers useful to submit to OHIM in support of his opposition and that, on the other hand, OHIM is

⁽¹⁴⁹⁾ *Wilfer v OHIM (Rockbass)*, footnote 122 above.

⁽¹⁵⁰⁾ *L'Oréal v OHIM — Revlon (Flexi Air)*, footnote 140 above.

⁽¹⁵¹⁾ *Atomic Austria v OHIM — Fabricas Agrupadas de Muñecas de Onil (Atomic Blitz)*, footnote 140 above.

obliged to examine all the evidence submitted to it in order to determine whether it does prove that the earlier mark was registered or filed, and cannot reject out of hand a particular type of evidence on the basis of the form it takes. If OHIM could impose conditions as to the form of the evidence to be produced, the result would be that in some cases the parties would find it impossible to produce such evidence, for example if a national patent office did not issue official documents to certify the renewal of a mark. In this case OHIM had rejected the opposition supported by the certificates produced by the applicant, relying on a presumption about the length of the protection period for marks under Austrian law. That presumption was legally correct but if OHIM, as it ought to have done, had verified it from the point of view of Austrian law, it would have found that the presumption had to be reversed. The Court thus annulled the Board of Appeal's decision.

— **Application of the principle that decisions must be adopted within a reasonable time before the Boards of Appeal**

In ***Sunrider v OHIM (TOP)***, the Court held that the principle that decisions must be adopted within a reasonable time applied to proceedings before the various adjudicating bodies of OHIM, including the Boards of Appeal, but that, as in the other areas in which the principle applies, infringement of the principle, assuming it is established, does not justify annulment of the contested decision in every case ⁽¹⁵²⁾.

b) *Proceedings before the Court*

Admissibility of the forms of order sought by OHIM

There were, once again, a large number of judgments in 2005 concerning the admissibility of the forms of order sought by OHIM, by which OHIM either left the matter to the Court's discretion or sought annulment of a decision of one of its Boards of Appeal.

In, for example, ***Reemark v OHIM — Bluenet (Westlife)***, OHIM had stated that it wished to support the form of order sought, and the pleas in law advanced, by the applicant but had nonetheless formally requested that the action be dismissed solely because it considered itself obliged to do so in view of the case-law of the Court ⁽¹⁵³⁾. In that case, and likewise in ***Spa Monopole v OHIM — Spaform (Spaform)*** ⁽¹⁵⁴⁾, the Court recalled the principle that, in proceedings concerning an action brought against a decision of an OHIM Board of Appeal adjudicating in opposition proceedings, OHIM does not have power to alter, by the position which it adopts before the Court of First Instance, the terms of the dispute, as delimited in the respective claims and contentions of the applicant for registration and of the opposing party ⁽¹⁵⁵⁾. The Court nonetheless found that it did not follow from the case-law

⁽¹⁵²⁾ *Sunrider v OHIM (TOP)*, footnote 122 above.

⁽¹⁵³⁾ *Reemark v OHIM — Bluenet (Westlife)*, footnote 140 above.

⁽¹⁵⁴⁾ *Spa Monopole v OHIM — Spaform (Spaform)*, footnote 140 above.

⁽¹⁵⁵⁾ Judgment of 12 October 2004 in Case C-106/03 P *Vedial v OHIM*, not yet published in the ECR, paragraphs 26 to 38.

that OHIM was obliged to claim that an action brought against a decision of one of its Boards of Appeal should be dismissed, since, although OHIM does not have the requisite capacity to bring an action against a decision of a Board of Appeal, conversely it cannot be required to defend systematically every contested decision of a Board of Appeal or to claim automatically that every action challenging such a decision should be dismissed. The Court therefore held that OHIM, although not able to alter the terms of the dispute, could claim that the form of order sought by whichever one of the parties it might choose should be allowed and could put forward arguments in support of the pleas in law advanced by that party. However, it also observed in *Reemark v OHIM* that it cannot independently seek an order for annulment or put forward pleas for annulment which have not been raised by the other parties.

In ***Peek & Cloppenburg v OHIM (Cloppenburg)***, which concerned *ex parte* proceedings, OHIM supported, in essence, the applicant's claim for annulment of the contested decision but considered that that approach would be tantamount to accepting the applicant's request and would relieve the Court of the need to give a ruling ⁽¹⁵⁶⁾. OHIM had, in consequence, refrained from formulating a particular form of order and had, at the hearing, left the matter to the Court's discretion. The Court, having recalled the principles set out above and applied them to *ex parte* proceedings, noted that OHIM had clearly expressed its intention to support the claims and pleas in law put forward by the applicant. It therefore reformulated the form of order sought by OHIM and deemed OHIM to have pleaded in essence that the applicant's claim should be allowed. Moreover, contrary to OHIM's contention, the action had not become devoid of purpose on account of the correspondence of the parties' arguments on the substance of the case, since it had not been possible to amend or withdraw the decision of the Board of Appeal because of the latter's independence.

