A — Proceedings of the Court of First Instance in 2006

By Mr Bo Vesterdorf, President of the Court of First Instance

In 2006, for the second year in succession, the Court of First Instance disposed of more cases than were brought before it (436 cases disposed of compared with 432 lodged). Overall, the number of cases lodged has fallen (432 compared with 469 in 2005). However, this drop is merely apparent and is attributable to the fact that no staff cases were lodged with the Court of First Instance in 2006 as those cases now come within the jurisdiction of the Civil Service Tribunal [1]. In fact, leaving aside staff cases and special forms of procedure, the number of cases lodged showed a marked increase of 33 % (387 cases compared with 291 in 2005). The number of trade mark cases brought has risen by 46 % (143 in 2006 compared with 98 in 2005), while cases concerning matters other than intellectual property and staff cases increased by 26 % (244 compared with 193). The number of cases disposed of as such has fallen (436 compared with 610), but, here too, account must be taken of the fact that, in 2005, 117 cases were disposed of by transfer to the Civil Service Tribunal. If those cases are not taken into account, the drop in the number of cases disposed of is still real but less marked (436 compared with 493).

In short, the number of cases pending was similar to that in the previous year, that is to say slightly over 1 000 (1 029 compared with 1 033 in 2005). It is interesting in this connection that, as at 1 January 2007, intellectual property cases represented nearly 25 % of the total number of cases pending. Accordingly, although 82 staff cases are still pending before the Court of First Instance and the first appeals against judgments of the Civil Service Tribunal have been brought before it (10 of them as at 31 December 2006), the litigation before the Court of First Instance is gradually changing character and becoming more focused on commercial litigation.

The average duration of proceedings increased slightly this year, in that, leaving aside staff cases and intellectual property cases, it went from 25.6 months in 2005 to 27.8 months in 2006. However, in 2006, use of the expedited procedure provided for by Article 76a of the Rules of Procedure of the Court of First Instance was allowed by the Court in four of the 10 cases in which it was applied for.

Ms Pernilla Lindh, appointed to the Court of Justice as a Judge, and Mr Paolo Mengozzi and Ms Verica Trstenjak, appointed to the Court of Justice as Advocates General, left the Court of First Instance on 6 October. On the same day they were replaced by Mr Nils Wahl, Mr Enzo Moavero Milanesi and Mr Miro Prek respectively.

It is impossible, in the framework of this report, to give an exhaustive account of the richness of the case-law of the Court of First Instance in 2006. Mention will be made only of the most significant developments of the year, the selection of which is necessarily subjective to some extent [2]. They relate to proceedings concerning the legality of measures (I), actions for damages (II) and, finally, applications for interim relief (III).

[1] However, in 2006, the Civil Service Tribunal referred a case to the Court of First Instance.

[2] For example, no mention is made of antidumping law, although it gave rise to some interesting developments, in particular in the judgment of 24 October 2006 in Case T-274/02 *Ritek and Prodisc Technology* v *Council*, not yet published in the ECR, and staff case-law.

I. *Proceedings concerning the legality of measures*

A. Admissibility of actions brought under Articles 230 and 232 EC

In 2006, the most significant developments on this question concern the definition of a challengeable act and, to a lesser extent, that of standing to bring proceedings.

1. Measures against which an action may be brought

According to settled case-law, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment [3]. In 2006, the current relevance of this issue was illustrated by no less than seven cases.

To begin with, three judgments defined the limits of actions for annulment of measures adopted by the European Anti-Fraud Office (OLAF) [4]. First, in its judgment in *Camós Grau* v *Commission*, the Court of First Instance held that a report of an investigation carried out by OLAF implicating the applicant did not significantly alter his legal position, given that, inter alia, it imposes no obligation, even of a procedural nature, on the authorities to which it is addressed. Secondly, following the same approach, the Court of First Instance made clear in its judgment in *Tillack* v *Commission* that the forwarding by OLAF of information to the national judicial authorities was not an act against which an action for annulment could be brought either. The forwarding of information by OLAF, although it had to be dealt with seriously by the national authorities, had no binding legal effect on them, as they remained free to decide what action should be taken following the OLAF investigation. Thirdly, and finally, in its order in *Strack* v *Commission*, the Court of First Instance held that an official who informs OLAF of possible irregularities may not challenge by means of an action for annulment the decision closing the investigation opened in the light of that information.

Secondly, two judgments delivered in 2006 in the case known as 'Austrian Banks — "Club Lombard"' held that actions brought against decisions taken by the Commission's hearing officer were admissible [5]. First, in its judgment in *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, two credit institutions sought the annulment of decisions to transmit to a political party non-confidential versions of the statements of objections relating to the fixing of bank charges. In its judgment the Court of First Instance

[3] Judgments of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 23.

[4] See judgments of 6 April 2006 in Case T-309/03 *Camós Grau* v *Commission* and of 4 October 2006 in Case T-193/04 *Tillack* v *Commission*, and order of 22 March 2006 in Case T-4/05 *Strack* v *Commission* (under appeal, Case C-237/06 P), none yet published in the ECR.

[5] Judgments of 30 May 2006 in Case T-198/03 *Bank Austria Creditanstalt* v *Commission* and of 7 June 2006 in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, not yet published in the ECR. Commission Decision of 11 June 2002 in Case COMP/36.571/D-l — Austrian Banks ('Lombard Club') (OJ L 56, 24.2.2004, p. 1).

held that the Commission's decision notifying an undertaking involved in infringement proceedings that the information transmitted by that undertaking does not qualify for the confidential treatment guaranteed by Community law (and may therefore be communicated to another complainant) has legal effect in relation to the undertaking in question, bringing about a distinct change in its legal position. It therefore constitutes a challengeable act. Second, in *Bank Austria Creditanstalt* v *Commission*, Bank Austria Creditanstalt sought the annulment of a decision of a hearing officer rejecting its objection to the publication in the Official Journal of the non-confidential version of the Commission's decision. In its judgment, the Court of First Instance held that a decision taken by the hearing officer under the third paragraph of Article 9 of Decision 2001/462/EC, ECSC [6] has legal effects inasmuch as it determines whether a text for publication contains business secrets or other information enjoying similar protection or other information which cannot be disclosed to the public either on the basis of rules of Community law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy. Such a decision therefore also constitutes a challengeable act.

Thirdly, in its judgment in *Deutsche Bahn* v *Commission* [7], the Court of First Instance defined the scope of the notion of challengeable act as regards decisions which the Commission adopts in the area of State aid on the basis of Article 4(2) of Regulation (EC) No 659/1999 [8]. In this case the Member of the Commission responsible for transport had informed the applicant in writing that his complaint seeking the opening of the procedure provided for by Article 88(2) EC would not be upheld. The letter included a clear and detailed statement of the reasons why the national measure should not be considered to be aid within the meaning of Article 87(1) EC. However, the Commission maintained that it was merely a letter providing information and not a decision within the meaning of Article 4(2) of Regulation (EC) No 659/1999 and that, consequently, it was not a challengeable act insofar as it did not have legal effects.

The Court of First Instance nonetheless held that a letter sent to a complainant undertaking by the Commission falls within the scope of Article 230 EC, where the Commission, having received information regarding alleged unlawful aid and thus being obliged to examine it without delay pursuant to Article 10(1) of Regulation (EC) No 659/1999, does not merely inform the complainant, as Article 20 of that regulation allows it to, that there are insufficient grounds for taking a view on the case, but takes a clear and definitive position, giving reasons and indicating that the measure in question does not constitute aid. In so doing, the Commission must be considered to have adopted a decision under Article 4(2) of that regulation. The Commission is therefore not entitled to exclude that decision from review by the Community court by declaring that it did not take such a decision, attempting to withdraw it or deciding not to send the decision to the Member State concerned, in breach of Article 25 of Regulation (EC) No 659/1999. In that connection it is irrelevant that the

[6] Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21).

[7] Judgment of 5 April 2006 in Case T 351/02 *Deutsche Bahn* v *Commission*, not yet published in the ECR.

[8] 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).

letter at issue does not stem from the adoption of a definitive decision on the complaint by the college of Commissioners or that such a decision was not published.

Finally, and fourthly, in its order in *Schneider Electric* v *Commission* [9], the Court of First Instance ruled, for the first time, on the admissibility of an action against a Commission decision to open the detailed examination phase of a concentration. In this case, the Commission had adopted such a decision in the course of the administrative procedure re-opened following two judgments annulling the decision declaring the concentration between Schneider Electric and Legrand, two producers of low voltage electrical equipment, to be incompatible with the common market, and annulling the decision splitting the two entities [10]. The applicant challenged the Commission decisions to open a detailed examination procedure and to formally close the procedure.

In its order, the Court of First Instance concluded, on the basis of the facts of the case, that an undertaking which, having secured the annulment by the Court of First Instance of a Commission decision prohibiting it from implementing a concentration, transfers the undertaking it had acquired within the time limit available to the Commission for the adoption of a new decision, cannot claim that it is adversely affected either by a Commission decision, taken after the decision to make that transfer, to re-open the procedure for detailed examination of the operation, or by a Commission decision, subsequent to the transfer, to formally close that procedure which has thus become devoid of purpose. The Court of First Instance also ruled *obiter* that the decision to open the formal examination procedure was simply a preparatory step. While it is true that the disputed measure involves extending the suspension of the transaction, as well as the obligation to cooperate with the Commission during the detailed examination phase, those consequences, which flow directly from the regulation and are naturally induced by the prior control of the compatibility of the transaction, amount to no more than the ordinary effects of any procedural step and do not therefore affect the legal position of Schneider Electric. In that connection the Court of First Instance rejected the analogy with the Community State aid regime suggested by that undertaking. Unlike a decision taken under Article 88(2) EC, which, according to the case-law of the Court of Justice, is liable in certain cases to have independent legal effects [11], the decision to open the detailed examination procedure does not, in itself, impose any obligation which does not already follow from the notification of the concentration to the Commission on the initiative of the undertakings concerned.

2. Standing to bring proceedings

(a) *Individual concern*

According to settled case-law, natural and legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects

[9] Order of 31 January 2006 in Case T-48/03 *Schneider Electric* v *Commission* (under appeal, Case C-188/06 P), not yet published in the ECR.

[10] Judgments of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071 and in Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201.

[11] Judgment of the Court of Justice in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 21 to 23.

them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed [12].

In 2006, the Court of First Instance applied those principles, inter alia in the case resulting in the judgment in *Boyle and Others* v *Commission* [13]. That case concerned a Commission decision addressed to Ireland rejecting a request to increase the objectives of the Multiannual guidance programme for the Irish fishing fleet ('MAGP IV'). The Court of First Instance held that although the applicants, who were owners of vessels belonging to the Irish fishing fleet, were not the addressees of the decision, they were nonetheless concerned by it. The request for an increase made by Ireland was made up of all of the individual requests of owners of vessels, including the applicants' requests. Although the decision was addressed to Ireland, it applied to a series of identified vessels and had therefore to be considered to be a series of individual decisions, each affecting the legal situation of the owners of those vessels. The number and identity of the vessel-owners in question were fixed and ascertainable even before the date of the contested decision and the Commission was in a position to know that its decision affected solely the interests and positions of those owners. The contested decision thus concerned a closed group of identified persons at the time of its adoption, whose rights the Commission intended to regulate. The factual situation thus created therefore characterised the applicants by reference to all other persons and distinguished them individually in the same way as an addressee of the decision.

(b) *Standing to bring proceedings in litigation on State aid*

In its judgment in *Commission* v *Aktiongemeinschaft Recht und Eigentum*, delivered in 2005, the Court of Justice held, first, that an action for the annulment of a decision taken on conclusion of the preliminary phase of examination of aid under Article 88(3) EC brought by a person who is concerned within the meaning of Article 88(2) EC, where he seeks to safeguard the procedural rights available to him under the latter provision, is admissible and, second, that where an applicant calls in question the merits of the decision appraising the aid as such or a decision taken at the end of the formal investigation procedure, an action for annulment of such a decision is admissible only if he succeeds in establishing that he has a particular status within the meaning of the judgment in *Plaumann* v *Commission* [14].

[12] Judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107.

[13] Judgments of 13 June 2006 in Joined Cases T-218/03 to T-240/03 *Boyle and Others* v *Commission* (under appeal, Case C-373/06 P), not yet published in the ECR; see also the judgment of 13 June 2006 in Case T-192/03 *Atlantean* v *Commission*, not published in the ECR.

[14] Judgment of the Court of Justice in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737.

Two judgments delivered in 2006 enabled the Court of First Instance to clarify the application of that distinction where the Commission took a decision without initiating the formal review procedure [15].

