A – Proceedings of the Court of First Instance in 2003

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

The statistics relating to the judicial activity of the Court of First Instance in 2003 provide confirmation of a steady increase in the number of new cases (466, compared with 411 in 2002), a lack of change in the number of cases decided (339, compared with 331 in 2002) and, consequently, an increasing number of pending cases.

The increase in the number of cases brought may be observed in every field of litigation. In percentage terms, proceedings falling within two specific areas, namely staff cases and intellectual property cases, account for more than 50% of the proceedings brought before the Court of First Instance (excluding special forms of procedure). With 100 new cases in 2003, as against 83 in 2002, registration of Community trade marks gives rise to an ever increasing number of actions. [1]. But it is staff cases, with 124 new actions this year, which rank first in the activity of the Court of First Instance.

In addition to these data, there is a factor which is not quantifiable but has nevertheless now become apparent: cases brought before the Court of First Instance are becoming more and more complicated and require its Judges to carry out an analysis of ever increasing depth of cases drawn up by specialised lawyers.

The above factors taken together — which have resulted in an increase in the number of pending cases, now verging on the threshold of 1 000 cases — fully justify implementation of some of the reforms to the judicial system made possible by the Treaty of Nice, in particular the possibility of creating judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas (Article 225a EC).

An initial step in this direction has already been taken by the Commission which, in November 2003, submitted a proposal for a Council decision establishing the European Civil Service Tribunal. The legislative procedure is in progress.

The average duration of cases decided in 2003 (excluding staff cases and intellectual property cases) is comparable to that of the previous year, despite the expedited treatment accorded to certain competition cases.

1 It should be noted that as yet no action has been brought challenging a decision of a Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) made in the field of Community designs.

Finally, it may be observed that the number of applications for expedition decreased appreciably, from 25 in 2002 to 13 in 2003. If applications for expedition and applications for interim relief (39 applications for interim relief were lodged in 2003) are taken together, the situation is very similar to that in 2001 when 12 applications for expedition [2] and 37 applications for interim relief were lodged. The existence of emergency cases as a branch of litigation is therefore now established.

Developments in the case-law are set out below. The account is divided into three distinct parts which in turn cover, without seeking to be exhaustive and necessarily reflecting the number of cases decided in each of the fields in question, proceedings concerning the legality of measures (I), actions for damages (II) and applications for interim relief (III).

I. *Proceedings concerning the legality of measures*

Consideration of the substance of an action presupposes that the action is admissible. Cases which broached the question of the admissibility of actions for annulment (B) will therefore be covered before the essential aspects of substantive law (C to J). The latter are grouped according to subject matter. Not every field falling within the jurisdiction of the Court of First Instance is included in the following account, which is therefore not exhaustive.

Certain questions of a procedural nature will, for the first time, be set out under a specific heading (A), since the clarification of the law provided by certain decisions is worthy of emphasis.

A. Procedural aspects

1. Raising of a ground by the Court of its own motion

In Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85 (under appeal, Case C-156/03 P), the Court annulled a Commission decision withdrawing marketing authorisation for certain medicinal products, on the basis of a ground relating to a matter of public policy raised by it of its own motion. The Court observed that the lack of competence of an institution which has adopted a contested measure constitutes a ground for annulment for reasons of public policy, which must be raised by the Community judicature of its own motion. The relationship between the power of the Community judicature to raise a ground of its own motion and the existence of a public-policy interest underlying the ground was confirmed in Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 37 (under appeal, Case C-186/03 P), and in

[2] The possibility of ruling on the substance of a case under an expedited procedure has been provided for by the Rules of Procedure of the Court of First Instance since 1 February 2001.

Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* (judgment of 23 September 2003, not yet published in the ECR), paragraph 34.

2. Extent of the rights granted to interveners

The Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties and the Rules of Procedure of the Court of First Instance state that the intervener is to accept the case as he finds it at the time of his intervention (Article 116(3)). The question arose as to whether a party granted leave to intervene may raise a plea in law not raised by the party whom he supports. In its judgments in Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1288 ("the *BaByliss* judgment") and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1442 ("the *Philips* judgment"), the Court answered clearly in the negative, stating that while the intervener may advance arguments which are new or which differ from those of the party he supports, in order that his intervention not be limited to restating the arguments advanced in the application, it cannot be held that those provisions permit him to alter or distort the context of the dispute defined in the application by raising new pleas in law.

3. Costs

It is exceptional for a costs issue to be mentioned in an annual report. However, the message delivered by the Court in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* (judgment of 30 September 2003, not yet published in the ECR) ("the *TACA* judgment") is worthy of emphasis in the absence of a binding legal provision limiting the volume of pleadings and documents lodged in support of an action for annulment.