Admissibility of new matters of fact and law before the Court

In ***Solo Italia v OHIM — Nuova Sala (Parmitalia)***, the Court held that its review of the legality of a decision by a Board of Appeal had to be carried out with regard to the issues of law raised before the Board of Appeal ⁽¹⁵⁷⁾. It therefore declined to examine a plea in law alleging infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which had not been raised before OHIM.

The Court took the same restrictive approach in ***SPAG v OHIM — Dann and Backer (Hooligan)***: it recalled the principle that a review of the legality of decisions of the Boards of Appeal in the context of Regulation (EC) No 40/94 must, pursuant to Article 74 of the regulation, be carried out in the light of the factual and legal context of the dispute as it was brought before the Board of Appeal ⁽¹⁵⁸⁾. More specifically, as regards

⁽¹⁵⁶⁾ *Peek & Cloppenburg v OHIM (Cloppenburg)*, footnote 122 above.

⁽¹⁵⁷⁾ Judgment of 31 May 2005 in Case T-373/03 *Solo Italia v OHIM — Nuova Sala (Parmitalia)*, not yet published in the ECR.

⁽¹⁵⁸⁾ *SPAG v OHIM — Dann and Backer (Hooligan)*, footnote 140 above. See also, to that effect, *Citicorp v OHIM (Live Richly)*, footnote 122 above.

the factual context of the proceedings, the Court concluded from Article 74 of Regulation (EC) No 40/94 that no contention of illegality on the part of OHIM may be made regarding matters of fact which were not submitted to it and that, accordingly, matters of fact which are relied on before the Court without having been submitted previously before any of the bodies of OHIM must be dismissed. As regards the legal framework of the dispute, the Court stated that 'the matters of law relied on before the Court of First Instance which have not been raised previously before the bodies of OHIM, in so far as they relate to a matter of law which it was not necessary to resolve in order to ensure a correct application of Regulation (EC) No 40/94 having regard to the facts, evidence and arguments provided by the parties, cannot affect the legality of a decision of the Board of Appeal relating to the application of a relative ground for refusal, since they do not form part of the legal framework of the dispute as it was brought before the Board of Appeal. They are, consequently, inadmissible. By contrast, when a rule of law must be upheld or a matter of law must be ruled upon in order to ensure a correct application of Regulation (EC) No 40/94 having regard to the facts, evidence and arguments provided by the parties, a matter of law relating to that issue may be relied upon for the first time before the Court'.

4. Operational continuity of the adjudicating bodies of OHIM

It follows from the principle of continuity in terms of functions as between the adjudicating bodies of OHIM that, within the scope of application of Article 74(1), *in fine*, of Regulation No 40/94 (which restricts, in proceedings relating to relative grounds for refusal of registration, the examination to the facts, evidence and arguments provided by the parties and the relief sought), the Board of Appeal is required to base its decision on all the matters of fact and of law which the party concerned introduced either in the proceedings before the body which heard the application at first instance or in the appeal, subject only to Article 74(2) of Regulation (EC) No 40/94 (the fact that OHIM disregards facts or evidence which are not submitted in due time by the parties concerned) ⁽¹⁵⁹⁾.

In ***Focus Magazin Verlag v OHIM***, the Opposition Division had rejected the applicant's opposition on the ground that, since it had failed to provide a complete translation of the certificate of registration of its German trade mark, it had not adduced proof of the existence of its earlier mark ⁽¹⁶⁰⁾. The Board of Appeal had in turn refused to take into

⁽¹⁵⁹⁾ Case T-308/01 *Henkel v OHIM — LHS (UK) (Kleencare)* [2003] ECR II-3253, paragraph 32. It should be noted on this point that Commission Regulation (EC) No 1041/2005 of 29 June 2005 amending Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ L 172, 5.7.2005, p. 4), provides that '[w]here the appeal is directed against a decision of an opposition division, the board shall limit its examination of the appeal to facts and evidence presented within the time limits set in or specified by the opposition division in accordance with the regulation and these rules, unless the board considers that additional or supplementary facts and evidence should be taken into account pursuant to Article 74(2) of the regulation'.

⁽¹⁶⁰⁾ Judgment of 9 November 2005 in Case T-275/03 *Focus Magazin Verlag v OHIM — ECI Telecom (Hi-FOCuS)*, not yet published in the ECR.

account the translation of the German certificate of registration, which had been produced for the first time before it. The Court censured that approach relying on the principle of continuity in terms of functions as between the adjudicating bodies of OHIM and holding that the document in question was not submitted out of time for the purposes of Article 74(2) of Regulation (EC) No 40/94, but was annexed to the pleading lodged by the applicant before the Board of Appeal, that is, within the four-month time limit laid down in Article 59 of Regulation (EC) No 40/94 ⁽¹⁶¹⁾.

By contrast, in **TeleTech Holdings v OHIM — Teletech International (Teletech Global Ventures)**, the Court held that, although it followed from the principle of continuity of functions as between the Boards of Appeal and the OHIM bodies ruling at first instance that the former are bound to consider, in the light of all the relevant matters of fact and of law, whether or not a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling, conversely in proceedings concerning the relative grounds for refusal of registration or for invalidity, operational continuity does not entail the obligation or even the opportunity for the Board of Appeal to extend its consideration of a relative ground for invalidity to facts, evidence or arguments which the parties have not invoked either before the Cancellation Division or the Board of Appeal ⁽¹⁶²⁾.