First, in *Air One* v *Commission* [16], the applicant, an Italian airline company, complained to the Commission alleging that the Italian authorities granted unlawful aid to the air carrier Ryanair in the form of reduced prices for the use of airport and groundhandling services. The applicant also called upon the Commission to order the Italian Republic to suspend those aid payments. Insofar as this was an action for failure to act, which represents one and the same means of redress as an action for annulment, the Court of First Instance needed to establish the admissibility of an action brought by the applicant for annulment of at least one of the measures which the Commission could have adopted on conclusion of the preliminary procedure for examination of aid. To that end the Court of First Instance applied the case-law of the Court of Justice and, in that connection, it clarified the definition of 'sufficient relationship of competition' for an undertaking to be considered a competitor of the recipients of aid and, therefore, concerned within the meaning of Article 88(2) EC. In this case, the Court of First Instance held, in ruling the action admissible, that it was sufficient to establish that the applicant and the recipient of aid jointly operate, directly or indirectly, an international airline and that the applicant aims to develop scheduled passenger transport services from or to Italian airports, inter alia regional airports, in relation to which it may be in competition with the recipient.

Second, in *British Aggregates* v *Commission* [17], the Commission had decided, without initiating the formal review procedure, not to raise objections to the levy under examination. The Court of First Instance recalled that if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The applicant must then demonstrate that it has a particular status within the meaning of the judgment in *Plaumann* v *Commission*. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates. The Court found, in this case, that the applicant, which is an association of undertakings, does not merely seek to challenge the Commission's refusal to initiate the formal investigation procedure, but also calls into question the merits of the contested decision. In considering whether it has explained why the measure under investigation is liable to have a significant effect on the position of one or more of its members on the relevant market, the Court of First Instance found that the measure was intended to modify generally the allocation of the market between virgin aggregates, which were subject to it, and alternative products, which were exempt. Moreover, that levy is liable to lead to a genuine change in the competitive position of some of the applicant's members since

[15] As regards standing to bring proceedings in the area of State aid, see also the judgment of 27 September 2006 in Case T-117/04 *Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission*, not yet published in the ECR, in which the Court of First Instance held that an association and its members had no standing to bring proceedings to contest a decision adopted on conclusion of the formal examination procedure provided for by Article 88(2) EC.

[16] Judgment of 10 May 2006 in Case T-395/04 *Air One* v *Commission*, not yet published in the ECR.

[17] Judgment of 13 September 2006 in Case T-210/02 *British Aggregates* v *Commission* (under appeal, Case C-487/06 P), not yet published in the ECR.

they were in direct competition with the producers of exempted materials, which had become competitive as a result of the introduction of the environmental tax at issue. As the measure was likely substantially to affect the competitive situation of certain members of the applicants, its action was admissible.

(c) *Direct concern*

In order for an applicant to be considered to be directly concerned within the meaning of the fourth paragraph of Article 230 EC, two conditions must be met. First, the measure at issue must directly affect the legal situation of the person concerned. Second, that measure must leave no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules [18]. The second condition is satisfied where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt [19].

Applying those principles in *Boyle and Others* v *Commission*, the Court of First Instance held that a decision rejecting a request to increase the objectives of the Multiannual guidance programme for the Irish fishing fleet ('MAGP IV') directly concerned the owners of the vessels in question. In the contested decision, the Commission, as the only authority with competence in the matter, ruled definitively on the eligibility for an increase in capacity of certain particular vessels by reference to the conditions of the application of the applicable legislation. In finding that the applicants' vessels were not eligible, the contested decision had the direct and definitive effect of precluding them from the possibility of benefiting from a measure of Community law. The national authorities had no discretion as regards their obligation to implement that decision. In that regard the Court of First Instance dismissed the argument that Ireland might in theory decide to grant the additional capacity to the applicants' vessels up to the ceiling set under MAGP IV. According to the Court of First Instance, a national decision of that nature would not mean that the Commission's decision ceased to apply automatically as it would remain extraneous, legally speaking, to the application in Community law of the contested decision. The effect of that national decision would be to alter the applicants' situation once again, and that second alteration of their legal situation would be the consequence of the national decision alone and not of the implementation of the contested decision.

B. Competition rules applicable to undertakings

In 2006 the Court of First Instance delivered 26 judgments in proceedings concerning the substantive rules prohibiting anti-competitive agreements, of which no fewer than 18

[18] Judgment of the Court of Justice in Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and judgment of the Court of First Instance in Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4039, paragraph 24.

[19] *Dreyfus* v *Commission*, paragraph 44.

related to cartels [20]. Apart from cartels, the Court of First Instance delivered four judgments relating to the application of Articles 81 EC and 82 EC [21], and also four judgments determining substantive questions relating to the control of concentrations [22].

1. The concept of undertaking within the meaning of the competition rules

In *SELEX Sistemi Integrati* v *Commission*, the Court of First Instance determined an action challenging the Commission's rejection of a complaint by SELEX Sistemi Integrati SpA, a company active in the air traffic management systems sector. That complaint had concerned infringements of the competition rules by Eurocontrol in carrying out its standardisation tasks in relation to air traffic management ('ATM') equipment and systems. The complaint had been rejected on the ground that Eurocontrol's relevant activities were not of an economic nature.

In that judgment, the Court of First Instance referred, first of all, to the consistent case-law of the Court of Justice according to which the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. In that regard, any activity consisting in offering goods and services on a given market is an economic activity [23]. Then, applying those principles, the Court of First Instance held that Eurocontrol's standardisation activities, in relation to both the production and the adoption of standards, and also the acquisition of prototypes of ATM systems and the management of intellectual property rights by Eurocontrol in this field cannot be described

[20] Judgments of 15 March 2006 in Case T-26/02 *Daiichi Pharmaceutical* v *Commission*, and Case T-15/02 *BASF* v *Commission*, not yet published in the ECR; of 5 April 2006 in Case T-279/02 *Degussa* v *Commission* (on appeal, Case C-266/06 P), not yet published in the ECR; of 30 May 2006 in Case T-198/03 *Bank Austria Creditanstalt* v *Commission*, not yet published in the ECR; of 7 June 2006 in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission*, not yet published in the ECR; of 4 July 2006 in Case T-304/02 *Hoek Loos* v *Commission* not yet published in the ECR; of 27 September 2006 in Case T-153/04 *Ferriere Nord* v *Commission*, Case T-59/02 *Archer Daniels Midland* v *Commission* (citric acid), and Case T-329/01 *Archer Daniels Midland* v *Commission* (sodium gluconate), Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission*, Case T-43/02 *Jungbunzlauer* v *Commission*, T-330/01 *Akzo Nobel* v *Commission*, Case T-322/01 *Roquette Frères* v *Commission* and also Case T-314/01 *Avebe* v *Commission*, not yet published in the ECR; of 16 November 2006 in Case T-120/04 *Peróxidos Orgánicos* v *Commission*, not yet published in the ECR; of 5 December 2006 in Joined Cases T-217/03 and T-245/03 *Westfalen Gassen Nederland* v *Commission*, not yet published in the ECR; of 13 December 2006 in Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission*, not yet published in the ECR; and of 14 December 2006 in Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission*, not yet published in the ECR.

[21] Judgments of 2 May 2006 in Case T-328/03 *O_2 (Germany)* v *Commission*, not yet published in the ECR; of 27 September 2006 in Case T-168/01 *GlaxoSmithKline Services* v *Commission* and Case T-204/03 *Haladjian Frères* v *Commission*, neither yet published in the ECR; and also of 12 December 2006 in Case T-155/04 *SELEX Sistemi Integrati* v *Commission*, not yet published in the ECR.

[22] Judgments of 23 February 2006 in Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* (on appeal, Case C-202/06 P); of 4 July 2006 in Case T-177/04 *easyJet* v *Commission*; of 13 July 2006 in Case T-464/04 *Impala* v *Commission* (on appeal, Case C-413/06 P); and of 14 July 2006 in Case T-417/05 *Endesa* v *Commission*, none yet published in the ECR.

[23] Judgments of the Court of Justice of 23 April 1991 in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and of 12 September 2000 in Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

as economic activities. On the other hand, it found that the consultancy activities which Eurocontrol carried out for the national administrations in the form of assistance in drafting the contract documents for calls for tender or the selection of undertakings participating in those calls for tender constitute an offer of services on a market on which private undertakings specialised in this area could also very well offer their services. The fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as an economic activity. Furthermore, while the fact that that activity of providing assistance is not remunerated and is carried out in pursuit of a public service objective is an indication that it is a non-economic activity, that does not preclude in all situations the existence of an economic activity. The Court of First Instance concluded that the Commission had therefore been wrong to take the view that the activities in issue could not be described as economic activities.

2. Application of competition law in the agricultural sector

By decision of 2 April 2003 [24], the Commission imposed fines amounting to EUR 16.68 million on the main French federations in the beef sector. Those federations, which represent farmers and slaughterers, were penalised for having taken part in a cartel contrary to Community law. The agreement in question continued orally beyond the end of November 2001, the date on which it was supposed to come to an end, in spite of a warning from the Commission, which drew the federations' attention to the unlawful nature of the agreement. The agreement had been concluded in an economic context marked by the serious crisis in the beef sector from 2000, following the discovery of new cases of bovine spongiform encephalopathy, known as 'mad cow disease'.

In *FNCBV and Others* v *Commission*, on an action against that decision, the Court of First Instance, after rejecting, in particular, the applicants' arguments that the Commission had infringed their freedom to form associations, considered that the agreement in question could not benefit from the exemption provided for in Regulation No 26 in favour of certain activities connected with the production and marketing of agricultural products [25]. Whereas such an exemption is applicable only where an agreement favours all the objectives of Article 33 EC and is also necessary for the attainment of those objectives, that was not the position in this case: although the agreement might well be considered to be necessary for the objective of ensuring a fair standard of living for the agricultural community, it could, on the other hand, be prejudicial to ensuring that supplies reach consumers at reasonable prices and did not concern the stabilisation of the markets.

[24] Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef) (OJ L 209, 19.8.2003, p. 12).

[25] Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959–62, p. 129).

3. Points raised on the scope of Article 81 EC

(a) *Application of Article 81(1) EC*

Article 81(1) EC provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are to be prohibited as incompatible with the common market.

Anti-competitive object or effect of agreements

The judgment in *GlaxoSmithKline Services* v *Commission*, which concerns the connections between the restriction of parallel trade and the protection of competition, contains some significant developments concerning the concept of an agreement having as its object the restriction of competition in the European pharmaceutical sector. Glaxo Wellcome, a Spanish subsidiary of the GlaxoSmithKline group, one of the main world producers of pharmaceutical products, had adopted new general sales conditions concerning wholesalers of pharmaceutical products, under which its medicines were to be sold to Spanish wholesalers at prices differentiated according to the national health insurance scheme which would reimburse them and the marketing of those medicines, depending on whether they would be marketed in Spain or in another Member State. In practice, medicines intended to be reimbursed in other Member States of the Community were to be sold at a higher price than those intended to be reimbursed in Spain, where the administration sets maximum prices. GlaxoSmithKline notified those general sales conditions to the Commission and, in response to a number of complaints, the Commission found that the sales conditions in question had the object and the effect of restricting competition.

In its judgment, the Court of First Instance nonetheless considered that an agreement intended to limit parallel trade must not be considered by its nature, that is to say, independently of any competitive analysis, to have as its object the restriction of competition. In effect, while it is accepted that parallel trade must be given a certain protection, it is not as such but insofar as it favours the development of trade, on the one hand, and the strengthening of competition, on the other hand, that is to say, in this second respect, insofar as it gives final consumers the advantages of effective competition in terms of supply or price. Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies insofar as the agreement may be presumed to deprive final consumers of those advantages. In this, in view of the legal and economic context in which GlaxoSmithKline's General Sales Conditions were applied, it could not be presumed that those conditions deprive the final consumers of medicines of such advantages. First, the wholesalers, whose function is to ensure that the retail trade receives supplies with the benefit of competition between producers, are economic agents operating at an intermediate stage of the value chain and may keep the advantage in terms of price which parallel trade may entail, in which case that advantage will not be passed on to the final consumers. Second, as the prices of the medicines concerned are to a large extent shielded

from the free play of supply and demand owing to the applicable regulations and are set or controlled by the public authorities, it cannot be taken for granted at the outset that parallel trade tends to reduce those prices and thus to increase the welfare of final consumers. In those circumstances, according to the Court of First Instance, it cannot be inferred merely from a reading of the terms of the agreement, even in its context, that the agreement is restrictive of competition, and it is therefore necessary to consider the effects of the agreement.

The Court of First Instance therefore examined the effects of the agreement on competition and rejected certain of the analyses carried out by the Commission on that point in its decision, but nonetheless found that the agreement constituted an obstacle to the pressure which in its absence would have existed on the unit price of the medicines in question, to the detriment of the final consumer, taken to mean both the patient and the national sickness insurance scheme acting on behalf of claimants.

Degree of proof required

In *Dresdner Bank and Others* v *Commission* the Court of First Instance observed that, in the light of the principle of the presumption of innocence, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Commission must therefore show precise and consistent evidence in order to establish the existence of the infringement. Nonetheless, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement: it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement. In the present case, the five applicant banks maintained that no agreement had been concluded by them, at a meeting held on 15 October 1997, on the level and structure of exchange commissions on currencies constituting subdivisions of the euro during the transitional stage between the introduction of the scriptural euro and the introduction of the fiduciary euro. The Court of First Instance examined both the evidence relating to the context of the meeting of 15 October 1997 and the direct evidence concerning that meeting and held that the evidence did not have sufficient force for it to be considered, without any reasonable doubt remaining on that point, that the banks present concluded the impugned agreement.