Although the Court in this case granted the application for annulment in part, it ordered each party to bear its own costs on the ground that the length of the applicants' written pleadings needlessly added to the costs of the Commission. The Court stated that the four applications lodged by the applicants and the annexes thereto were unusually long — each application totalled some 500 pages and the annexes made up approximately 100 files — and that the pleas contained in the applications were for the most part unfounded and their number so great as to amount to an abuse.

B. Admissibility of actions brought under Article 230 EC

Under the fourth paragraph of Article 230 EC, "any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

1. Measures against which an action may be brought

In order to ascertain whether a measure whose annulment is sought is open to challenge, it is necessary (i) to look to its substance and not to its form and (ii) to determine whether it produces legal effects binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position.

It was in the light of those two rules that the Court was led, on a number of occasions, to find that measures were not open to challenge.

First, the Court held that decisions by the Commission to commence legal proceedings against certain American cigarette manufacturers before a federal court in the United States of America did not constitute measures that were open to challenge. In its judgment in Joined Cases T-377/00, T-379/00, T 380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1 (under appeal, Joined Cases C-131/03 P and C 146/03 P), the Court held that a decision to bring court proceedings does not in itself alter the legal position in question, but has the effect merely of opening a procedure whose purpose is to achieve a change in that position through a judgment. While noting that the commencement of legal proceedings may give rise to certain consequences by operation of law, the Court held that their commencement does not in itself determine definitively the obligations of the parties to the case and that that determination results only from the judgment of the court. The Court stated that this finding applies both to proceedings before the Community Courts and to proceedings before courts of the Member States and even of non-member countries, such as the United States.

Second, a case concerned whether a declaration of the President of the European Parliament at the plenary sitting of 23 October 2000 was a measure open to challenge. The declaration stated that, in accordance with Article 12(2) of the Act concerning the election of representatives to the European Parliament by direct universal suffrage,[3] annexed to the Council Decision of 20 September 1976, "the ... Parliament takes note of the notification of the French Government declaring the disqualification of Mr Le Pen from holding office". The Court held that the declaration was not open to challenge. In its judgment of Case T-353/00 *Le Pen v Parliament* [2003] ECR II-1731 (under appeal, Case C-208/03 P), the Court found that the intervention of the European Parliament under the first subparagraph of Article 12(2) of the abovementioned Act was restricted to taking note of the declaration, already made by the national authorities, that the applicant's seat was vacant. The Court accordingly held that the declaration of the President of the European Parliament was not intended to produce legal effects of its own, distinct from those of the decree dated 31 March 2000 of the French Prime Minister stating that the applicant's ineligibility brought to an end his term of office as a representative in the European Parliament.

3 OJ 1976 L 278, p. 5.

Third, according to Case T-52/00 *Coe Clerici Logistics* v *Commission* (judgment of 17 June 2003, not yet published in the ECR) a letter from the Commission refusing to act on an undertaking's complaint based on Articles 82 EC and 86 EC is not, in principle, a measure against which an action for annulment may be brought. After recalling that the exercise of the Commission's power conferred by Article 86(3) EC to assess the compatibility of State measures with the Treaty rules is not coupled with an obligation on the part of the Commission to take action, the Court held that legal or natural persons who request the Commission to take action under Article 86(3) EC do not, in principle, have the right to bring an action against a Commission decision not to use the powers which it has under that article. The Court concluded in the present case that the applicant was not entitled to bring an action for annulment of the act by which the Commission decided not to use the powers conferred on it by Article 86(3) EC. However, since the applicant relied at the hearing on the judgment in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313 (under appeal, Case C-141/02 P), commented upon in the *Annual Report 2002*, the Court added that "if the contested act, in so far as it concerns infringement of Article 82 EC in conjunction with Article 86 EC, must be classified as a decision rejecting a complaint" as referred to in *max.mobil* v *Commission*, the applicant should, as complainant and addressee of that decision, be regarded as entitled to bring his action. In the present case the question as to the admissibility of the action did not affect the outcome of the dispute since the Court held on the merits that the action was unfounded.

Fourth, the orders of the Court of 9 July 2003 in Case T-219/01 *Commerzbank* v *Commission*, not yet published in the ECR, and in Case T-250/01 *Dresdner Bank* v *Commission* and Case T-216/01 *Reisebank* v *Commission*, neither published in the ECR, result from challenges to decisions of the hearing officer taken pursuant to Article 8 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings. [4] By those decisions, several banks which were subject to administrative investigation to establish their participation in an arrangement contrary to Article 81 EC were refused access to information relating to the circumstances which had led to the termination of some of the administrative procedures initiated against other banks also proceeded against by the Commission. In each of the three cases the Court held that the decision of the hearing officer in itself produced only limited effects, characteristic of a preparatory measure in the course of an administrative procedure initiated by the Commission, and could not therefore justify the action being admissible before that procedure had been completed. It followed that any infringement of rights of defence by the refusal capable of rendering the administrative procedure unlawful could properly be pleaded only in an action brought against the final decision finding that Article 81 EC had been infringed.