E. Access to documents

In 2005, the nine decisions made by the Court of First Instance ruling on decisions on requests for access to documents on the basis of Regulation (EC) No 1049/2001 ⁽¹⁶³⁾ served to confirm, in one case, that the Court exercised only a restricted review over decisions refusing access on the basis of a public interest exception (Article 4(1)(a) of Regulation (EC) No 1049/2001) ⁽¹⁶⁴⁾ and, in seven other cases, that the refusal by a Member State as regards a request for disclosure of a document originating from it (or drawn up on its behalf) is binding on the Commission and therefore prevents it from disclosing it ⁽¹⁶⁵⁾.

⁽¹⁶¹⁾ See, to the same effect, *GfK v OHIM — BUS (Online Bus)*, footnote 140 above.

⁽¹⁶²⁾ *TeleTech Holdings v OHIM — Teletech International (Teletech Global Ventures)*, footnote 140 above.

⁽¹⁶³⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

⁽¹⁶⁴⁾ Judgment of 26 April 2005 in Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* (under appeal, Case C-266/05 P), not yet published in the ECR.

⁽¹⁶⁵⁾ Judgment of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* (under appeal C-64/05 P), not yet published in the ECR. See judgment of 17 March 2005 in Case T-187/03 *Scippacercola v Commission*, not yet published in the ECR; orders of 8 June 2005 in Case T-139/03 *Nuova Agricast v Commission*, in Case T-287/03 *SIMSA v Commission*, in Case T-295/03 *Poli Sud v Commission*, in Case T-297/03 *Tomasetto Achille v Commission*, in Case T-298/03 *Bieffe v Commission*, not published in the ECR, and in Case T-299/03 *Nuova Faudi v Commission*, not yet published in the ECR.

In the ninth decision, in *VKI v Commission*, the Court clarified the conditions governing the treatment by the institutions of a request for access to a large number of documents ⁽¹⁶⁶⁾. In that case, the Verein für Konsumenteninformation (VKI), an association of Austrian consumers, had made a request to the Commission for access to its administrative file in a competition procedure resulting in a decision censuring eight Austrian banks for their participation in a cartel (known as the 'Lombard Club'). The Commission refused that request in its entirety and the VKI brought an action for annulment of that refusal before the Court.

The Court held that since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted.

In this case, the Court found that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents. Consequently, the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible.

However, the Court added that a derogation from that obligation to examine the documents may be permissible in exceptional cases where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required. In such a situation, the institution is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. The institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access.

In this case, it was not apparent from the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned. As a result, the Court annulled the decision.

⁽¹⁶⁶⁾ *Verein für Konsumenteninformation v Commission*, footnote 8 above.

F. Common foreign and security policy (CFSP) — Fight against terrorism

Over the last few years, a substantial number of actions have been brought against specific restrictive measures directed against certain persons and entities with a view to combating terrorism, which led the Court to rule, in 2005, in five cases on this subject. Three of those cases were held inadmissible either on the ground of the applicant's lack of standing to bring proceedings ⁽¹⁶⁷⁾ or, in the last of them, on the ground that the Court manifestly had no jurisdiction and the action was out of time ⁽¹⁶⁸⁾. However, the Court ruled on the substance of two other cases which allowed it to establish very important principles as regards, in particular, the relationship between the provisions of the Community legal order and those of the United Nations Charter ⁽¹⁶⁹⁾.

Before and after the terrorist attacks of 11 September 2001, the Security Council of the United Nations adopted several resolutions concerning the Taliban, Osama bin Laden, the Al-Qaeda network and the persons and bodies associated with them. By those resolutions, all the Member States of the United Nations are required to freeze funds and other financial resources under the direct or indirect control of those persons and bodies. A sanctions committee was tasked with identifying the subjects concerned and the financial resources to be frozen and considering requests for derogations. Those resolutions were implemented in the Community by several common positions and Council regulations ordering the freezing of the funds of the persons and bodies concerned. Several of them sought the annulment of those regulations before the Court.

In its judgments, the Court held, first, that reliance on Articles 60 EC, 301 EC and 308 EC in combination as a legal basis made it possible, in the field of economic and financial sanctions, to attain the objective pursued by the Union and its Member States under the CFSP. Having held that the Council was competent to adopt the contested regulation, the Court considered the applicants' plea alleging breach of their fundamental rights enshrined in Community law and the ECHR. Since the contested regulations applied decisions taken by the Security Council of the United Nations, consideration of that plea led the Court to consider, as a preliminary issue, the relationship between the international legal order under the United Nations and the domestic or Community legal order. The Court found, on that point, that under international law, the obligations of the Member States of the United Nations under the Charter of that organisation clearly prevail over every other obligation including their obligations under the ECHR and under the EC Treaty and that primacy extends to decisions of the Security Council taken pursuant to Title VII of the Charter. Moreover, although it is not itself a Member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the

⁽¹⁶⁷⁾ Orders of 15 February 2005 in Case T-206/02 *KNK v Council* and in Case T-229/02 *PKK and KNK v Council* (under appeal, Case C-229/05 P), not yet published in the ECR.