Obligations borne by the Commission when it examines an agreement

In *O_2 (Germany)* v *Commission*, the Court of First Instance recalled that, in order to assess whether an agreement is compatible with the common market in the light of the prohibition laid down in Article 81(1) EC, it is necessary to examine the economic and legal context in which the agreement was concluded, its object, its effects, and its impact on intra-Community trade, taking into account in particular the economic context in which the undertakings operate, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functions. Furthermore, in a case such as this, where it is accepted that the agreement does not have an anti-competitive object, the effects of the agreement should be considered and in order for the agreement to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted

or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.

Such an approach is not, according to the Court of First Instance, tantamount to applying a 'rule of reason' to Article 81(1) EC, which would consist in carrying out an assessment of the pro- and anti-competitive effects of the agreement, but to taking account of the impact of the agreement on existing and potential competition and also the competitive situation in the absence of the agreement, those two factors being intrinsically linked. The Court of First Instance further stated that such an examination is particularly necessary in respect of markets undergoing liberalisation or emerging markets, as in the case of the third-generation mobile communications market here at issue, where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry.

In this case, the Court of First Instance considered that the contested decision was affected by a number of errors of analysis. First, it contained no objective discussion of what the competition situation would have been in the absence of the agreement, which distorted the assessment of the actual and potential effects of the agreement on competition. In order to be able to make a proper assessment of the extent to which the agreement was necessary for O_2 (Germany) to penetrate the third-generation mobile communications market, the Commission ought to have examined more closely whether, in the absence of the agreement, the applicant would have been present on that market. Second, the decision did not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming had restrictive effects on competition, but was confined, in this respect, to a *petitio principii* and to broad and general statements.

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

Article 81(3) EC provides that the provisions of Article 81(1) EC may be declared inapplicable to, in particular, any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford to such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In *GlaxoSmithKline Services* v *Commission*, to which reference has already been made, the applicant put forward, in particular, evidence intended to establish that parallel trade would lead to a loss in efficiency by reducing the applicant's capacity to innovate. It thus contended that the agreement in issue, by affecting parallel trade and improving the applicant's margins, would enable the applicant to increase its capacity for innovation. The Commission's examination of certain relevant evidence put forward by the applicant could not be accepted as sufficient to support the conclusions which the Commission had

reached. The Commission could not neglect to consider whether the agreement in issue could enable the applicant's capacity for innovation to be reinstated and could thus give rise to a gain in efficiency for interbrand competition insofar as in the medicines sector the effect of parallel trade on competition is ambiguous. In effect, the gain in efficiency to which the agreement is likely to give rise for interbrand competition, the role of which is limited by the applicable pharmaceutical regulatory framework, must be compared with the loss in efficiency to which the agreement is likely to give rise for interbrand competition. The Court of First Instance therefore annulled the Commission's decision on that point.

4. Points raised on the scope of Article 82 EC

In 2006 the Court of First Instance adjudicated on the conditions of Article 82 EC in only two judgments, both relating to the rejection of a complaint.

First, in *SELEX Sistemi Integrati* v *Commission*, to which reference has already been made in connection with the concept of 'undertaking', the Court of First Instance found that the applicant had not shown in its complaint that Eurocontrol's conduct, in the context of its activity of advising national administrations, satisfied the criteria for the application of Article 82 EC, and, moreover, no competitive relationship appeared to exist between Eurocontrol and the applicant or any other undertaking active in the sector concerned.

Second, in *Haladjian Frères* v *Commission*, the company Haladjian Frères had lodged a complaint with the Commission, claiming in particular that there had been a number of infringements of Article 82 EC which were alleged to result from the introduction of a system for the marketing of replacement parts by the United States company Caterpillar. The Court of First Instance held that the applicant's arguments did not call in question the appraisals of the elements of fact and of law carried out by the Commission and that the Commission had been correct to reject the applicant's complaint. The complaints alleging the imposition of unfair prices, the limiting of markets or the application of dissimilar conditions to equivalent transactions were rejected, regard being had in particular to the fact that the system in issue did not prohibit in fact or in law competition in the form of parts imported at prices lower than the European prices.

5. Procedure for penalising anti-competitive practices

(a) *Legitimate interest of third parties and conduct of the proceedings for the application of the competition rules*

In *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission* and also in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that a final customer purchasing goods or services, such as a political party which is a customer for Austrian banking services, has a legitimate interest which entitles it to access to the statement of objections. A final customer which shows that it has suffered harm or might suffer harm to his economic interests owing to a restriction of competition has a legitimate interest in lodging an application or a complaint in order to obtain a finding by

the Commission that there has been an infringement of Articles 81 EC and 82 EC. As the ultimate purpose of the rules which seek to ensure that competition is not distorted within the internal market is to increase the welfare of the consumer, the recognition that such customers have a legitimate interest in obtaining a finding by the Commission that there has been an infringement of Articles 81 EC and 82 EC contributes to the attainment of the objectives of competition law. In *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance further stated, first, that a concerned party may be admitted as complainant and receive the statement of objections at any stage of the administrative procedure and, second, that the right to receive the statement of objections cannot be restricted on the basis of mere suspicion that that document may be misused.

(b) *Right not to incriminate oneself*

The judgment in *Archer Daniels Midland* v *Commission (citric acid)* provided the Court of First Instance with the opportunity to define the conditions in which the Commission may use against an undertaking admissions obtained by an authority in a non-Member country without breaching the right not to contribute to one's own incrimination as recognised by Community law [26]. Bayer, one of the members of the cartel on which sanctions were imposed, had communicated to the Commission a report of the United States Federal Bureau of Investigation (FBI) concerning the hearing of a representative of the applicant before the United States authorities, which was subsequently used in support of the statement of objections and then of the decision penalising the undertaking. In its action against that decision, the applicant contended that it had not had the opportunity to rely on its right not to incriminate itself, as recognised by Community law. In its judgment, however, the Court of First Instance held that there is no provision prohibiting the Commission from relying, as evidence, on a document drawn up in a procedure other than that conducted by the Commission itself. Nonetheless, it held that where the Commission relies on a statement made in a different context from that of the procedure before it, and where that statement potentially contains information which the undertaking concerned would have been entitled to refuse to supply, the Commission is required to ensure that the undertakings concerned enjoys procedural rights equivalent to those conferred by Community law. Thus, the Commission is required to examine of its own motion whether, at first sight, there are serious doubts as to observance of the procedural rights of the parties concerned in the proceedings during which they supplied such statements. In the absence of such doubts, the procedural rights of the parties concerned must be considered to have been sufficiently guaranteed if, in the statement of objections, the Commission indicated clearly, annexing the documents concerned to the statement of objections where necessary, that it intended to rely on the statements in issue. In this case, none of those principles had been breached by the Commission, notably because it had annexed the report in issue to the statement of objections and Archer Daniels Midland had not criticised the use of that document.

[26] On the right not to incriminate oneself, see the judgment of the Court of Justice of 18 October 1989 in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

(c) *Public nature of measures and definition of professional secrecy*

In *Bank Austria Creditanstalt* v *Commission*, the applicant claimed, in substance, that it was unlawful to publish a decision imposing fines, as the publication of that decision was not in this case obligatory. In its judgment, however, the Court of First Instance rejected that plea, holding that the power of the institutions to make acts which they adopt public is the rule. Nonetheless, there are exceptions to that principle, insofar as Community law, notably by means of the provisions that guarantee compliance with professional secrecy, opposes the publication of those acts or of certain information which they contain. The Court of First Instance then defined the concept of professional secrecy, holding that, in order that information be of the kind to be covered by that protection, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires that the legitimate interests opposing disclosure of the information be weighed against the public interest that the activities of the Community institutions take place as openly as possible. In fact, the Community legislature has balanced the public interest in the transparency of Community action against interests liable to militate against such transparency in various acts of secondary legislation, inter alia in Regulations (EC) No 45/2001 and (EC) No 1049/2001 [27]. The Court of First Instance therefore established a relationship of correspondence between the concept of professional secrecy and those two regulations. Insofar as such provisions of secondary legislation prohibit the disclosure of information to the public or exclude public access to documents containing it, that information must be considered to be covered by the obligation of professional secrecy. Conversely, to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the obligation of professional secrecy.

6. Fines

In 2006, the Court of First Instance again delivered a large number of judgments dealing with the lawfulness of the appropriateness of fines imposed for infringement of Article 81 EC. The most significant developments this year concerned the principle that penalties must be in accordance with the law, the application of the Guidelines on the method of setting fines, the ceiling of 10 % of turnover and the Court of First Instance’s unlimited jurisdiction in relation to fines.

[27] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1) and 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).

(a) *Principle that penalties must be provided for by law*

In *Jungbunzlauer* v *Commission* and *Degussa* v *Commission*, the Court of First Instance rejected an objection of illegality in respect of Article 15(2) of Regulation No 17 [28], whereby it was alleged that that provision was incompatible with the principle that penalties must be provided for by law. According to the applicants, which had been parties to the cartels covering the markets for citric acid and methionine, that provision unlawfully confers on the Commission the discretion to decide on the appropriateness and the amount of the fine.

The Court of First Instance nonetheless considered that the principle that penalties must be provided for by law, as interpreted by the case-law of the European Convention on Human Rights, on the assumption that Article 7(1) of the European Convention on Human Rights is applicable to fines imposed in respect of infringements of the competition rules, requires only that the terms of the provisions whereby penalties are imposed be sufficiently precise for the consequences that may arise from an infringement of those provisions to be foreseeable with absolute certainty. Furthermore, although the Commission's discretion in applying penalties is wide, it is not absolute, since it is limited by the ceiling of 10 % of turnover, by the appraisal of the gravity and the duration of infringements, by the principles of equal treatment and proportionality, by its previous administrative practice seen in the light of the principle of equal treatment and, last, by the self-restraint which the Commission has imposed on itself by adopting the Leniency Notice and the Guidelines on the method of setting fines. The Court of First Instance therefore rejected the objection of illegality raised.

(b) *Guidelines*

Although the Commission adopted new Guidelines on the method of setting fines on 1 September 2006, the judgments delivered, and, moreover, the newly lodged cases, in 2006 concerned only the Guidelines adopted in 1998 [29].

From a general point of view, it is now accepted that the Guidelines bind the Commission. However, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that the fact that the Commission had thus bound itself was not incompatible with its retention of a substantial discretion. The adoption of the Guidelines thus did not render irrelevant the previous case-law according to which the Commission has a discretion which allows it to take into consideration, or not to do so, certain elements when it fixes the amount of the fines which it proposes to impose, depending in particular on the circumstances of the case. Where the Commission has departed from the method set out

[28] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959–62, p. 87).

[29] 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). Those guidelines have now been replaced by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 5.9.2003, p. 2). The new guidelines are to apply in cases where a statement of objections is notified after 1 September 2006.

in the Guidelines, it is for the Court of First Instance to ascertain whether that departure is justified in law and whether the reasons for such departure have been stated to the requisite legal standard. However, the Court of First Instance also made clear that the Commission's discretion and the limits which it has placed on it are without prejudice to the exercise by the Community judicature of its unlimited jurisdiction.

Extending, in substance, the same principles to the particular case of attenuating circumstances, the Court of First Instance stated that, in the absence of any binding indication in the Guidelines as regards the attenuating circumstances that might be taken into account, it must be considered that the Commission has retained a certain discretion to make a global assessment of the size of any reduction in the amount of fines to reflect attenuating circumstances.

During 2006 the Court of First Instance also continued to shed further light on certain provisions of the Guidelines, for example on the concept of 'actual impact', in *Archer Daniels Midland (sodium gluconate)* and *Archer Daniels Midland (citric acid)*, on the aggravating circumstance associated with the role of leader, in *BASF* v *Commission* and *Archer Daniels Midland* v *Commission (citric acid)*, and also on the attenuating circumstance associated with termination of the infringement as soon as the Commission intervenes, in *Archer Daniels Midlands* v *Commission (citric acid)* and *Archer Daniels Midland* v *Commission (sodium gluconate)*.

(c) *10 % ceiling*

Regulation No 17 provided, as Article 23(2) of Regulation (EC) No 1/2003 now provides, 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.