Finally, in the field of State aid, the Court had the opportunity to clarify the case-law concerning the ability to challenge decisions to initiate the formal investigation procedure envisaged in Article 88(2) EC. In contrast to decisions initiating the formal

4 OJ 2001 L 162, p. 21.

examination procedure in regard to measures that have been provisionally classified as new aid, which have independent legal effects vis-à-vis the final decision for which they are a preparatory step (judgments in Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217 and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-4259; commented upon in the *Annual Report 2002*), the decision initiating the formal examination procedure which gave rise to the order of 2 June 2003 in Case T-276/02 *Forum 187* v *Commission*, not yet published in the ECR, classified the Belgian scheme at issue — the coordination centres scheme — as a scheme of existing aid. After finding that such a decision does not have the independent legal effects deriving from the suspension of measures provided for in Article 88(3) EC in regard to new aid and that the classification of the scheme at issue was provisional in nature, the Court concluded that since the contested decision did not produce any legal effect, it did not constitute a challengeable measure.

2. Legal interest in bringing proceedings

An action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in seeing the contested measure annulled. Although a legal interest in bringing proceedings is not expressly required by Article 230 EC, it is settled case-law that the applicant must prove that he has such an interest in bringing proceedings. The Court of First Instance states that this is an essential and fundamental prerequisite for any legal proceedings (order in Case T-167/01 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2003] ECR II-1875) and that, in the absence of a legal interest in bringing proceedings, it is unnecessary to examine whether the contested decision is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC (Case T-326/99 *Olivieri* v *Commission and European Agency for the Evaluation of Medicinal Products* (judgment of 18 December 2003, not yet published in the ECR)).

That interest must be a vested and present interest and is assessed as at the date when the action is brought. If the interest which an applicant claims concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain. Such an interest is not established by an applicant who seeks the annulment of a decision addressed to a Member State ordering it to recover State aid from various companies where, contrary to the applicant's assertions, the decision does not impose any joint and several obligation on him to repay the contested aid (*Schmitz-Gotha Fahrzeugwerke*, cited above).

Nor does an applicant have a legal interest in bringing proceedings where he seeks the annulment of a Commission decision granting marketing authorisation for a medicinal product and it is established that the scientific information forwarded by him to the

European Agency for the Evaluation of Medicinal Products has, first, justified the reopening of the assessment procedure and, second, been examined and taken into account under that procedure (*Olivieri*, cited above).

3. Standing to bring proceedings

An applicant is recognised as having standing to bring proceedings where he shows that he is directly and individually concerned by a contested measure not addressed to him.

It is now well-established that a Community measure is of direct concern to an individual where it directly affects his legal situation and its implementation is purely automatic and results from Community rules alone without the application of other intermediate rules. Several decisions of the Court in 2003 constitute examples demonstrating the application of that settled case-law (order of 6 May 2003 in Case T-45/02 *DOW AgroSciences* v *Parliament and Council*, not yet published in the ECR; the *Philips* judgment; and Case T-243/01 *Sony Computer Entertainment Europe* v *Commission* and in Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* (judgments of 30 September 2003, neither yet published in the ECR)).

The focus will therefore essentially be placed on applicants' individual concern. It will be remembered that, following the judgment of 25 July 2002 in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 in which the Court of Justice confirmed its interpretation of the concept of individual concern, the Court of First Instance took account of the Court of Justice's interpretation when it examined whether actions for annulment were admissible and thus no longer followed the different interpretation which it had adopted in its judgment of 3 May 2002 in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365 (under appeal, Case C-263/02 P) (see the *Annual Report 2002*).

The Court of First Instance has therefore assessed the concept of individual concern by reference to the formula laid down in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. Thus, in order for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

In order to provide a clear account, a distinction will be drawn according to whether the contested measure was genuinely a decision or a measure of general application.

(a) *Decisions*

(a.1) Decisions of approval in the field of concentrations of undertakings

On several occasions the Court declared actions for annulment of decisions approving concentrations brought by legal persons not a party to the concentration to be admissible (the *BaByliss* judgment, Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* (judgment of 8 July 2003, not yet published in the ECR) and Case T-158/00 *ARD* v *Commission* (judgment of 30 September 2003, not yet published in the ECR)).

In January 2002 the Commission approved, without opening the second phase of examination, the purchase by SEB of certain elements of Moulinex's business, subject to conditions. BaByliss and Philips challenged that decision before the Court of First Instance. In the *BaByliss* judgment, the Court examined the admissibility of the action and found that the decision, which was not addressed to BaByliss, was none the less of direct and individual concern to it. In this connection, the Court took into account (i) that BaByliss actively participated in the procedure, as evidenced by written and oral contributions provided to the Commission; (ii) that BaByliss was a potential competitor on oligopolistic markets characterised by substantial barriers to entry arising from strong brand loyalty and by the difficulty of access to retail trading; and (iii) that BaByliss was interested in acquiring Moulinex or, at least, some of its assets, as evidenced by several purchase offers. It is thus accepted that a potential competitor of the parties to a concentration is entitled, in certain circumstances, to seek the annulment of a decision of approval in the case of oligopolistic markets.