⁽¹⁶⁸⁾ Order of 18 November 2005 in Case T-299/04 *Selmani v Council and Commission*, not yet published in the ECR.

⁽¹⁶⁹⁾ Judgments of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* (under appeal, Case C-415/05 P), and in Case T-315/01 *Kadi v Council and Commission* (under appeal, Case C-402/05 P), not yet published in the ECR.

same way as its Member States, by virtue of the Treaty establishing it. Accordingly, first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.

The Court went on to analyse the implications of this principle for its judicial review of regulations which merely implement the decisions of the Security Council of the United Nations. The Court observed in that regard that any review of the internal lawfulness of the contested regulation would therefore imply that the Court is to consider, indirectly, the lawfulness of those decisions. In view of their primacy, those decisions fall outside the ambit of the Court's judicial review so that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law or of the fundamental rights enshrined in the Community legal order. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations. Nonetheless, the Court considers itself empowered to check the lawfulness of the contested regulation and, indirectly, the lawfulness of the decisions of the Security Council which that regulation implements, with regard to superior rules of international law falling within the ambit of *jus cogens*, understood as a body of higher rules of public international law from which neither the Member States nor the bodies of the United Nations may derogate and which include inter alia mandatory provisions concerning the universal protection of fundamental human rights.

The Court then reviewed the regulation in the light of those principles and found that the freezing of funds provided for by the contested regulation does not infringe the applicants' fundamental rights, as protected by *jus cogens*. In particular, the regulation does not infringe the applicants' right to property provided that it is protected by *jus cogens*. As regards the right to a fair hearing, the Court observes that no rule of *jus cogens* requires a prior hearing for the persons concerned by the Sanctions Committee, and, moreover, the resolutions at issue set up a mechanism for the re-examination of individual cases.

On the question of the right to an effective judicial remedy, the Court observed that, in dealing with the action brought by the applicants it carries out a complete review of the lawfulness of the contested regulation with regard to observance by the Community institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. It also reviews the lawfulness of the contested regulation having regard to the Security Council's decisions. Further, it reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council in the light of *jus cogens*. On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions are themselves compatible with fundamental rights as protected by the Community legal order, nor to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or to check indirectly the appropriateness and proportionality of those measures. To that extent, and in the absence of an independent international court responsible for ruling in actions brought against decisions taken by the Sanctions Committee, there is no judicial remedy available to the applicant.

(¹⁷⁰) See, for example, the judgments of 3 February 2005 in Case T-137/03 *Mancini v Commission* (under appeal, Case C-172/05 P); and in Case T-172/03 *Heurtaux v Commission* and the judgment of 17 March 2005 in Case T-362/03 *Milano v Commission*, not yet published in the ECR.

However, the Court acknowledged that any such lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*, as the right of access to the courts is not absolute. The applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council. Consequently, the Court dismissed the actions as unfounded.

G. Community staff cases

In 2005, the Court decided a large number of staff cases given that, leaving aside the 117 cases transferred to the Civil Service Tribunal, approximately 20 % of the cases decided this year (or 119 cases) fall within that area. However, the Court annulled measures in only a small number of cases as there were only fourteen judgments to that effect. Given the very large number of decisions made in this subject area and the limited scale of this report, the commentary will be limited to three observations.

First, as last year, the variety of decisions challenged before the Court should be highlighted, judgments and orders having been delivered on matters of appointment, promotion and competitions ⁽¹⁷⁰⁾ on the financial entitlements of officials and other staff ⁽¹⁷¹⁾, on a framework agreement concluded between the Commission and trade union and professional organisations ⁽¹⁷²⁾, on contracts for temporary staff ⁽¹⁷³⁾, on disciplinary procedures ⁽¹⁷⁴⁾, and on career development reports ⁽¹⁷⁵⁾. Second, a significant proportion of annulments (six out of 14 judgments) are the result of a failure to state reasons or adequate reasons in the contested decision ⁽¹⁷⁶⁾. Finally, because of the practical importance of the

⁽¹⁷¹⁾ In particular, many judgments were delivered this year on the conditions for entitlement to an expatriation allowance under the Staff Regulations, which gave the Court an opportunity to clarify the term 'State' within the meaning of Article 4(1)(a) of Annex VII to the old Staff Regulations for Officials of the European Communities (see, for example, the judgment of 30 June 2005 in Case T-190/03 *Olesen v Commission*, and of 25 October 2005 in Case T-83/03 *Salazar Brier v Commission* (under appeal, Case C-9/06 P)), not yet published in the ECR.

⁽¹⁷²⁾ Judgment of 12 April 2005 in Case T-191/02 *Lebedef v Commission* (under appeal, Case C-268/05 P), not yet published in the ECR.

⁽¹⁷³⁾ Judgment of 13 September 2005 in Case T-272/03 *Fernández Gómez v Commission* (under appeal, Case C-417/05 P), not yet published in the ECR.