In *FNCBV and Others* v *Commission*, to which reference has already been made in connection with the application of the competition rules to the agricultural sector, the contested decision was vitiated by a failure to state reasons owing to the fact that the Commission had not dedicated any passage in the decision to compliance with the 10 % limit and the turnover to be taken into account when calculating that limit. Nonetheless, the Court of First Instance further held that the possibility for the Commission to rely not on the federations' own turnover but on that of their members is not limited to the circumstance, already identified in the case-law, in which an association may render its members liable. It must be possible to apprehend the real economic power of an association. Other specific circumstances may therefore justify the turnovers of the members of an association being taken into account, such as, for example, that fact that the infringement committed by an association relates to the activities of its members and that the practices are implemented by the association directly for the benefit of its members and in cooperation with them, the association having no autonomous objective interests by reference to its members' interests. That was indeed the situation in this case. The penalised federations' essential task was to defend their members and to represent their members' interests. The agreement in issue concerned those members' activities and had been concluded directly for their benefit. Last, it had been implemented, in particular, by the conclusion of local agreements

between departmental federations and local agricultural trade associations which were members of the national federations penalised in this case.

(d) *Exercise of unlimited jurisdiction*

Under Article 17 of Regulation No 17, and also under Article 31 of Regulation (EC) No 1/2003, the Court of First Instance, when hearing an action against a decision imposing a fine, is to have unlimited jurisdiction, within the meaning of Article 229 EC, which allows it to reduce or increase fines imposed by the Commission. During 2006 the Court of First Instance exercised that jurisdiction on numerous occasions and in various ways.

Thus, in the vitamins cartels cases, the Court of First Instance exercised its unlimited jurisdiction solely in order to draw the consequences from defects affecting the legality of the decision. In *BASF* v *Commission*, the Court of First Instance considered that the finding of the illegality of the Commission's assessment in regard to the aggravating circumstances which had led to an increase in the fine by reference to its basic amount gave the opportunity for the Community judicature to exercise its unlimited jurisdiction in order to confirm, cancel or amend that increase in the fine in the light of all the relevant circumstances of the case. More generally, having been invited by BASF to exercise its unlimited jurisdiction independently of a finding of illegality, the Court of First Instance held that the review which it exercises in respect of a Commission decision finding an infringement of the competition rules and imposing fines is confined to a review of the legality of that decision, it being possible for the Court to exercise its unlimited jurisdiction only where it has made a finding of illegality affecting the decision, and in respect of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for the determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.

Conversely, in *Hoek Loos* v *Commission*, which concerned the industrial gases cartel, the Court of First Instance considered the applicant's argument from the aspect of the request to cancel or reduce its fine. In that context, it observed that the assessment of the proportionate nature of the fine by reference to the gravity and duration of the infringement fell within the unlimited jurisdiction conferred on the Court of First Instance [30]. Having finally rejected all of those complaints, the Court of First Instance concluded that 'since the final amount of the fine imposed on the applicant appear[ed] to be wholly appropriate, no points raised by the latter justif[ied] any reduction thereof'. Likewise, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Court of First Instance held that, in addition to reviewing the legality of a decision, it must appraise whether it is appropriate to exercise its unlimited jurisdiction in regard to the fine imposed on the various members of the cartel. Thus, on a number of occasions, the Court of First Instance, after rejecting a plea put forward by the applicants, has exercised its unlimited jurisdiction and confirmed that the fine imposed was appropriate.

[30] See also *Westfalen Gassen Nederland* v *Commission* and Case T-329/01 *Archer Daniels Midland* v *Commission*, paragraph 380.

Last, in *FNCBV and Others* v *Commission*, to which reference has already been made, the Court of First Instance noted that, by way of attenuating circumstances, the Commission had taken into account, first, the fact that this was the first time that it had imposed sanctions on a cartel concluded exclusively between trade federations, relating to a basic agricultural product and involving two links in the production chain, and, second, the specific economic context of the case, marked in particular by the serious crisis in the beef sector from 2000, following the discovery of new cases of mad cow disease. For that reason, the Commission had applied a reduction of 60 % to the amount of the fines imposed on the applicants. Exercising its unlimited jurisdiction, the Court of First Instance considered that that reduction, although considerable, did not take sufficient account of the exceptional nature of the circumstances of the case. Accordingly, it considered that it was appropriate to establish at 70 % the percentage of reduction of the fines to be granted to the applicants and therefore to apply an additional reduction of 10 % to the amount of the fine.

It will also be noted that in two cases the Court of First Instance considered the possibility of increasing the fine imposed by the Commission.

Thus, in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, the Commission requested the Court of First Instance to increase the amount of the fine imposed on the applicant, on the ground that it had disputed for the first time, before the Court of First Instance, the existence of a part of the impugned agreements. The Court of First Instance held that it is important in that regard to know whether the applicant's conduct obliged the Commission, against any expectation that it might reasonably found on the applicant's cooperation during the administrative procedure, to prepare and present a defence before the Court of First Instance specifically aimed at the contestation of the unlawful acts which it had been entitled to consider were no longer called in question by the applicant. The Court of First Instance concluded in this case that an increase in the penalty was not appropriate owing to the relative unimportance of the points disputed both for the structure of the contested decision and for the preparation of the Commission's defence, which was scarcely rendered more difficult by the applicant's conduct.

In *Roquette Frères* v *Commission*, on the other hand, the Court of First Instance increased the contested fine after reducing it. It found, initially, that the fine imposed on the applicant did not correspond with its position on the sodium gluconate market. Even though no criticism could be levelled against the Commission, since it had calculated the amount of the fine on the basis of unclear and equivocal information originating with the applicant, the Court of First Instance nonetheless decided to correct that defect in the decision and therefore to reduce the fine. It then increased the fine by EUR 5 000 to take account of the fact that the applicant, which was aware that the Commission might be confused, had communicated its turnover incorrectly following a request for information. As Regulation No 17 provides that the Commission may impose a fine of between EUR 100 and EUR 5 000 if the undertaking supplies incorrect information in response to a request for information, the Court of First Instance decided to take the applicant's serious negligence into account and to increase the fine by the maximum amount provided for in that provision.

Last, the Court of First Instance commented in that judgment on the manner in which it may exercise its unlimited jurisdiction: under that power, the Court of First Instance may

take into consideration additional information which was not mentioned in the contested decision when assessing the amount of the fine in the light of the complaint raised by the applicant, an assessment which was confirmed in *Raiffeisen Zentralbank Österreich and Others* v *Commission*. However, the Court of First Instance made clear in *Roquette Frères* v *Commission* that, in the light of the principle of legal certainty, that possibility must in principle be limited to taking into account items of information preceding the contested decision and of which the Commission might have been aware at the time of adopting its decision. A different approach would lead the Court of First Instance to substitute itself for the administration in order to assess a question which the Commission has not yet been called upon to examine, which would be tantamount to interfering with the system of the allocation of functions and the institutional balance between the judiciary and the administration.

7. Points raised in connection with the control of concentrations

Three judgments concerning the application of Regulation (EEC) No 4064/89, now replaced by Regulation (EC) No 139/2004, were delivered during 2006, as was a fourth judgment concerning the application of the latter regulation [31].

(a) *The Commission's competence in relation to the control of concentrations*

Regulations (EEC) No 4064/89 and (EC) No 139/2004 apply solely to concentrations having a Community dimension, which is defined, inter alia, by reference to a number of turnover thresholds applicable to the parties to the transaction. Two judgments delivered in 2006 define the Commission's competence in that regard.

In the first place, *Endesa* v *Commission* set out the criteria on which the turnovers of two parties to a concentration must be calculated in order to ascertain whether the concentration has a Community dimension. In that case, Gas Natural, a Spanish company active in the energy sector, had notified the Spanish competition authority of its intention to launch a public bid to acquire the whole of the capital of Endesa, a Spanish company essentially active in the electricity sector. Taking the view that, according to Regulation (EEC) No 139/2004, the transaction had a Community dimension and therefore ought to have been notified to the Commission, Endesa had lodged a complaint with the Commission, which had nonetheless rejected it. Endesa challenged that decision before the Court of First Instance, maintaining, in particular, that the Commission had assessed its turnover incorrectly.

In its judgment, the Court of First Instance found, in particular, that the Merger Regulation does not expressly require that the Commission satisfy itself, of its own motion, that every concentration which is not notified to it is not of a Community dimension. However, on a

[31] 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), repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

complaint by an undertaking which considers that a concentration which has not been notified to the Commission is of a Community dimension, the Commission is required to take a decision on the principle of its competence. Consequently, it is in principle for the complainant to demonstrate the merits of its complaint, whereas it is for the Commission to carry out a diligent and impartial examination of the complaints submitted it and to provide a properly reasoned response to the arguments put forward by the complainant. Furthermore, the Commission cannot be required to satisfy itself of its own motion in each case that the audited accounts submitted to it faithfully reflect reality and to examine all the adjustments envisageable. It is only when its attention is drawn to specific problems that the Commission must examine those adjustments.

In this case, Endesa maintained, in particular, that the Commission's examination of its turnover ought to have been based on international accounting standards and not on the Spanish standards then in force. However, the Court of First Instance interpreted Regulation (EC) No 139/2004 as meaning that it requires that the Commission refer to the undertakings' accounts for the previous year, drawn up and audited in accordance with the applicable legislation. In this case, the rules applicable in Spain for accounts for the 2004 business year were the generally accepted national accounting principles and not international accounting principles, which, in accordance with the regulation on the application of international accounting standards, did not become applicable until the 2005 business year.

The Court of First Instance also rejected Endesa's arguments that the Commission ought to have carried out two adjustments, one relating to Endesa's distribution operations and the other in respect of gas exchanges. In that context, the Court of First Instance stated, in particular, that for reasons of legal security, the turnover to take into consideration for the purpose of determining the authority competent to examine a concentration must, in principle, be defined on the basis of the published annual accounts. It is only exceptionally, where particular circumstances so warrant, that it is necessary to make certain adjustments intended to better reflect the economic reality of the undertakings concerned. The Court of First Instance therefore finally dismissed Endesa's action.

In the second place, the judgment in *Cementbouw Handel & Industrie* v *Commission* is particularly informative as regards the Commission's assessment of the unitary nature of a concentration brought about by means of a number of legal transactions. The action was brought against a decision whereby the Commission had retroactively authorised the acquisition of the Netherlands joint undertaking CVK by the German group Haniel and by Cementbouw Handel & Industrie (both of which dealt in construction materials) following the commitment given by those two undertakings to put an end to their pre-existing joint undertaking. The case involved a complex transaction, based essentially on two separate legal transactions, one of which had been notified to and then approved by the Netherlands competition authority. In its action, Cementbouw Handel & Industrie contested, in particular, the possibility that the Commission could characterise a number of separate transactions as a single transaction.

The Court of First Instance, however, adopted a purposive interpretation of the concept of concentration, which must correspond to the economic logic followed by the parties. Thus, it held that a such a transaction, within the meaning of Regulation (EEC) No 4064/89,

may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions — the result of which is to confer on one or more undertakings direct or indirect economic control of the activity of one or more other undertakings — are interdependent, insofar as none of them would be carried out without the others. In this case, the Commission had not erred in taking the view that the transactions in issue were indeed interdependent.

Nor does the Commission misconstrue the allocation of powers between national and Community competition authorities effected by Regulation (EEC) No 4064/89 where it examines, together with a subsequent transaction from which it cannot be dissociated, another transaction which, taken on its own, does not fulfil the 'Community dimension' criteria and was approved by a national competition authority. In fact, in that case it is artificial to consider that the approved transaction is economically autonomous.

(b) *Commitments given in order to amend the initial proposed concentration*

Article 8(2) of Regulation (EEC) No 4064/89 provides, in substance, that the Commission is to approve a proposed concentration, following modification of the initial proposal by the undertakings concerned if necessary, provided that it is compatible with the common market. The Commission may therefore attach to its decision conditions intended to ensure that the undertakings comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible.

In *Cementbouw* v *Commission*, to which reference has just been made, the Court of First Instance examined the delicate interconnection between the principle of proportionality and the parties' freedom to propose commitments to resolve in full the competition problems identified by the Commission. During the procedure involving the examination of the concentration in question, the parties, including the applicant, had proposed in turn draft commitments, which had been refused by the Commission, and then final commitments, which had been accepted.

The Court of First Instance concluded, first, that the draft commitments did not enable the competition problem identified by the Commission to be resolved in full. As to the final commitments, since they went beyond the objective of restoring the competitive situation existing before the transaction, the Court of First Instance held that the Commission was required to take formal notice and to declare the transaction compatible with the common market. It could not therefore either declare the concentration incompatible with the common market or adopt a decision declaring the concentration compatible with the common market and imposing conditions aimed at strictly restoring the competitive situation existing before the concentration other than those proposed by the parties. In particular, Regulation (EEC) No 4064/89 makes no provision for the Commission to make its declaration that a concentration is compatible with the common market subject to conditions which it has imposed unilaterally, independently of the commitments given by the notifying parties. The applicant could not therefore plead failure by the Commission to respect the principle of proportionality, nor could it claim in this case to have proposed those commitments under the arbitrary constraint of the Commission.

(c) *Assessment of the creation of a collective dominant position*

According to the case-law [32], three conditions are necessary in order for a collective dominant position which significantly impedes effective competition in the common market or a substantial part thereof to be capable of being created following a concentration. First, the market must be sufficiently transparent, so that the undertakings which coordinate their conduct may be in a position to monitor to a sufficient extent whether the rules of coordination are being observed. Second, there must be a form of deterrent mechanism in the event of deviating conduct. Third, the reactions of undertakings which do not participate in the coordination, such as present or future competitors, and also the reactions of customers, must not be capable of jeopardising the results expected from coordination.