ARD, a company operating on the free-TV market in Germany, challenged the Commission decision of 21 March 2000 approving subject to conditions, but without opening the second phase, the concentration by which BSkyB acquired, with KVV, joint control of KirchPay TV, a company operating on the pay-TV market in Germany. In *ARD v Commission*, the Court held that ARD, in addition to being directly concerned by the contested decision, was individually concerned by it. In this connection, the Court had regard, first, to the fact that ARD had actively participated in the administrative procedure, since it had been invited by the Commission to submit observations and the observations submitted by it had partly determined the content of the contested decision and the nature of the commitments, and second, to the specific effect on the position of ARD, which was not present on the markets on which the undertaking holding the monopoly saw its position strengthened by the concentration but only on neighbouring upstream or downstream markets.

(a.2) Referrals to national authorities in the field of concentrations of undertakings

Article 9 of Regulation No 4064/89 [5] enables examination of a notified concentration to be referred to the competent authorities of a Member State in certain circumstances. In two judgments, actions for annulment of a decision to refer examination to the national authorities pursuant to that provision were declared admissible. The first case arose from the Commission's decision to refer the concentration between SEB and Moulinex to the French competition authorities so far as concerned the French markets for small electrical household appliances, with a view to the application of national law (the *Philips* judgment). In the second case, examination of the concentration consisting in the merger of Vía Digital and Sogecable was referred to the Spanish authorities (*Cableuropa and Others* v *Commission*, cited above).

It is apparent from these judgments that applicants may be distinguished individually in two sets of circumstances in particular.

First, an applicant is regarded as individually concerned by the decision to refer where it would have been individually concerned by a decision of approval adopted by the Commission without a referral. The Court thus determines whether, had a referral to the national authorities not been made, it would have been open to the applicant to challenge the assessment of the effects of the concentration on the relevant markets in the Member State concerned which the Commission would have carried out. The status of competitor (potential competitor in the *BaByliss* judgment and actual competitor in *Cableuropa and Others* v *Commission*) and the active involvement of the applicant in the course of the procedure preceding the reference are two relevant criteria.

Second, an applicant is regarded as individually concerned by the decision to refer where that decision denies it the benefit of the procedural guarantees granted by Regulation No 4064/89 (Article 18(4)) to third parties with a sufficient interest (*Cableuropa and Others* v *Commission*).

[5] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

(b) *Measures of general application*

(b.1) Regulations

In its judgment in *Sony Computer Entertainment Europe* v *Commission*, cited above, the Court declared admissible an action for annulment of a Commission regulation concerning the classification of certain goods in the Combined Nomenclature. The Court acknowledged that, as has been held previously, Commission regulations for the classification of specific goods in the Combined Nomenclature are of general application. None the less it held, relying on a series of factors, that Sony Computer Entertainment Europe was individually concerned by such a regulation since it triggered the administrative procedure which led to the adoption of the regulation concerning the tariff classification of the product imported by it into the Community — the PlayStation®2, it was the only undertaking whose legal position was affected as a result of adoption of the regulation, the regulation focused specifically on the classification of the PlayStation®2 imported by it, there were no other products with identical features at the time when the regulation entered into force, and the applicant was the sole authorised importer of the product into the Community.

(b.2) Directives

Directive 2002/2 [6] introduces new labelling rules for compound feedingstuffs, designed to provide more detailed information on the composition of feedingstuffs. An animal feed undertaking, Établissements Toulorge, sought the annulment of the directive and compensation for the damage allegedly suffered by it. By order in Case T-167/02 *Établissements Toulorge* v *Parliament and Council* [2003] ECR II-1114, the Court dismissed the action for annulment as inadmissible on the ground that the applicant was not individually concerned by the directive.

The Court stated that the legislative nature of directives does not preclude an interested business from being granted standing to challenge the legality of a directive, but nevertheless held that in the present case the applicant had not shown that it was individually concerned by the contested directive. The disclosure of composition formulae of feedingstuffs did not adversely affect the applicant's particular situation but was an obligation owed in identical fashion by all manufacturers of compound feedingstuffs. Accordingly, the Court dismissed the action as inadmissible without examining whether the directive was of direct concern to the applicant.

6 Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ 2002 L 63, p. 23).

The Court adopted the same reasoning in concluding that the founder of an internet site was not individually concerned by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [7] (order of 6 May 2003 in Case T-321/02 *Vannieuwenhuyze-Morin* v *Parliament and Council*, not yet published in the ECR).