⁽¹⁷⁴⁾ Judgment of 5 October 2005 in Case T-203/03 *Rasmussen v Commission*, not yet published in the ECR.

⁽¹⁷⁵⁾ Judgment of 12 July 2005 in Case T-157/04 *De Bry v Commission* (under appeal, Case C-344/05 P), not yet published in the ECR.

⁽¹⁷⁶⁾ Judgments in *Heurtaux v Commission*, footnote 170 above; of 1 March 2005 in Case T-143/03 *Smit v Europol*; of 2 June 2005 in Case T-177/03 *Strohm v Commission*; of 5 July 2005 in Case T-9/04 *Marcuccio v Commission*; of 15 September 2005 in Case T-132/03 *Casini v Commission*; and of 8 December 2005 in Case T-237/00 *Reynolds v Commission*, not yet published in the ECR.

question decided, it must be pointed out that, in its judgment in *Fardoom and Reinard v Commission*, the Court held the system of target averages and indicative quotas set up by the Commission in 2002 for the reporting procedure for officials to be lawful ⁽¹⁷⁷⁾. The Court held that the system of target averages, far from limiting the freedom of judgment of the assessors, served, on the contrary, to increase it by encouraging the awarding of marks which represent the merits of officials.

H. Customs law

In 2005, as in previous years, the Court ruled in several actions concerning the refusal by the Commission of applications for remission of import duties on the basis of the relief clause in the Community customs legislation which provides that import duties or export duties may be repaid or remitted in specific situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned ⁽¹⁷⁸⁾. Although the Court decided these cases by applying the established principles in this field, two cases are nonetheless of interest.

First, in *Geologistics v Commission*, which concerned an application for remission made by an undertaking deemed to be financially liable as the person authorised to use the external Community transit procedure ('the principal'), for the removal of goods from customs supervision, the Court annulled a Commission decision, taking the view that it had made two manifest errors of assessment ⁽¹⁷⁹⁾. First, contrary to the Commission's view, the fact that the national authorities, who were aware of the existence of a fraud affecting the applicant and were investigating it, did not inform the applicant because of the demands of that investigation, had placed the applicant in a 'special situation', as regards the customs debt relating to fraudulent operations taking place after the discovery of the fraud and connected to it. Secondly, the Commission was wrong to take the view that the applicant was guilty of 'obvious negligence' in not supervising the various third parties involved in the transit and in not taking out appropriate insurance. The first was not substantiated and, as regards the second, the Court held that it cannot be accepted that as a general rule the failure to take out insurance amounts, on its own, to obviously negligent conduct on the part of the trader.

Second, in *Ricosmos v Commission*, the Court made two interesting points clarifying the conditions under which an application for remission may be refused ⁽¹⁸⁰⁾.

⁽¹⁷⁷⁾ *Fardoom and Reinard v Commission*, footnote 28 above.

⁽¹⁷⁸⁾ Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1), and Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1). See, for example, the judgment in *Common Market Fertilisers v Commission*, footnote 14 above.

⁽¹⁷⁹⁾ Judgment of 27 September 2005 in Case T-26/03 *Geologistics v Commission*, not yet published in the ECR.

⁽¹⁸⁰⁾ Judgment of 13 September 2005 in Case T-53/02 *Ricosmos v Commission* (under appeal, Case C-420/05 P), not yet published in the ECR.

First, as regards procedure, the Court relied *inter alia* on case-law concerning access to the case file in the field of competition law to establish that, where the Commission intends to take a decision unfavourable towards the applicant, it must, at the time it communicates its objections, give the applicant an opportunity to examine all the documents likely to be relevant in support of the request for remission or repayment and, in order to do so, it must at the very least provide the applicant with a complete list of the non-confidential documents on file containing sufficiently precise information for the applicant to assess, in full knowledge of the facts, whether the documents described are likely to be useful to it.

Secondly, as regards the assessment of the substance of applications for remission, the Court made clear that although, in order to refuse such an application, there must be a connection between the negligence of which the operator is accused and the special situation established, it is not necessary for the special situation to be the direct and immediate consequence of such negligence. In that connection it is sufficient for the negligence to have contributed to or facilitated the removal of goods from customs supervision.

III. *Actions for damages*

In 2005, leaving aside staff cases, the Court ruled in 17 judgments and orders on the substantive conditions for the non-contractual liability of the Community ⁽¹⁸¹⁾. It was only in *AFCon Management Consultants and Others v Commission* that a right to damages was upheld, in that case an amount just less than EUR 50 000 to be paid to an undertaking unlawfully excluded from a tendering procedure ⁽¹⁸²⁾. Moreover, in *Camar v Council and Commission*, the Court, applying the classic principles of assessment of damage, fixed the quantum of damages awarded previously in an interlocutory judgment ⁽¹⁸³⁾. All the other actions, although they were dismissed, provided a number of clarifications regarding the admissibility of actions for damages, the damage which can be indemnified and the conduct liable to give rise to damages.