The judgment in *Impala* v *Commission* defines the obligations borne by the Commission, as regards the risk of the creation of a collective dominant position, when it declares a concentration compatible with the common market. In that case, Bertelsmann and Sony, two companies active in the media, had notified the Commission of a proposed concentration intended to combine their worldwide recorded music businesses under the name Sony BMG. The Commission had initially informed the parties that it had reached the provisional conclusion that the concentration was incompatible with the common market, since, in particular, it would reinforce a collective dominant position on the recorded music market. After hearing the parties, however, the Commission authorised the transaction. Impala, an international association of independent music production companies, then requested the Court of First Instance to annul that decision.

In its judgment, the Court of First Instance, relying on the case-law deriving from *Airtours* v *Commission*, recalled that, in the context of Regulation (EEC) No 4064/89, as regards the risk that a collective dominant position maybe created, the Commission is required to base its assessment on a prospective analysis of the reference market, which calls for a delicate prognosis as regards the probable development of the market and of the conditions of competition. Conversely, the finding not of a risk of a collective dominant position but of the existence of a collective dominant position is supported by a concrete analysis of the situation existing at the time of adoption of the decision. Accordingly, although the three conditions identified by the Court of First Instance in *Airtours* v *Commission* are indeed also necessary for the assessment of the existence of a collective dominant position, they may be established indirectly on the basis of a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position. In particular, close alignment of prices over a long period, especially if they are above the prices normally applied in a competitive situation, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, which may be presumed in such circumstances. Nonetheless, since the applicant had in this case relied solely on the conditions defined in *Airtours* v *Commission*, the Court of First Instance confined itself to ascertaining that those conditions had been observed.

[32] Judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 62.

In this case, as regards the reinforcement of a pre-existing collective dominant position on the recorded music market, the Court of First Instance found that, according to the decision, the absence of a collective dominant position on that market may be inferred from the heterogeneity of the relevant product, from the lack of market transparency and from the absence of retaliation between the five largest companies operating on the market. The Court of First Instance held, however, that the argument that the markets for recorded music are not sufficiently transparent to permit a collective dominant position was not supported by a statement of reasons of the requisite legal standard and was vitiated by a manifest error of assessment in that the elements on which it was based were incomplete and did not include all the relevant data that ought to have been taken into consideration by the Commission and were not capable of supporting the conclusions drawn from them. The Court of First Instance further observed that the Commission had relied on the absence of proof that retaliatory measures had been used in the past when, according to the case-law, the mere existence of effective deterrent mechanisms is sufficient. If the companies conform to the common policy, there is no need to resort to the exercise of sanctions. In that context, the Court of First Instance stated that credible and effective deterrent measures did appear to exist in the present case, in particular the possibility of sanctioning a deviating major record company by excluding it from compilations. Furthermore, even on the assumption that the appropriate test in that regard consists in whether such retaliatory means had been used in the past, the examination carried out by the Commission was insufficient.

In addition, as regards the possible creation after the merger of a collective dominant position on the markets for recorded music, the Court of First Instance criticised the Commission for having carried out an extremely brief examination and for having presented in the decision only a few superficial and formal observations on that point. The Court of First Instance further considered that the Commission could not, without making an error, rely on the fact that there was no market transparency and no evidence that retaliatory measures had been used in the past to conclude that the concentration was not likely to give rise to the creation of a collective dominant position. In effect, examination of the creation of a collective dominant position rests on a prospective assessment which ought to have induced the Commission not to rely solely on the existing situation. The Court of First Instance therefore annulled the contested decision.

C. State aid

1. Basic rules

Article 87(1) EC provides that, save as otherwise provided in the Treaty, any aid granted through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is to be incompatible with the common market.

As the Court of First Instance confirmed in *Le Levant 001 and Others* v *Commission* [33], classification as aid, in the sense of State aid incompatible with the common market,

[33] Judgment of 22 February 2006 in Case T-34/02 *Le Levant 001 and Others* v *Commission*, not yet published in the ECR.

requires that all the conditions set out in that provision are fulfilled, while the Commission's obligation to state reasons must also be satisfied in respect of each of those conditions. The aid in question in that case related to tax deduction measures for certain overseas investments, introduced initially by the French Law of 11 July 1986, in respect of which the Commission had raised no objections under Article 87 EC. The operation in question consisted in ensuring the financing and operation of the cruise vessel *Le Levant*, for a period of approximately seven years, by investors who were natural persons, through one-person limited liability undertakings (EURLs), constituted solely for that purpose and brought together in a maritime co-ownership.

In its judgment, the Court of First Instance found that the contested decision did not explain how the aid in question met three of the four conditions laid down in Article 87(1) EC. First, as regards the effect on trade between Member States, the Court of First Instance observed that the Commission did not state how the aid in question might affect such trade, when the vessel was to be used at Saint-Pierre-et-Miquelon, which is not part of the territory of the Community. Second, as regards the advantage conferred on the beneficiary of the aid and the selective nature of that advantage, the Court of First Instance considered that the contested decision did not explain how the private investors had been placed in an advantageous position by the aid in question. Third, as regards the effects of the aid on competition, the Court observed that there was nothing in the contested decision explaining how, and on what market competition was affected or likely to be affected by the aid. On the ground, in particular, of that defective reasoning, the Court of First Instance annulled the Commission's decision.

It may be noted in that regard that the Court of First Instance also found insufficient or lack of reasoning leading to the annulment in whole or in part of the contested decision in *Ufex and Others* v *Commission*, *Lucchini* v *Commission* and *Italie and Wam* v *Commission* [34].

Although the Court of First Instance adjudicated in 2006 on many other points of the State aid system, mention will be made only of *British Aggregates* v *Commission*, in which the Court of First Instance examined the capacity of the national measure to confer a selective advantage to the exclusive benefit of certain undertakings or of certain business sectors [35].

In that case, the United Kingdom of Great Britain and Northern Ireland had introduced an environmental levy which is, in principle, a burden on the commercial exploitation of virgin aggregates, that is to say granular material on first extraction used in the construction sector, and intended in principle to maximise the use of recycled aggregates and other alternative materials to virgin aggregate, to promote its efficient use and to ensure the

34 Judgments of 7 June 2006 in Case T-613/97 *Ufex and Others* v *Commission*, not yet published in the ECR; of 19 September 2006 in Case T-166/01 *Lucchini* v *Commission*, not yet published in the ECR; and of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and Wam* v *Commission*, on appeal, not published in the ECR.

35 Judgment of 13 September 2006 in Case T-210/02 *British Aggregates* v *Commission* (on appeal, Case C-487/06 P). Also concerned with the question of the selectivity of aid is the judgment of 26 January 2006 in Case T-92/02 *Stadtwerke Schwäbisch Hall and Others* v *Commission* (on appeal, Case C-176/06 P), not published in the ECR.

internalisation of environmental costs of the extraction of the aggregates to which the tax applied, in accordance with the 'polluter-pays' principle. Faced with such a tax measure, the Court of First Instance found it necessary to determine whether the Commission had been right to consider that the differentiation introduced by the measure in question had arisen from the nature or the general system of the overall scheme which applied. Where it was apparent that a differentiation was based on objectives other than those pursued by the overall scheme, the measure in question would, in principle, be regarded as satisfying the condition of selectivity laid down under Article 87(1) EC.

According to the Court of First Instance, an environmental levy is an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base. It seeks to tax certain goods or services so that the environmental costs may be included in their price and/or so that recycled products are rendered more competitive and producers and consumers are oriented towards activities which better respect the environment. It is open to the Member States, which are competent in matters relating to environmental policy, to introduce sectoral environmental levies in order to attain certain environmental objectives. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or services, and cannot be seen as part of an overall system of taxation which applies to all similar activities which have a comparable impact on the environment, does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage. In this case, the Commission had not exceeded the limits on its power of assessment in taking the view that scope of the levy in question could be justified by the pursuit of the desired environmental objectives and, accordingly, that the levy did not constitute State aid.

2. Procedural matters

(a) *Right of interested parties to submit observations*

In two judgments delivered in 2006, the Court of First Instance emphasised the detail which a decision to initiate the procedure must contain, in order to allow third parties to submit their comments.

First, in *Le Levant 001 and Others* v *Commission*, to which reference has already been made, the Court of First Instance defined the Commission's obligations under Article 88(2) EC as regards respect for the procedural guarantees of persons concerned by a decision which declares a national measure incompatible with Article 87(1) EC. The Court of First Instance held that the identification of the beneficiary of the aid is necessarily one of the 'relevant issues of fact and law' which must be contained in the decision to open the procedure if that is possible at that stage of the procedure, since it is on the basis of that identification that the Commission will be able to adopt the recovery decision. In this case, the Court of First Instance found that the decision to open the procedure had made no reference to the investors as potential beneficiaries of the alleged aid but, on the contrary, had given the

impression that that beneficiary was the manager of the co-ownership, which was referred to as the operator and ultimate owner of the vessel. The Court of First Instance concluded that, by not giving the private investors the opportunity to submit comments, the Commission had infringed Article 88(2) EC and also the general principle of Community law which requires that any person against whom an adverse decision may be taken must be given the opportunity to make his views known effectively regarding the facts held against him by the Commission as a basis for the disputed decision.

Second, in *Kuwait Petroleum (Nederland)* v *Commission* [36], the Court of First Instance stated that the Commission cannot be required to present a complete analysis on the aid in question in its notice of intention to initiate that procedure. It must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments. In this case, the fundamental concept, namely that the oil companies could be the actual recipients of the aid in the light of the exclusive supply agreements, had been contained in the notice, so that the Commission, with the means it had at its disposal, had correctly performed its task of putting the interested parties on formal notice duly to submit their comments during the formal investigation procedure on the aid.

(b) *Reliance before the Court of First Instance on facts not mentioned during the administrative phase before the Commission*

In two judgments delivered in 2006, the Court of First Instance supplemented its case-law limiting the right for an applicant to rely before the Court on evidence not available to the Commission during the administrative phase [37].

Thus, in *Schmitz-Gotha Fahrzeugwerke* v *Commission* [38], the Court of First Instance held that as the applicant had not participated in the administrative procedure, it could not rely on elements of which the Commission had not been aware during that phase, although the applicant had been mentioned by name as being the beneficiary of the aid in question and although the Commission had requested the German authorities and any interested parties to produce evidence of certain elements. Once the Commission has given the interested parties the opportunity to submit their comments, it cannot be criticised for having failed to take account of any elements of fact which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it.

[36] Judgment of 31 May 2006 in Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission*, not yet published in the ECR.

[37] Judgments of 14 January 2004 in Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 50 and 51, and of 11 May 2005 in Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and Zemag* v *Commission*, paragraphs 67 to 70, not yet published in the ECR.

[38] Judgment of 6 April 2006 in Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission,* not yet published in the ECR.

The Court of First Instance likewise found in *Ter Lembeek* v *Commission* [39] that, notwithstanding that the applicant had been perfectly aware of the initiation of a formal investigation procedure and of the need and importance for it to supply certain information, it had decided not to participate in that procedure and had not even claimed that the reasons given in the decision to initiate the formal investigation procedure were insufficient to allow it properly to exercise its rights. In those circumstances, the applicant could neither rely for the first time before the Court on information which had been unknown to the Commission at the time when it had adopted the contested decision nor rely on a plea supported only by information which had been unknown to the Commission when it had adopted the contested decision, such a plea being inadmissible.

(c) *Reasonable time*

In *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [40], the preliminary stage provided for in Article 88(3) EC had lasted almost 28 months. The Court of First Instance held that, as the reasonableness of the duration of an initial investigation procedure within the meaning of Article 88(3) EC must be determined in relation to the particular circumstances of each case, in the present case neither the volume of documents submitted to the Commission by the applicants nor the other circumstances of the case justified the duration of the initial investigation conducted by the Commission. However, in the absence of other circumstances the existence of which had not been established by the applicants, the mere adoption of a decision after the expiry of a reasonable period was not regarded by the Court of First Instance as in itself sufficient to render unlawful a decision taken by the Commission. The Court of First Instance therefore dismissed the action for annulment.

D. Community trade mark

In 2006 a great many decisions again concerned Regulation (EC) No 40/94 [41]. The 90 trade mark cases completed thus account for 20 % of the cases disposed of by the Court in 2006.

1. Absolute grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in two of the total of eight judgments which disposed of substantive issues in cases concerning absolute grounds for refusal of registration [42]. In 2006 the case-law dealt essentially with the absolute grounds for refusal

[39] Judgment of 23 November 2006 in Case T-217/02 *Ter Lembeek* v *Commission*, not yet published in the ECR.

[40] Judgment of 12 December 2006 in Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, not yet published in the ECR.