(b.3) Decisions

Despite the term used, a "decision" may be considered to be a measure of general application. As was held in the order in *DOW AgroSciences* v *Parliament and Council*, cited above, Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC [8] cannot, notwithstanding its title, be considered to constitute a decision within the meaning of the fourth paragraph of Article 230 EC since it was adopted by the Parliament and the Council at the end of the codecision procedure (Article 251 EC) and is of the same general nature as Directive 2000/60, altering the latter's wording by the insertion of an annex.

The order dismisses as inadmissible the action brought by several companies active in the manufacture and marketing of two substances covered by the decision. The Court held that such a decision could not be considered to be of individual concern to the applicants which did not plead breach of an exclusive intellectual property right in respect of the substances listed in the contested measure or of a specific right, did not establish that the decision caused them exceptional damage, and the special position of which did not have to be taken into account by the authors of the measure when adopting it.

C. Competition rules applicable to undertakings

Competition has once again been the source of cases from which much can be learned in the field of the application of Articles 81 EC and 82 EC and in that of concentrations between undertakings.

7 OJ 2002 L 201, p. 37.

8 OJ 2001 L 331, p. 1.

First of all, the lengthy *TACA* judgment, which followed the delivery of the judgments in Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, concerning the Trans-Atlantic Agreement ("the TAA"), see the *Annual Report 2002*; and Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, concerning the FEFC Agreement, see the *Annual Report 2002*; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-927, concerning the FETTCSA Agreement; under appeal, Case C-236/03 P; and the order of 4 June 2003 in Case T-224/99 *European Council of Transport Users and Others* v *Commission*, not yet published in the ECR, closed the series of cases concerning the legality of practices adopted by liner conferences in the light of Council Regulation No 4056/86 laying down detailed rules for the application of Articles 81 EC and 82 EC to maritime transport.[9] By the judgment in *TACA* (an abbreviation of the Transatlantic Conference Agreement, an agreement concluded in July 1994 between 15 shipping companies which were parties to the TAA, several provisions of which had been prohibited by the Commission in its decision of 19 October 1994 [10]), the Court rejected all of the pleas raised by the applicants with respect to infringements of Article 81 EC and allowed in part those concerning infringements of Article 82 EC. Given that there are so many, the important points made in that judgment will be addressed under most of the following headings.

1. Points raised in the case-law on the scope of Articles 81 EC and 82 EC

(a) *Scope ratione personae*

The agreements and practices covered by Articles 81 EC and 82 EC are prohibited only if they have been concluded or implemented by one or more "undertakings". In its judgment in Case T-319/99 *FENIN* v *Commission* [2003] ECR II-360, under appeal, Case C-205/03 P, the Court stated that the concept of "undertaking" does not cover purchases of products which have been made with a view to using those products in connection with a non-economic activity.

FENIN (Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental) is an association of the majority of the undertakings marketing medical goods and equipment in Spain from which the bodies running the national public health system ("the SNS") purchase medical goods and equipment which are

9 Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles [81] and [82] of the Treaty to maritime transport (OJ 1986 L 378, p. 4), Article 1 of which defines liner conference as a group of vessel-operating carriers which provides international liner services for the carriage of cargo on one or more particular routes and which operates under uniform or common freight rates.

10 Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article [81] of the Treaty (IV/34.446 – Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1).

then used in Spanish hospitals. On 26 August 1999, the Commission rejected a complaint made by FENIN alleging abuse of a dominant position which, according to FENIN, arose from the average delay of 300 days in the settlement of debts by the bodies running the SNS.

In the judgment given on the action for annulment brought by FENIN against the Commission's decision, the Court first of all stated that, in Community competition law, the concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. However, the Court explained that the characteristic feature of an economic activity is the offer of goods and services on a given market and not the business of purchasing them, as such. Consequently, when determining the nature of the purchasing activity, it would be incorrect to dissociate it from the use to which the purchased goods are subsequently put, since the nature of the purchasing activity is to be determined according to whether or not the subsequent use amounts to an economic activity.

The Court went on to point out that, according to the case-law of the Court of Justice, bodies which fulfil an exclusively social function based on the principle of solidarity and which are non profit making are not undertakings (Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637).

Applying those principles to the facts of *FENIN* v *Commission*, the Court found that the SNS is funded by social contributions and that it provides services free of charge to its members on the basis of universal cover, with the result that it operates according to the principle of solidarity. The Court therefore ruled that the bodies of the SNS could not be regarded as undertakings for the purposes of Articles 81 EC and 82 EC either in terms of their management of the SNS or, consequently, in terms of their purchasing activities related to that management. The Court therefore dismissed the action.

(b) *Competition proceedings and reasonable period*

Following a complaint lodged in 1991, the Commission, by decision of 26 October 1999, [11] imposed on Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie ("FEG and TU") fines amounting to EUR 4.4 million and EUR 2.15 million for various infringements of Article 81 EC. More than eight years passed between the lodging of the complaint with the Commission and adoption of the contested decision. During the administrative procedure, FEG and TU objected to the excessive duration of the investigation. Referring to its obligation to adopt decisions in competition matters within a reasonable period (Case C-185/95 P

[11] Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty – Case IV/33.884 – Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU) (OJ 2000 L 39, p. 1).