⁽¹⁸¹⁾ Judgments of 3 February 2005 in Case T-19/01 *Chiquita Brands and Others v Commission*, in *Comafica and Dole Fresh Fruit Europe v Commission*, footnote 50 above; of 16 March 2005 in Case T-283/02 *EnBW Kernkraft v Commission*; of 17 March 2005 in Case T-285/03 *Agraz and Others v Commission* (under appeal, Case C-243/05 P); in Case T-160/03 *AFCon Management Consultants and Others v Commission*, not yet published in the ECR; judgment in *Holcim (Deutschland) v Commission*, footnote 68 above; judgment of 13 July 2005 in Case T-260/97 *Camar v Council and Commission*; order of 14 September 2005 in Case T-140/04 *Adviesbureau Ehcon v Commission*, not yet published in the ECR; judgment in *Cofradía de pescadores de 'San Pedro' de Bermeo and Others v Council*, footnote 22 above; order of 26 October 2005 in Case T-124/04 *Ouariachi v Commission* (under appeal, Case C-4/06 P); judgments of 30 November 2005 in Case T-250/02 *Autosalone Ispra v Commission*; of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies v Council and Commission*; in Case T-151/00 *Laboratoire du Bain v Council and Commission*; in Case T-301/00 *Groupe Fremaux and Palais Royal v Council and Commission*; in Case T-320/00 *CD Cartondruck v Council and Commission*; in Case T-383/00 *Beamglow v Parliament and Others*, and in *Fedon & Figli and Others v Council and Commission*, footnote 181 above, none yet published in the ECR.

⁽¹⁸²⁾ *AFCon Management Consultants and Others v Commission*, footnote 181 above.

⁽¹⁸³⁾ *Camar v Council and Commission*, footnote 181 above.

A. Conditions for admissibility of an action for damages

In 2005 the Court made several rulings clarifying the formal conditions for the admissibility of actions for damages, the limitation periods in this area and the principle of autonomous remedies.

First, according to settled case-law, an applicant is not obliged to put in figures the amount of the loss which it submits it has suffered. Nonetheless, as the Court made clear in *Polyelectrolyte Producers Group v Council and Commission*, to meet the formal conditions for admissibility laid down by the Rules of Procedure (Article 44(1)(c)), the applicant must clearly indicate the evidence which enables its nature and extent to be assessed. In this case the evasive argument of the applicant regarding the loss it allegedly suffered is confined to mere assertion wholly unsupported by relevant evidence, which results in the inadmissibility of the action for damages ⁽¹⁸⁴⁾.

Second, as regards limitation periods, the Court was able to reiterate the settled case-law according to which the time bar applies only to the period preceding by more than five years the date of the act stopping time from running and does not affect rights which arose during subsequent periods ⁽¹⁸⁵⁾. In its order in *Adviesbureau Ehcon v Commission*, the Court held that that case-law applied only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That was not the position in this case, in which the alleged loss, if proved, even though its full extent may not have been appreciated until after the rejection of the applicant's tender for the contract in question, was nevertheless caused instantly by that rejection ⁽¹⁸⁶⁾.

Then, thirdly, in *Holcim (France) v Commission*, the Court reiterated the principle of the autonomy of remedies, ruling that, where an applicant could have brought an action for annulment or for failure to act against an act or abstention allegedly causing it loss, but failed to do so, the failure to exercise such remedies does not in itself make the action for damages time-barred ⁽¹⁸⁷⁾. Again on the question of autonomous remedies that case also allowed the Court to clarify the scope of the case-law according to which an action for damages is inadmissible where it actually seeks the withdrawal of an individual decision which has become definitive. That case-law concerns 'the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision.' ⁽¹⁸⁸⁾ The Court made clear that this case-law was relevant only where

⁽¹⁸⁴⁾ Order in *Polyelectrolyte Producers Group v Council and Commission*, footnote 29 above. See also the judgment in *Autosalone Ispra v Commission*, footnote 181 above.

⁽¹⁸⁵⁾ See, to that effect, the judgment of 16 April 1997 in Case T-20/94 *Hartmann v Council and Commission*, [1997] ECR II-595, paragraph 132. For an application of that case-law in 2005, see the judgment in *Holcim (Deutschland) v Commission*, footnote 68 above.

⁽¹⁸⁶⁾ Order in *Ehcon v Commission*, footnote 181 above.

⁽¹⁸⁷⁾ Order in *Holcim (France) v Commission*, footnote 68 above.

⁽¹⁸⁸⁾ See, inter alia, judgment in Case 175/84 *Krohn v Commission* [1986] ECR 753, paragraph 33.

the alleged damage results solely from an individual administrative measure which has become definitive and which the person concerned could have contested in an action for annulment. In this case the loss alleged by the applicant did not result from an individual administrative measure which the applicant could have contested but from the wrongful failure of the Commission to take a measure necessary to comply with a judgment. The action was therefore held admissible.