[41] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

[42] Judgments of 4 October 2006 in Case T-188/04 *Freixenet* v *OHIM (Shape of a frosted matt black bottle)* and Case T-190/04 *Freixenet* v *OHIM (Shape of a frosted white bottle)*, neither published in the ECR.

based on lack of any distinctive character of the sign and the fact that it is descriptive (Article 7(1)(b) and (c) of Regulation (EC) No 40/94). For example, the following were held to be descriptive or lacking any distinctive character: the shape of a plastic bottle for drinks, condiments and liquid foodstuffs; the WEISSE SEITEN sign, inter alia for certain data carriers and paper-based goods, and an oblong shape calling to mind a skein or a twist for certain food products [43].

2. Relative grounds for refusal of registration

There was once again a great deal of case-law in 2006 in relation to this point. Mention can for example be made of the clarifications to the relationship between distinctive character and reputation set out in the judgment in *Vitakraft-Werke Wührmann* v *OHIM — Johnson's Veterinary Products (VITACOAT)*, or the temporal assessment of the conflict between two marks in *MIP Metro* v *OHIM — Tesco Stores (METRO)* [44]. However, **only** the new developments in relation to the concept of a 'family of marks' and the scope of the protection conferred by genuine use of a mark will be discussed here.

(a) *Concept of a 'family of marks'*

In *Ponte Finanziaria* v *OHIM — Marine Enterprise Projects (BAINBRIDGE)*, the Court explained the relevance of the concept of a 'family of marks' for the assessment of the likelihood of confusion [45]. In that case the applicant submitted that the earlier trade marks, all characterised by the presence of the same word component, 'bridge', constituted a 'family of marks' or 'marks in a series'. In its view, such a circumstance was liable to give rise to an objective likelihood of confusion. For the Court, although the concept of 'marks in a series' is not referred to by Regulation (EC) No 40/94, the likelihood of confusion must nonetheless be assessed globally, taking into account all factors relevant in the circumstances. The Court added that the fact that an opposition to a Community trade mark application is based on several earlier marks and that those marks display characteristics which give grounds for regarding them as forming part of a single 'series' or 'family' constitutes such a relevant factor for the purpose of assessing whether there is a likelihood of confusion. That may be the case, inter alia, either when those marks reproduce in full a single distinctive element with the addition of a figurative or word element differentiating them from one another, or when they are characterised by the repetition of a single prefix or suffix taken from an original mark. In those circumstances, a likelihood of confusion may be created by the possibility of association between the trade mark applied for and the earlier marks

[43] Judgments of 15 March 2006 in Case T-129/04 *Develey* v *OHIM (Shape of a plastic bottle)* (under appeal, Case C-238/06 P); of 16 March 2006 in Case T-322/03 *Telefon & Buch* v *OHIM — Herold Business Data (Weisse Seiten)*, neither yet published in the ECR; and of 31 May 2006 in Case T-15/05 *De Waele* v *OHIM (Shape of a sausage)*, not yet published in the ECR.

[44] See, respectively, judgments of 12 July 2006 in Case T-277/04 *Vitakraft-Werke Wührmann* v *OHIM — Johnson's Veterinary Products (VITACOAT)* and of 13 September 2006 in Case T-191/04 *MIP Metro* v *OHIM — Tesco Stores (METRO)* (under appeal, Case C-493/06 P), neither yet published in the ECR.

[45] Judgment of 23 February 2006 in Case T-194/03 *Ponte Finanziaria* v *OHIM — Marine Enterprise Projects (BAINBRIDGE)* (under appeal, Case C-234/06 P), not yet published in the ECR.

forming part of the series where the trade mark applied for displays such similarities to those marks as might lead the consumer to believe that it forms part of that same series and therefore that the goods covered by it have the same commercial origin as those covered by the earlier marks, or a related origin.

The Court however limited that solution to cases in which two conditions are cumulatively satisfied. First, the proprietor of a series of earlier registrations must furnish proof of use of all the marks belonging to the series or, at the very least, of a number of marks capable of constituting a 'series'. Second, in addition to its similarity to the marks belonging to the series, the trade mark applied for must also display characteristics capable of associating it with the series. The Court stated that that could not be the case where, for example, the element common to the earlier marks in a series is used in the trade mark applied for either in a different position from that in which it usually appears in the marks belonging to the series or with a different semantic content. In this instance the Court held that, at the very least, the first of those two conditions was not satisfied since the applicant had proved the presence on the market only of two earlier marks in the series relied on.

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

Article 15(1) of Regulation (EC) No 40/94 states that if, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark is to be subject to the sanctions provided for in that regulation, unless there are proper reasons for non-use. Article 15(2) provides that use of the Community trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered also constitutes genuine use.

Furthermore, according to 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 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 that if the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it is, for the purposes of the examination of the opposition, to 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 extends the application of those principles to the case of earlier national trade marks.

In *Ponte Finanziaria* v *OHIM*, the Court ruled on an argument of the applicant based on the concept of a 'defensive mark'. That concept makes it possible, in Italian law, to bring about an exception to the rule that a trade mark must be revoked for non-use where the proprietor of the unused trade mark is, at the same time, the proprietor of another, similar trade mark

or several other, similar trade marks still in force, at least one of which is used to identify the same goods or services.

The Court held, however, that there was no concept of a 'defensive trade mark' in the system of protection of the Community trade mark, which imposes, as an essential condition for the recognition of the rights attached to marks, actual use of a sign in trade in connection with the goods or services in question. The Court stated in this regard that defensive registrations did not fall within the 'proper reasons' for non-use referred to in Article 43(2) of Regulation (EC) No 40/94. That concept refers to the existence of obstacles to use of the trade mark or to situations in which its commercial exploitation proves, in the light of all the relevant circumstances of the case, to be excessively onerous. That could for example be the case where national rules impose restrictions on the marketing of the goods covered by the trade mark. Conversely, that is not the case in respect of a national provision which allows the registration as trade marks of signs not intended to be used in trade on account of their purely defensive function in relation to another sign which is being commercially exploited.

Nor is the concept of a 'defensive mark' covered by the possibility, for the proprietor of a mark, to demonstrate genuine use by furnishing proof of use in trade in a form slightly different from that in which registration was effected. According to the Court, the purpose of Article 15(2)(a) of Regulation (EC) No 40/94 is to allow the proprietor of a mark, on the occasion of its commercial exploitation, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned. The material scope of that provision must be regarded as limited to situations in which the sign actually used by the proprietor of a trade mark constitutes the form in which that same mark is commercially exploited. However, that provision does not allow the proprietor of a registered trade mark to avoid his obligation to use that mark by relying in his favour on the use of a similar mark covered by a separate registration.

3. Formal and procedural issues

It follows from the principle of continuity in terms of functions as between the adjudicating bodies of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) that, within the scope of application of Article 74(1) of Regulation (EC) 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) [46].

[46] Judgment in Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 32.

The Court continued in 2006 to define the scope of its case-law by clarifying the purpose of the examination which the Board of Appeal must carry out, both from a factual and a legal point of view.

First, as regards the factual examination of the Board of Appeal, in *La Baronia de Turis* v *OHIM — Baron Philippe de Rothschild (LA BARONNIE)* and *Caviar Anzali* v *OHIM — Novomarket (Asetra)*, the Court held that the Board of Appeal has the same powers as the department which was responsible for the decision appealed and that its examination concerns the dispute as a whole as it stands on the date of its ruling [47]. Consequently, the review exercised by the Boards of Appeal is not limited to the lawfulness of the contested decision, but, by virtue of the devolutive effect of the appeal proceedings, it requires a reappraisal of the dispute as a whole, since the Boards of Appeal must re-examine in full the initial application and take into account evidence produced in due time before them. The Court therefore held that, although Article 74(2) of Regulation (EC) No 40/94 gives OHIM the option to disregard evidence which is not submitted 'in due time' by the parties, that concept must be interpreted in proceedings before a Board of Appeal as referring to the time limit applicable to the lodging of an appeal and to the time limits granted in the course of those proceedings. Since this notion applies in each of the proceedings pending before OHIM, the expiry of the time limits granted by the department hearing the application at first instance for producing evidence therefore has no bearing on the question whether the evidence has been produced 'in due time' before the Board of Appeal. The Board of Appeal is therefore required to take into consideration the evidence produced before it, irrespective of whether or not it has been produced before the Opposition Division. In this instance, since the documents in question had been annexed to the statement before the Board of Appeal within the four-month time limit laid down in Article 59 of Regulation (EC) No 40/94, the production of those documents could not be regarded as late for the purposes of Article 74(2) of Regulation (EC) No 40/94.

The Court nonetheless held that it was necessary to examine the consequences that had to be derived from that error in law, since a procedural irregularity entails the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the contested decision might have been substantively different. In this instance, the Court, whilst observing that it was not for it to replace OHIM in assessing the matters at issue, held that it could not be ruled out that the evidence which the Board of Appeal wrongly refused to take into consideration might be such as to modify the substance of the contested decision. It therefore annulled the contested decision [48].

Second, as regards the legal examination which the Board of Appeal must conduct, the Court stated, in *DEF-TEC Defense Technology* v *OHIM — Defense Technology (FIRST DEFENSE AEROSOL PEPPER PROJECTOR)*, that that examination is not, in principle, determined

[47] Judgments of 10 July 2006 in Case T-323/03 *La Baronia de Turis* v *OHIM — Baron Philippe de Rothschild (LA BARONNIE)* and of 11 July 2006 in Case T-252/04 *Caviar Anzali* v *OHIM — Novomarket (Asetra)*, neither yet published in the ECR.

[48] See, for a substantially similar analysis, the judgment in *Torre Muga*.

exclusively by the grounds relied on by the party who has brought the appeal [49]. Accordingly, even if the party who brought the appeal has not raised a specific ground of appeal, the Board of Appeal is nonetheless bound to examine whether or not, in the light of all the relevant matters of fact and of law, the decision under appeal could be lawfully adopted. In the present case, the applicant contended before the Court that the decision of the Opposition Division was void because it does not have signatures. The Court held that although that plea was not put forward before the Board of Appeal, and assuming that an infringement of the formal rules applicable were proven, the Board of Appeal should have raised it of its own motion.

Also from a procedural point of view, the Court dealt again in 2006 with the question of the factors which could be relied on before it against a decision of the Board of Appeal.

In *Vitakraft-Werke Wührmann* v *OHIM*, the Court thus relied on its earlier case-law in holding that facts which are pleaded before it without having previously been brought before the departments of OHIM can affect the legality of a decision of the Board of Appeal only if OHIM should have taken them into account of its own motion. Since Article 74(1) of Regulation (EC) No 40/94 provides that, in proceedings relating to relative grounds for refusal of registration, OHIM is to be restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, it is not required to take into account of its own motion facts which have not been put forward by the parties. Therefore, such facts cannot affect the legality of a decision of the Board of Appeal.

By contrast, in *Armacell* v *OHIM — nmc (ARMAFOAM)*, the Court held that the fact that a party agreed in the proceedings before the Opposition Division that the goods covered by the marks in question might potentially be identical, then stated before the Board of Appeal that the question whether the goods were similar could be left undecided on account of the alleged differences between the conflicting signs, did not in any way divest OHIM of the power to adjudicate on whether the goods covered by those marks were similar or identical [50]. Consequently, such a fact does not deprive that party of the right to challenge before the Court, in the factual and legal context of the dispute before the Board of Appeal, the findings of that body on this point.

E. Access to documents

Only two judgments were delivered in 2006 in relation to a refusal of access to documents in the light of Regulation (EC) No 1049/2001 [51]. Those judgments nonetheless enabled the

[49] Judgment of 6 September 2006 in Case T-6/05 *DEF-TEC Defense Technology* v *OHIM — Defense Technology* (*FIRST DEFENSE AEROSOL PEPPER PROJECTOR*), not yet published in the ECR.

[50] Judgment of 10 October 2006 in Case T-172/05 *Armacell* v *OHIM — nmc (ARMAFOAM)*, not yet published in the ECR.

[51] 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). Judgments of 6 July 2006 in Joined Cases T-391/03 and T-70/04 *Franchet and Byk*; and of 14 December 2006 in Case T-237/02 *Technische Glaswerke Ilmenau* v *Commission*, neither yet published in the ECR.

Court to define the scope of the exceptions based on the protection of the purpose of inspections and investigations and on the protection of court proceedings.

First, in *Technische Glaswerke Ilmenau* v *Commission*, which concerned a refusal of a request for access to documents relating to State aid proceedings, the Court held that the mere fact for the Commission to claim that access could compromise the necessary dialogue between the Commission, the Member State and the undertakings concerned in the context of investigations in progress did not demonstrate that there were special circumstances justifying not undertaking a concrete, individual examination of the documents to which access was requested.

Second, in the judgment in *Franchet and Byk* v *Commission*, the Court dealt with a refusal of access to various documents of OLAF and the internal audit service of the Commission. Those documents had been sent to the French and Luxembourg judicial authorities in the context of an investigation into alleged irregularities at Eurostat. The applicants' liability had been an issue in the context of that case.