Baustahlgewebe v *Commission* [1998] ECR I-8417 and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739), the Commission acknowledged in the contested decision that the duration of the administrative procedure had been "considerable" and reduced the level of the fines imposed by EUR 100 000.

Before the Court, FEG and TU submitted that the Commission's infringement of the principle that decisions must be adopted within a reasonable period should lead to annulment of the contested decision or, at the very least, to a further reduction in the level of the fines. The applicants complained that it had been difficult to conduct their defence as a result of the time which had elapsed and the protracted uncertainty of their situation.

By its judgment of 16 December 2003 in Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, not yet published in the ECR, the Court rejected those complaints and held that, while the Commission is under an obligation to adopt its decisions within a reasonable period, the fact that that period is exceeded does not necessarily justify annulment of the decision terminating the procedure. Confirming the "*PVC II*" case-law (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, commented on in the *Annual Report 1999*), the Court took the view that the fact that the Commission exceeded a reasonable period could constitute a ground of annulment only where that adversely affected the exercise by the undertakings concerned of their rights of defence. Since the Commission had acknowledged that the period had been excessive, the Court examined whether, in this case, the rights of the defence had been adversely affected. The Court explained that, in order to do so, it was necessary to distinguish between the investigatory phase preceding the statement of objections and the developments after the administrative procedure. Since no accusations were made against the undertakings during the first phase, the extension of that phase could not have adversely affected the rights of the defence. The Court ruled that the second phase, which covered the period of 23 months between the hearing of the parties and the contested decision, was considerable and attributable to the Commission's failure to act.

However, the Court went on to find that the rights of the defence had not been affected by the duration of that phase of the procedure. In that connection, it stated, inter alia, that, so long as the limitation period laid down in Regulation No 2988/74 [12] has not expired, the protraction of the uncertainty alleged by the applicants as regards their

[12] Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

situation and as regards the adverse effects on their reputation is inherent in proceedings under Regulation No 17 and does not, in itself, prejudice the rights of the defence.

The Court also dismissed the applications for a reduction in the fines on account of the length of the administrative procedure and, exercising its unlimited jurisdiction, found that the applicants had failed to adduce any factors which could justify a reduction in addition to that already granted by the Commission.

(c) *Article 81 EC*

(c.1) Prohibited agreements

– Horizontal agreements

Horizontal price fixing agreements are expressly prohibited by Article 81(1) EC. The Commission decisions identifying and penalising such agreements were for the most part upheld.

First of all, in the judgment in *CMA CGM and Others* v *Commission*, cited above, the Commission's decision of 16 May 2000 [13] was upheld in so far as it found that the agreement between shipping lines operating on the northern Europe/Far East trade, the Far East Trade Tariff Charges and Surcharges Agreement, which provided that discounts were not to be granted on published rates for charges and surcharges for certain services, constituted an infringement of Article 81(1) EC and Article 2 of Regulation No 1017/68 [14] and that the conditions for an exemption of that agreement under Article 81(3) EC and Article 5 of Regulation No 1017/68 were not satisfied. Only the article of the decision relating to the fines was annulled.

In this connection, it is sufficient to note that the Court, like the Commission before it, took the view that an agreement prohibiting the grant of discounts on charges and surcharges between the members of a liner conference and independent companies must be regarded as a collective horizontal price-fixing agreement prohibited not only by the express wording of Article 81(1)(a) EC and Article 2(a) of Regulation No 1017/68 but also by the spirit of Regulation No 4056/86.

[13] Commission Decision 2000/627/EC of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 – Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)) (OJ 2000 L 268, p. 1).

[14] Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

Moreover, the five judgments of 11 December 2003 in Case T-56/99 *Marlines* v *Commission*, Case T-59/99 *Ventouris* v *Commission*, Case T-61/99 *Adriatica di Navigazione* v *Commission*, Case T-65/99 *Strintzis Lines Shipping* v *Commission* and Case T-66/99 *Minoan Lines* v *Commission*, not yet published in the ECR, essentially uphold the Commission decision of 1998 finding that there was an agreement contrary to Article 81 EC in the sector of maritime transport between Greece and Italy. [15] In that decision, the Commission found that there was a series of agreements and practices fixing the prices for roll on roll off ferry services between the ports of Patras (Greece) and Ancona (Italy) and for transport by truck on the Patras to Bari (Italy) and Patras to Brindisi (Italy) routes. Fines amounting to a total of approximately EUR 9 million were imposed on the seven companies which participated in the infringements. Five of the seven companies penalised by the Commission brought actions for annulment of the decision and for a reduction of the fines. All the actions were dismissed, save in respect of the fines imposed on Ventouris and Adriatica, which were reduced on the ground that the Commission had erred in its assessment of the gravity and scope of the infringements committed by them.