B. Damage which can be the subject of compensation

In its judgment in *Internationaler Hilfsfonds v Commission*, the Court established the principle that lawyers' fees incurred in proceedings before the Ombudsman are not recoverable by way of damages in an action for compensation, inter alia because a party has the option of applying to the Ombudsman without using a lawyer ⁽¹⁸⁹⁾. Similarly, in its order in *Ehcon v Commission*, the Court held that the applicant has not managed to establish the existence of a direct causal relationship between the alleged costs incurred before the Ombudsman and the alleged illegalities and that a citizen's free choice to refer a matter to the Ombudsman cannot appear to be the direct and necessary consequence of cases of improper administration which may be attributable to Community institutions or bodies ⁽¹⁹⁰⁾.

C. Liability for unlawful conduct

In addition to the liability which may be incurred even in the absence of unlawful conduct which will be discussed below, it is more usual for the Community to incur non-contractual liability for an unlawful act. In those circumstances, in order for the Community to incur non-contractual liability a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded ⁽¹⁹¹⁾.

In 2005, the Court delivered no less than nine judgments in actions for damages in connection with a common organisation of the market ⁽¹⁹²⁾. However, discussion will be confined here to the six judgments delivered in December 2005, in which the Court, sitting as a Grand Chamber, considered the question of the relationship between the decisions of

⁽¹⁸⁹⁾ Order of 11 July 2005 in Case T-294/04 *Internationaler Hilfsfonds v Commission* (under appeal, Case C-331/05 P), not yet published in the ECR.

⁽¹⁹⁰⁾ Order in *Ehcon v Commission*, footnote 181 above.

⁽¹⁹¹⁾ Judgments in Case 26/81 *Oleifici Mediterranei v CEE* [1982] ECR 3057, paragraph 16, and in Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, paragraph 30.

⁽¹⁹²⁾ Judgments in *Chiquita Brands and Others v Commission*, footnote 181 above; *Comafrika and Dole Fresh Fruit Europe v Commission*, footnote 181 above; *Agraz and Others v Commission*, footnote 181 above; *FIAMM and FIAMM Technologies v Council and Commission*, footnote 181 above; *Laboratoire du Bain v Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal v Council and Commission*, footnote 181 above; *CD Cartondruck v Council and Commission*, footnote 181 above; *Beamglow v Parliament and Others*, footnote 181 above, and *Fedon & Figli and Others v Council and Commission*, footnote 181 above.

the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) and the Community legal order ⁽¹⁹³⁾.

In those cases, the applicants submitted that the conduct of the Community was unlawful under the WTO agreements, which led the Court to decide whether such agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation in the light of a decision of the DSB. In those six judgments, the Court held that that was not the position. The WTO agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions except where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements ⁽¹⁹⁴⁾. Neither of those exceptions is applicable where there is a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules. As regards the first exception, in undertaking to comply with the WTO rules, the Commission did not intend to assume a specific obligation in the context of the WTO capable of allowing a review, as the dispute settlement system in any event accords considerable importance to negotiation. Accordingly, review by the Community courts could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute. As regards the second exception, the Court held that the common organisation of the market for bananas cannot be regarded as referring expressly to specific provisions of the WTO agreements.

The case-law requires that, for the conduct of an institution to be declared illegal under the rules on liability for unlawful conduct, a sufficiently serious breach of a legal rule designed to confer rights on individuals must be established. The system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question. The determining factor for regarding a breach of Community law as sufficiently serious lies in the manifest and serious failure by the Community institution concerned to observe the limits on its discretion. Where that institution has only considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ⁽¹⁹⁵⁾. In *Holcim (Deutschland) v Commission*, the applicant sought reimbursement of the cost of bank guarantees set up to avoid the payment of a fine eventually annulled by the Court ⁽¹⁹⁶⁾. The Court found that although the Commission had reduced dis-

⁽¹⁹³⁾ *FIAMM and FIAMM Technologies v Council and Commission*, footnote 181 above; *Laboratoire du Bain v Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal v Council and Commission*, footnote 181 above; *CD Cartondruck v Council and Commission*, footnote 181 above; *Beamglow v Parliament and Others*, footnote 181 above; and *Fedon & Figli and Others v Council and Commission*, footnote 181 above. On this point, see also *Chiquita Brands and Others v Commission*, footnote 181 above.

⁽¹⁹⁴⁾ See, for example, the judgment in Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

⁽¹⁹⁵⁾ Judgments in Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 40 and 42 to 44, and in Case C-312/00 P *Commission v Camar and Tico* [2002] ECR I-11355, paragraphs 52 to 55.

⁽¹⁹⁶⁾ *Holcim (Deutschland) v Commission*, footnote 68 above.

cretion in the field where the unlawful measure complained of was taken (assessment of a breach of Article 81(1) EC), it was nonetheless confronted with a complex situation, such that the unlawful measure it took was not, in the light of that complexity, sufficiently serious to give rise to a right to compensation.

D. Liability in the absence of unlawful conduct

Under Article 288 EC, in the case of non-contractual liability, the Community has, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties. In a series of judgments delivered in December 2005, the Court, sitting as a Grand Chamber, expressly recognised that the Community could incur liability even in the absence of unlawful conduct ⁽¹⁹⁷⁾.