Having observed that the exceptions to the principle of access to documents of the institutions must be construed and applied restrictively, the Court examined the Commission's application of those exceptions, more specifically those based on the protection of court proceedings and of the purpose of inspections, investigations and audits.

As regards the first exception, the Court held that, in the circumstances of this case, the Commission was not entitled to find that the various documents sent by OLAF had been drawn up solely for the purposes of court proceedings. The action taken by the national competent authorities or the institutions in response to the reports and information forwarded by OLAF is within their sole and entire responsibility and it is possible that a communication from OLAF to the national authorities or to an institution would not lead to the opening of judicial proceedings at national level or disciplinary or administrative proceedings at Community level. Compliance with national procedural rules is sufficiently safeguarded if the institution ensures that disclosure of the documents does not constitute an infringement of national law. Therefore, in the event of doubt, OLAF should have consulted the national court and should have refused access only if that court objected to disclosure of the documents.

As regards the second exception, based on the protection of the purpose of inspections, investigations and audits, the Court held that that provision applies only if disclosure of the documents in question may endanger the completion of the inspections, investigations or audits in question. That makes it necessary to ascertain whether, at the time of the adoption of the contested decisions, inspections and investigations were still in progress which could therefore have been jeopardised and whether these activities were carried out within a reasonable period. In this instance, the Commission made no error of law or of assessment in taking the view that, at the time of the adoption of the first contested decision, access to the documents sent to the French and Luxembourg authorities had to be refused on the ground that disclosure of these documents would undermine the protection of the purpose of inspections, investigations and audits. It is apparent however from certain communications from OLAF to the Commission, that OLAF made a decision

in abstracto without showing to the requisite legal standard that disclosure of these documents would actually prejudice the protection of the purpose of inspections, investigations and audits and that the exception invoked actually applied to all the information contained in those documents. The decision to refuse access was therefore annulled insofar as it concerned those documents.

Finally, mention should be made of the application, in *Kallianos* v *Commission*, of the principles deriving from Regulation (EC) No 1049/2001 in order to rule, in an action brought by an official against a decision withholding part of his remuneration, on a plea alleging inter alia a lack of transparency [52]. In that case, the applicant had requested access to the opinions of the Commission's legal service concerning his personal circumstances. Although the applicant had not lodged a request on the basis of Regulation (EC) No 1049/2001, it is in the light of the case-law concerning that legislation that it was held that the Commission had partially infringed the applicant's right of access to the file. The Court did not however annul the Commission's decision, since the refusal to disclose the legal opinions in question had not harmed the applicant's defence.

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

In 2006, the Court delivered three judgments concerning the fight against terrorism [53]. The first two supplement the principles laid down in *Yusuf and Al Barakaat International Foundation* v *Council and Commission* and in *Kadi* v *Council and Commission* [54], whilst the third judgment was given in an unprecedented legal context.

After the terrorist attacks of 11 September 2001, the Security Council of the United Nations adopted several resolutions calling on all the Member States of the United Nations (UN) to freeze the funds and other financial resources of the persons and entities associated with the Taliban, Osama bin Laden and the Al-Qaeda network. A Sanctions Committee was tasked by the Security Council with identifying the subjects and maintaining an updated list of them. Those resolutions were implemented in the Community by Council regulations ordering the freezing of the funds of the persons and entities concerned. Those persons and entities are included in a list which is regularly revised by the Commission on the basis of updates carried out by the Sanctions Committee. Derogations to the freezing of funds may be granted by States for humanitarian reasons, subject to the approval of the Sanctions Committee. Requests to be removed from the list can be submitted to the Sanctions Committee through the State in which the person concerned resides or of which he is a national, in accordance with a specific procedure.

52 Judgment of 17 May 2006 in Case T-93/04 *Kallianos* v *Commission* (under appeal, Case C-323/06 P), not yet published in the ECR.

53 Judgments of 12 July 2006 in Case T-253/02 *Ayadi* v *Council* (under appeal, Case C-403/06 P), not yet published in the ECR, and in Case T-49/04 *Hassan* v *Council and Commission* (under appeal, Case C-399/06 P), not published in the ECR; and judgment of 12 December 2006 in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council*, not yet published in the ECR.

54 Judgment in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* (under appeal, Case C-45/05 P) [2005] ECR II-3533, and Case T-315/01 *Kadi* v *Council and Commission* (under appeal, C-402/05 P) [2005] ECR II-3649.

Chafiq Ayadi, a Tunisian national residing in Dublin (Ireland), and Faraj Hassan, a Libyan national held in Brixton prison (United Kingdom), were included in the Community list in question. Those two persons requested that the Court annul that measure and, in the two resulting judgments, the Court clarified a number of points in relation to the procedure for freezing funds.

In *Ayadi* v *Council*, the Court, having observed that the freezing of funds provided for by the contested regulation does not infringe the universally recognised fundamental rights of the human person (*jus cogens*), acknowledged that such a measure is particularly drastic. However, it went on to state that the importance of the aims pursued by the legislation in question is such as to justify those negative consequences and that the freezing of the funds did not prevent the individuals concerned from leading satisfactory personal, family and social lives, given the circumstances. In particular, they were not prevented from carrying on professional activities even if, however, the receipt of income from those activities was regulated.

As regards, next, the procedure for removal from the list, the Court found that the Sanctions Committee's guidelines and the contested Council regulation provide for the right for an individual to submit his case to the Sanctions Committee for re-examination through the government of the country in which he resides or of which he is a national. That right is therefore also safeguarded by the Community legal order. In examining such a request, the Member States are bound to respect the fundamental rights of the persons involved given that the respect of those rights is not capable of preventing the proper performance of their obligations under the Charter of the United Nations. In particular, the Member States must ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities. The Member States are not entitled to refuse to initiate the review procedure solely because the individual concerned cannot provide precise and relevant information owing to his having been unable to ascertain the precise reasons for which he was included in the list in question, on account of the confidential nature of those reasons. Member States are also required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Sanctions Committee if that appears to be objectively justified in the light of the relevant information supplied.

Finally, it is open to the persons concerned to bring an action before the national courts against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination. The need to ensure the full effectiveness of Community law may lead a national court to refrain from applying, if need be, a national rule preventing the exercise of that right, such as a rule excluding from judicial review a refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals. In the present cases, the Court found that it was for Mr Ayadi and Mr Hassan to avail themselves of the opportunities for judicial remedy offered by national law if they intended to challenge the alleged failure of the Irish and British authorities to cooperate in good faith with them.

The judgment in *Organisation des Modjahedines du peuple d'Iran* v *Council* also concerned the fight against terrorism, but was given in another legal context which gives rise to the establishment of different principles. On 28 September 2001, the United Nations Security

Council adopted a resolution calling on all the Member States of the UN to combat terrorism and the financing thereof by all means, inter alia by freezing the funds of persons and entities who commit, or attempt to commit, terrorist acts. That resolution can be distinguished from those at issue in *Yusuf and Al Barakaat International Foundation* v *Council and Commission*, *Kadi* v *Council and Commission*, *Ayadi* v *Council* and *Hassan* v *Council and Commission* in that the identification of the persons whose funds must be frozen is left to the discretion of the States. That resolution was implemented in the Community inter alia by two common positions and a Council regulation, adopted on 27 December 2001, which order the freezing of funds of the persons and entities included in a list drawn up and regularly updated by the Council [55]. By a common position and by a decision of 2 May 2002, the Council updated the list of persons and entities concerned, including in it inter alia l'Organisation des Modjahedines du peuple d'Iran (OMPI) [56]. Since then, the Council has adopted a number of common positions and decisions updating the list in question, OMPI still appearing in that list. OMPI brought an action before the Court seeking the annulment of those common positions and decisions to the extent that those measures concerned it.

In its judgment, the Court found that certain rights and fundamental safeguards, in particular the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection are, as a matter of principle, fully applicable in the context of the adoption of a Community decision to freeze funds under the regulation in question. As regards the right to a fair hearing, the Court drew a distinction between this case and *Yusuf and Al Barakaat International Foundation* v *Council and Commission* and *Kadi* v *Council and Commission*. Since, in the system in question in the present case, the specific identification of the persons and entities whose funds must be frozen is left to the assessment of the members of the UN, that identification involves the exercise of the Community's own powers, entailing, by the Community, a discretionary appreciation from the point of view of UN law. In those circumstances, the Council is in principle fully bound to observe the right to a fair hearing of the parties concerned.

Determining next the extent of those rights and safeguards, and the restrictions to which they may be subject in the context of the adoption of a Community measure to freeze funds, the Court held, first, that the general principle of observance of the right to a fair hearing does not require that the parties concerned be heard by the Council when an initial decision freezing their funds is adopted, since that decision must be able to benefit from a surprise effect. By contrast, that principle requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence which gives rise to a decision to freeze funds be notified, insofar as reasonably possible, either concomitantly with or as soon as possible after the adoption of such a decision. Subject to the same reservations,

[55] Common Position 2001/930/CFSP on combating terrorism (OJ L 344, 28.12.2001, p. 90), Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ L 344, 28.12.2001, p. 93), and Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344, 28.12.2001, p. 70).

[56] Common Position 2002/340/CFSP updating Common Position 2001/931 (OJ L 116, 3.5.2002, p. 75), and Decision 2002/334/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927/EC (OJ L 116, 3.5.2002, p. 33).

the parties concerned must be afforded the opportunity effectively to make known their views before any subsequent decision to maintain a freeze of funds.

Similarly, subject also to the same reservation, the statement of reasons for an initial or subsequent decision to freeze funds must at least make actual and specific reference to the factors which give rise to the freezing of the funds, including in particular the specific information or material in the file indicating that a decision has been taken in respect of the parties concerned by a competent authority of a Member State. That statement must also indicate the reasons why the Council considers, in the exercise of its discretion, that the parties concerned must be the subject of such a measure.

Lastly, the right to effective judicial protection is ensured by the right the parties concerned have to bring an action before the Court against any decision ordering the freeze of their funds or the maintenance thereof. However, given the broad discretion that the Council enjoys in this area, the review carried out by the Court of the lawfulness of such decisions must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.

In applying those principles to this case, the Court observed that the relevant legislation does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent decisions to maintain the freeze of funds, with a view to having them removed from the list. Next, the Court found that at no time before the action was brought was the evidence which gave rise to the freezing of the funds notified to OMPI. Neither the initial decision to freeze its funds, nor the subsequent decisions to maintain that freeze mentioned even the specific information or material in the file which indicated that a decision justifying its inclusion in the disputed list had been taken by a competent national authority. The Court concluded from this that the Council had infringed its obligation to state reasons. Consequently the Court annulled the contested decision insofar as it concerned OMPI.

II. *Actions for damages*

A. Conditions for admissibility of an action for damages

The action for damages provided for in the second paragraph of Article 288 EC is an independent form of action which differs from an action for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution. The specific nature of the action for damages means that it must be declared inadmissible where it is actually aimed at securing withdrawal of a measure which has become definitive and would, if upheld, nullify the legal effects of that measure. According to the case-law, that is particularly the case where the action for damages seeks the payment of an amount precisely equal to the duty paid by the applicant pursuant to the measure which has become definitive [57].

[57] Judgment of the Court of Justice in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 30, 32 and 33.

In *Danzer* v *Council* [58], the applicants brought an action aimed at obtaining compensation for the loss allegedly suffered because of the penalties imposed on them by the competent Austrian authorities on the basis of national law implementing two directives coordinating company law provisions [59]. They did not allege any other loss which might be regarded as being distinct from the effects arising immediately and solely from the implementation of those decisions on penalties. The Court of First Instance concluded that the applicants were seeking to obtain, through their action for damages, the result that would be obtained if the decisions taken by the competent national authorities were annulled, and that their action was therefore admissible.

The Court of First Instance attached to that conclusion several riders concerning the system of Community remedies. It held that, even if the disputed provisions could be regarded as being directly behind those national penalties decisions and even if the applicants thus had an interest in having the disputed provisions declared unlawful, their action for damages was not the appropriate means to achieve that end. In the system of legal remedies provided for by the Treaty, the appropriate legal remedy would have been to request, from the national court before which the action to have those decisions annulled was brought, a reference for a preliminary ruling on the validity of the disputed provisions from the Court of Justice. The Court of First Instance found it to be entirely irrelevant that the national courts seised had rejected their requests for a reference to be made. The Court stated, without prejudice to the possible liability of the Member State concerned [60], that the case-law of the Court of Justice does not recognise an absolute obligation to refer a question for a preliminary ruling [61]. The Court of First Instance held that it was not for it to assess, in the context of an action for damages, the appropriateness of the refusal of the Austrian courts to refer a question for a preliminary ruling on the validity of the disputed provisions of those directives. In the view of the Court of First Instance, to allow the action for damages as admissible would enable the applicants to circumvent both the rejection of their applications for annulment of the national decisions imposing penalties by the national courts, which alone are competent to do so, and the refusal by those courts to grant their request for a reference to the Court of Justice for a preliminary ruling, which would undermine the very principle of judicial cooperation underlying the preliminary reference procedure.