The Court found that the facts on which the Commission had relied had been duly established. Contrary to the claims made by the applicants, the Court found that the anti-competitive conduct in question had not been imposed on them by the Greek authorities and that, therefore, the applicants had not been deprived of the possibility of setting their tariff policy independently. The Court also confirmed that the agreements distorted competition on the common market.

Moreover, the Court took the view that the Commission had not exceeded its powers by carrying out an investigation on the premises of a company other than that to which the investigation decision had been addressed. The Court took account of the fact that the premises were used by the addressee company for the conduct of its business and found that they could be treated as the business premises of the addressee company.

The Court also held that the Commission had been right to impute the actions and initiatives of one company to another company with a distinct legal personality, since those two companies were, respectively, the principal and its trade representative and formed a single economic unit.

– Vertical restrictions

As regards vertical restrictions, the Court annulled two decisions of the Commission in accordance with settled case-law laying down that a unilateral act without the express or tacit participation of another undertaking does not fall within Article 81(1) EC.

[15] Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty – (IV/34.466 – Greek Ferries) (OJ 1999 L 109, p. 24).

First, in its judgment of 3 December 2003 in Case T-208/01 *Volkswagen* v *Commission*, not yet published in the ECR, the Court annulled the Commission decision [16] by which the Commission found that Volkswagen had infringed Article 81 EC by setting the sale price of the new Volkswagen Passat model on the basis of exhortations to its German dealers not to sell that model below the recommended sale price and to grant limited, or even no, discounts to customers.

The Court referred, first of all, to the case-law according to which the Commission may not find that unilateral conduct on the part of a manufacturer, adopted in the context of its contractual relations with its dealers, in reality forms the basis of an anti-competitive agreement if it does not establish the existence of express or implied acquiescence by the dealers in the attitude adopted by the manufacturer.

The Court went on to point out that, in the *Volkswagen* case, the Commission had failed to prove actual acquiescence by the dealers to the requests made by Volkswagen when they had become aware of them. The Commission had taken the view that such proof was unnecessary since, by signing the dealership agreement, the dealers had tacitly agreed to those requests in advance.

Finally, the Court observed that the compatibility with Community competition law of the dealership agreement signed by the dealers was not in dispute. The Court therefore held that the Commission's argument amounted to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that agreement, even though, by virtue precisely of its compliance with competition law, that agreement could not enable the dealer to foresee such a variation. Since it was not proven that there was a concurrence of wills between Volkswagen and its dealers, the Court annulled the Commission decision imposing a fine of EUR 30.96 million on Volkswagen.

Those same principles were applied again in Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* (judgment of 21 October 2003, not yet published in the ECR, under appeal, Case C-551/03 P) but in that case they led only to a reduction in the fine imposed by the Commission.

Opel Nederland, which carries out the sale, import, export and wholesale trade in motor vehicles and associated spare parts of the Opel brand in the Netherlands, concluded dealership agreements with approximately 150 authorised dealers. The Community rules on the distribution of motor vehicles [17] do not permit manufacturers or their

16 Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 – Volkswagen) (OJ 2001 L 262, p. 14).

17 See, in particular, Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81](3) of the EC Treaty to certain categories of motor vehicle

importers to prohibit dealers from supplying goods to final consumers, their authorised intermediaries or other dealers who are part of the distribution network of that manufacturer or importer. In accordance with those principles, the Commission, by decision of 20 September 2000, [18] ordered Opel Nederland to pay a fine of EUR 43 million for having adopted a general strategy aimed at restricting or preventing all export sales from the Netherlands, consisting of three measures, namely a restrictive supply policy, a restrictive bonus policy and a direct export ban.

In its judgment, the Court essentially upheld the Commission's decision. However, the Court took the view that the Commission had failed to prove to the requisite legal standard that Opel Nederland had in fact communicated to its dealers the restrictive supply measure previously adopted by its management so that, *a fortiori*, it was likewise not established that that measure had become part of the contractual relations linking Opel Nederland to its dealers.

Conversely, the Court found that the Commission had established to the requisite legal standard that Opel Nederland's restrictive bonus policy had been incorporated into a series of continuous commercial relations governed by a pre-established general agreement and, consequently, was an agreement within the meaning of Article 81(1) EC and that, following the calls made by Opel Nederland, the dealers in question had undertaken not to make any more export sales.

Although the infringement had rightly been treated as "very serious", the Court held that the basic amount of EUR 40 million should be reduced in view of the fact that it had not been established that there was a restrictive supply measure. As a result, the final amount of the fine was fixed at EUR 35 475 000.