In 1993, the Council adopted a regulation introducing for the Member States common rules for the import of bananas (the COM for bananas) ⁽¹⁹⁸⁾. This regulation contained preferential provisions for bananas from certain African, Caribbean and Pacific States. Following complaints lodged by certain States, the DSB of the WTO held that the Community regime governing the import of bananas was incompatible with the WTO agreements. In 1998 the Council therefore adopted a regulation amending that regime. Since the United States took the view that the new regime was still not compatible with the WTO agreements, it requested, and obtained, authorisation from the DSB to impose increased customs duty on imports of Community products appearing on a list drawn up by the United States authorities. Six companies established in the European Union brought proceedings before the Court of First Instance of the European Communities claiming compensation from the Commission and the Council of the European Union for the damage alleged to have been suffered by them because the United States' retaliatory measures applied to their exports to the United States.

In its judgment the Court first held that the Community could not incur liability in this case for unlawful conduct. However, it held that where it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community's non-contractual liability. National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the per-

⁽¹⁹⁷⁾ *FIAMM and FIAMM Technologies v Council and Commission*, footnote 181 above; *Laboratoire du Bain v Council and Commission*, footnote 181 above; *Groupe Fremaux and Palais Royal v Council and Commission*, footnote 181 above; *CD Cartondruck v Council and Commission*, footnote 181 above; *Beamglow v Parliament and Others*, footnote 181 above; and *Fedon & Figli and Others v Council and Commission*, footnote 181 above.

⁽¹⁹⁸⁾ Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ L 47, 25.2.1993, p. 1).

petrator of the damage. When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, as to the causal link between that damage and the conduct of the Community institution and as to the unusual and special nature of the damage in question are all met. This is thus the first time that the Court held that the Community incurred non-contractual liability in the absence of unlawful conduct on the part of its bodies other than in a purely hypothetical case.

In this case, the condition requiring the applicants to have sustained damage is satisfied. That is also true of the condition relating to the causal link between that damage and the conduct of the institutions. The withdrawal of concessions in relation to the Community which took the form of the increased customs duties on imports is to be regarded as a consequence resulting objectively, in accordance with the normal and foreseeable operation of the WTO dispute settlement system accepted by the Community, from the retention in force by the defendant institutions of a banana import regime incompatible with the WTO agreements. Thus, the conduct of the defendant institutions necessarily led to adoption of the retaliatory measure, and 'must be regarded as the immediate cause of the damage suffered by the applicants following imposition of the United States increased customs duty.' On the other hand, the applicants have not succeeded in proving that they sustained unusual damage, that is to say, damage which exceeds the limits of the economic risks inherent in operating in the sector concerned. The possibility of tariff concessions being suspended is among the vicissitudes inherent in the current system of international trade and, accordingly, has to be borne by every operator who decides to sell his products on the market of one of the WTO members. The Court therefore dismissed the six actions.

IV. Applications for interim relief

2005 confirmed the downward trend in the number of applications for interim relief already observed in 2004, with only 21 applications lodged, compared with 26 in 2004 and 39 in 2003. In 2005, the President of the Court of First Instance, in his capacity as judge responsible for granting interim relief, decided 13 cases.

Of those, only the assessment of urgency in *Deloitte Business Advisory v Commission* will be considered in this report ⁽¹⁹⁹⁾. In that case, Deloitte Business Advisory sought suspension of the operation of both a Commission decision rejecting the bid made by a consortium to which it belonged and the decision awarding the contract at issue to a third party. In addition to the damage to its reputation, the applicant claimed that, if the contested decisions were annulled and interim measures were not adopted, it would no longer be possible for it to be awarded the contract covered by the tendering procedure and then to perform the contract and, as a result, to derive certain benefits in terms of prestige, experience and revenue.

⁽¹⁹⁹⁾ Order of the President of the Court of First Instance of 20 September 2005 in Case T-195/05 R *Deloitte Business Advisory v Commission*, not yet published in the ECR.

When he considered whether it was proven, with a sufficient degree of probability, that the applicant was likely to suffer serious and irreparable damage if the interim measures applied for were not adopted, the judge hearing the application for interim measures took the view that the consortium to which the applicant belonged had lost its opportunity to be awarded the contract and, consequently, to derive the various financial and non-financial benefits that could possibly result from the performance of the contract. In view, first, of the expected date of performance of the contract, it was therefore unlikely that the possibility of the Commission organising a new tendering procedure would in itself make it possible to preserve the opportunity that the applicant had to be awarded and to perform the contract. Second, as regards the possibility that the applicant could be compensated subsequently for any damage suffered, the file did not contain anything to guarantee, with a sufficient degree of certainty, that, if the contested decisions were annulled, the Commission would compensate the applicant without an action for damages being brought. Moreover, the damage sustained by the applicant through the loss of the opportunity to be awarded the contract must be considered very difficult to quantify and, therefore, as constituting irreparable damage. However, the applicant had not thereby established satisfactorily that it would have been able to derive sufficiently sizeable benefits from the award and performance of that contract under the tendering procedure. Since the balance of interests was in any case in favour of not ordering interim measures, the judge hearing the application for interim relief dismissed the application.