[58] Judgment of 21 June 2006 in Case T-47/02 *Danzer* v *Council*, not yet published in the ECR.

[59] First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article [48 EC], with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition, 1968 (I), p. 41); Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g) EC] on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

[60] Judgment of the Court of Justice in Case C-224/01 *Köbler* [2003] ECR I-10239.

[61] Judgments of the Court of Justice in Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 21, and in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 14.

B. Admissibility of claims seeking an injunction

In *Galileo* v *Commission* [62], the Court of First Instance ruled on the admissibility of claims seeking the cessation of alleged unlawful conduct by the Commission in an action for damages. In this case, the applicants were the proprietors of several Community trade marks containing the sign Galileo who contested the use by the Commission of the word in connection with the Community project relating to a global satellite radio navigation system and asked the Court of First Instance, inter alia, to prohibit the Commission from using the term. The Commission pleaded the inadmissibility of that claim contending that the EC Treaty did not confer such a power on the Community courts even in actions for damages.

The Court of First Instance nonetheless held that the Community courts have the power under the second paragraph of Article 288 EC and Article 235 EC to impose on the Community any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something. In relation to trade marks, Directive 89/104/EEC [63] approximates laws so that the proprietor of a mark is entitled 'to prevent all third parties' from using it. The Court of First Instance concluded that the uniform protection of the proprietor of a trade mark falls within the general principles common to the laws of the Member States, so that the Community cannot, on principle, be excluded from a corresponding procedural measure on the part of the Community courts, particularly as the Community institutions are obliged to comply with the entire body of Community law, which includes secondary law.

C. Causal link

The non-contractual liability of the Community, whether for unlawful conduct, or in the absence of such conduct, depends on the existence of a causal connection between the operative event and the damage caused [64]. In its judgments in *Abad Pérez and Others* v *Council and Commission* and *É.R. and Others* v *Council and Commission* [65], the Court of First Instance defined the notion of a causal link in actions brought respectively by Spanish cattle breeders, by indirect victims and by the next of kin of five people who died in France,

[62] Judgment of 10 May 2006 in Case T-279/03 *Galileo International Technology and Others* v *Commission* (under appeal, Case C-325/06 P), not yet published in the ECR.

[63] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1).

[64] See, inter alia, as regards liability for unlawful conduct, the judgment of the Court of Justice in Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and, as regards liability in the absence of such conduct, the judgment of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* (under appeal, Case C-120/06 P), paragraph 160, not yet published in the ECR.

[65] Judgments of 13 December 2006 in Case T-304/01 *Abad Pérez and Others* v *Council and Commission* and in Case T-138/03 *É.R. and Others* v *Council and Commission*, not yet published in the ECR.

who sought reparation of the harm allegedly suffered as a result of acts and omissions on the part of the Council and the Commission in relation to the spread in Europe of mad cow disease and new variant Creutzfeldt-Jakob disease.

In that context, the Court of First Instance stated, inter alia, that in an area such as that of animal and human health, the existence of a causal link between conduct and damage must be established from an analysis of the conduct required of the institutions according to the state of scientific knowledge at the time. Furthermore, where the conduct which allegedly caused the damage in question consists in refraining from taking action, it is particularly necessary to be certain that such damage was actually caused by the inaction complained of and could not have been caused by different conduct from that alleged against the defendant institutions. Relying, inter alia, on those principles, the Court of First Instance held in the end that it had not been established that the allegedly unlawful actions and omissions on the part of the Council and the Commission could be regarded as a certain and direct cause of the damage alleged. It is thus not shown in the circumstances of this case that if those institutions had adopted — or had adopted earlier — the measures which the applicants criticise them for not adopting, the damage in question would not have occurred.

D. Liability for unlawful conduct

According to established case-law in relation to the liability of the Community for damage caused to an individual by a breach of Community law for which a Community institution or organ is responsible, a right to reparation is conferred where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties [66]. In two cases, the Court of First Instance defined what was to be understood by a rule of law which is intended to confer rights on individuals.

First, in its judgment in *Camós Grau* v *Commission*, the Court of First Instance held that the requirement of impartiality, to which the institutions are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with [67]. It must therefore be considered to be intended to confer rights on individuals. In this case, the breach of that rule by OLAF was serious and manifest. Moreover, there was a direct causal link between the breach of that obligation and the damage sustained by the applicant, which took the form of impairment of his honour and professional reputation and difficulties in his living conditions. The Court of First Instance therefore awarded Mr Camós Grau damages of EUR 10 000.

[66] See, inter alia, the judgment in *Brasserie du pêcheur and Factortame*, paragraph 51.

[67] Judgment of 6 April 2006 in Case T-309/03 *Camós Grau* v *Commission*, not yet published in the ECR.

Second, in its judgment in *Tillack* v *Commission*, the Court of First Instance recalled that it had already held that the principle of sound administration does not, in itself, confer rights upon individuals [68]. However, the Court of First Instance made clear that the same does not apply where that principle constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union [69].

E. Liability in the absence of unlawful conduct

As the Grand Chamber of the Court of First Instance ruled in 2005, the second paragraph of Article 288 EC allows individuals to obtain compensation in the Community court even in the absence of unlawful action by the perpetrator of the damage [70]. In 2006, the Court of First Instance had occasion to rule on this regime of liability several times. Two examples will illustrate this.

First, in *Galileo* v *Commission*, the Court of First Instance recalled that Community liability in the absence of unlawful conduct can only arise if there is unusual and special damage. Damage is held to be unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned. In his case it held that the damage caused by the use by a Community institution of a term to designate a project cannot be regarded as exceeding the limits of the risks inherent in the use by the applicants of the same term in respect of their trade marks, given that, by reason of the characteristics of the term chosen, inspired by the first name of the renowned Italian mathematician, physicist and astronomer, the proprietor of the trade mark voluntarily exposed himself to the risk that someone else could legally, that is to say without infringing their trade mark rights, give the same name to one of its projects.

Second, in its judgment in *Masdar* v *Commission* [71], the Court of First Instance recognised the possibility an applicant had of relying on unjust enrichment and *negotiorum gestio* to establish the non-contractual liability of the institutions, even in the absence of unlawful conduct on their part. This case arose over a sub-contract concluded by the applicant with a Commission contractor. As that company never paid the applicant, the applicant pursued the Commission which refused to pay it directly. The applicant then brought an action for damages claiming that the Commission had breached certain principles of non-contractual liability recognised in many of the Member States.

It cited inter alia the civil law action based on the principle of the prohibition of unjust enrichment (*de in rem verso*) and the civil law action based on *negotiorum gestio*.

68 Judgment of 4 October 2006 in Case T-193/04 *Tillack* v *Commission*, citing the judgment in Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 43.

69 Charter of fundamental rights of the European Union proclaimed on 7 December 2000 in Nice (OJ C 364, 4.12.2000, p. 1).

70 Judgment in *FIAMM and FIAMM Technologies* v *Council and Commission*, paragraphs 158 to 160.

71 Judgment of 16 November 2006 in Case T-333/03 *Masdar* v *Commission*, not yet published in the ECR.

After first observing that the liability of the Community could arise even in the absence of unlawful conduct, the Court of First Instance found that actions based on unjust enrichment or *negotiorum gestio* are designed, in specific civil law circumstances, to constitute a source of non-contractual obligation on the part of persons in the position of the enriched party or the principal involving, in general, either refund of sums paid in error or indemnification of the manager respectively. Accordingly, pleas regarding unjust enrichment and *negotiorum gestio* cannot be dismissed solely on the ground that the condition relating to the unlawfulness of the conduct of the institution is not satisfied. Further observing that the Community courts have already had the opportunity to apply certain principles in respect of recovery of undue payments, including in relation to unjust enrichment, the prohibition of which is a general principle of Community law, the Court of First Instance concluded that it had to be examined whether the conditions governing the action *de in rem verso* or the action based on *negotiorum gestio* are satisfied in the case at hand.

In that regard, the Court of First Instance outlined the detailed rules governing such actions according to the general principles common to the laws of the Member States, namely that those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation, and that it is generally possible to plead such actions only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed. It concluded that in this case the pleas of the applicant were unfounded.

III. *Applications for interim relief*

This year 25 applications for interim relief were made to the President of the Court of First Instance, which represents a slight increase compared with the number of applications (21) made the previous year. In 2006, the President decided 24 cases and twice ordered interim measures, in his orders in *Globe* v *Commission* and *Romana Tabacchi* v *Commission* [72].

The order in *Globe* v *Commission* forms part of a process begun by the order made in 2005 in *Deloitte* v *Commission* [73], but, unlike the decision in that case, it ordered interim measures. In this case the applicant was seeking suspension of the operation of a Commission decision rejecting its bid made in a tendering procedure for the supply of goods destined for certain countries in central Asia.

First, as regards to the condition relating to the existence of a prima facie case, the President held that one of the pleas put forward by the applicant gave rise to serious doubts about the lawfulness of the contract. Thus, when going on to examine whether the suspension of operation sought should be ordered as a matter of urgency, the President found that it was not for him to prejudice measures which might be taken by the Commission in order

[72] Orders of the President of the Court of First Instance of 20 July 2006 in Case T-114/06 R *Globe* v *Commission* and of 13 July 2006 in Case T-11/06 R *Romana Tabacchi* v *Commission*, not yet published in the ECR.

[73] 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* [2005] ECR II-3485.

to comply with any annulling decision. It added that nevertheless, the general principle of Community law which gives individuals a right to complete and effective judicial protection required that interim protection be available to individuals, if it was necessary for the full effectiveness of the definitive future decision, in order to ensure that there was no lacuna in the legal protection provided by the Community courts. It should therefore be examined whether, following an annulling judgment, the possibility of the Commission organising a new tendering procedure would allow such damage to be repaired and, if that is not the case, it should be assessed whether the applicant could be compensated accordingly.

In this case it was very unlikely that, following an annulling judgment, which would probably be delivered after the contract had been performed, a fresh tendering procedure would be organised by the Commission. The President therefore examined whether Globe could be compensated for the loss of a chance of being awarded the contract which was the subject of the Community tendering procedure. Although that chance was a very serious one, it was very difficult, or even impossible, to quantify it and, therefore, to assess as precisely as required the damage resulting from its loss. As the damage could not be quantified sufficiently precisely, it had to be considered to be very difficult to remedy. The President of the Court of First Instance also took the view that the damage was serious, having regard to the particular circumstances of the case and the characteristics of the market on which the applicant and the undertaking awarded the contract were operating.

Finally, having weighed up the interests involved, the President recalled that there were serious reasons for thinking that the Commission had acted unlawfully. Moreover, in view of the compensation which the party awarded the contract could claim from the Commission before the competent courts, the balance of interests could not be allowed to favour the party awarded the contract at the expense of the applicant. Further, the Commission could not plead any interest liable to affect that assessment, with the result that the President ordered the suspension of operation of the contract.

In the order in *Romana Tabacchi* v *Commission*, the President of the Court of First Instance ruled on an application made by an undertaking which sought a waiver of the obligation to set up a bank guarantee as a condition for the fine imposed on it not being recovered immediately. The President found that there were exceptional circumstances in the case which justified a partial suspension of the obligation on the applicant to set up a bank guarantee. The applicant succeeded in establishing not only the existence of a prima facie case but also that its precarious financial situation and that of its shareholders were the reasons for the refusal by certain banks to grant the guarantee required. Having weighed up the interests in the matter, the President also took the view that the financial interests of the Commission would not be better safeguarded by immediate enforcement of the decision because it was unlikely that it would be able to obtain the amount of the fine. In this case, too, interim measures were ordered.

Finally, mention should be made of the fact that, in *Endesa* v *Commission* [74], already cited in connection with the control of concentrations, the applicant made an application for

[74] Judgment of 14 July 2006 in Case T-417/05 *Endesa* v *Commission*, not yet published in the ECR.

interim measures, seeking, inter alia, an order suspending the operation of a Commission decision rejecting the complaint by Endesa [75]. In his order, the President recalled that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. Such damage must, in particular, be likely to be caused to the interests of the party seeking the interim measure. In that regard, Endesa relied, inter alia, on the risk that, without interim measures, Gas Natural might take control of it and proceed to dismantle it, and such damage would, according to the applicant, also affect its shareholders. According to the President, to establish urgency Endesa cannot rely on damage which would be caused to its shareholders, as they have a legal personality separate from Endesa's. As regards the damage alleged to have been caused to Endesa as such, the President of the Court of First Instance found that it was hypothetical, because it depended on the launching and success of the take-over bid, the success of which was not proven at that stage. Finally, the President took the view that, in any event, it had not been established that the remedies provided by Spanish law would not enable Endesa to avoid the serious and irreparable damage which it alleged. The President of the Court of First Instance therefore dismissed the application for interim relief.

[75] Order of the President of the Court of First Instance of 1 February 2006 in Case T-417/05 R *Endesa* v *Commission*, not published in the ECR.