In Case T-65/98 *Van den Bergh Foods* v *Commission* (judgment of 23 October 2003, not yet published in the ECR, under appeal, Case C-552/03 P) the Court gave a ruling on the compatibility with Articles 81 EC and 82 EC of agreements under which Van den Bergh Foods ("HB"), the principal manufacturer of ice cream products in Ireland, supplied Irish ice cream retailers with freezer cabinets for ice cream for immediate consumption, on the condition that they be used exclusively for HB ice creams. By decision of 11 March 1998, [19] the Commission found that those agreements infringed Articles 81 EC and 82 EC.

distribution and servicing agreements (OJ 1985 L 15, p. 16), which was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

18 Commission Decision 2001/146/EC of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 – Opel) (OJ 2001 L 59, p. 1).

19 Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles [81] and [82] of the Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 – Van den Bergh Foods Limited) (OJ 1998 L 246, p. 1).

Ruling on a plea alleging manifest errors of assessment and infringement of Article 81(1) EC, the Court found that the exclusivity clause in question was not, in formal terms, an exclusive purchasing obligation since it did not preclude retailers from selling products of HB's competitors, provided that HB's freezers were used exclusively for its products. The Court stated that it therefore had to ascertain, first, whether that clause in fact imposed exclusivity on some sales outlets, then whether the Commission had correctly quantified the degree of foreclosure arising under that clause and, finally, whether the degree of foreclosure was sufficiently high to constitute an infringement of Article 81(1) EC.

Relying on settled case-law, the Court also observed that, in order to assess that degree of foreclosure, it is necessary to examine, first, whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market to new competitors and, second, where that is the case, whether the agreements at issue contribute to the cumulative effect produced (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 23 and 24, and Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 99).

The Court then applied those principles and carried out a detailed analysis of the effects of the clause in question. It found that, among other factors, the provision of a freezer without charge, the popularity of HB's ice cream, the breadth of its range of products and the benefits associated with the sale of them are very important considerations in the eyes of retailers when they consider whether to install an additional freezer cabinet in order to sell a second range of products or whether to terminate their agreement with HB.

The Court also found that a significant proportion of retailers would be prepared to stock a wider range of products if there were no exclusivity clauses in the distribution agreements of ice cream manufacturers.

Finally, the Court observed that, even though the agreements concluded by HB involved only around 40% of all sales outlets on the market, the Commission had taken into consideration the effects on competition of all the agreements concerned, which, taking all manufacturers together, apply in 83% of the sales outlets on the relevant market, so that suppliers wishing to enter into the market might be dissuaded by the need first to acquire a stock of freezers.

The Court concluded that the agreements concluded by HB were liable to have an appreciable effect on competition and contribute significantly to a foreclosure of the market.

(c.2) Exemptions

The conditions for exempting an anticompetitive agreement from prohibition, as assessed by the Commission, were examined by the Court in the judgment in *CMA CGM and Others* v *Commission* and in the *TACA* judgment.

In support of their claim for annulment, CMA CGM and others raised several pleas alleging failure to define or error in the definition of the markets.

The Court observed that a precise definition of all the relevant markets is not necessarily indispensable in determining whether an agreement satisfies the four conditions for the grant of individual exemption laid down by Article 81(3) EC and Article 5 of Regulation No 1017/68. It is true that, in determining whether the fourth condition laid down by Article 81(3)(b) EC and Article 5(b) of Regulation No 1017/68 is met, the Commission must examine whether the agreement in question is liable to eliminate competition in respect of either a substantial part of the products in question or the transport market concerned. However, the four conditions for granting exemption are cumulative and therefore non-fulfilment of only one of those conditions suffices to make it necessary to refuse exemption. The Court therefore held that, since the Commission had established that the first three conditions for the grant of individual exemption were not satisfied and that it was unnecessary to rule on the fourth condition, it was under no obligation to define in advance all the relevant markets in order to establish whether the agreement in question qualified for individual exemption. In order to determine whether the first three conditions are satisfied it is necessary to have regard to the benefits flowing from the agreement, not specifically on the relevant market, but for any market on which the agreement in question might have beneficial effects.

The background to the *TACA* judgment is the conclusion of the Trans-Atlantic Conference Agreement ("the TACA"), by which 15 shipping companies which were parties to the TAA sought to respond to the objections which the Commission had raised against the latter agreement. Two shipping companies which were not involved in transatlantic trade (Hanjin and Hyundai) subsequently became parties to the TACA.

Like the TAA, the TACA covers eastbound and westbound transatlantic shipping routes between northern Europe and the United States of America. The TACA contains provisions on the fixing of the price for maritime transport in the strict sense, on the fixing of the price for inland transport operations provided as part of intermodal transport services, on the determination of the conditions under which service contracts may be concluded with shippers and of the content of such contracts (service contracts are contracts by which a shipper undertakes to provide a minimum quantity of freight to be transported either by the conference (conference service contracts) or by one or several individual carriers (individual service contracts) over a fixed period of time in exchange for a fixed rate and for the provision of specific services), on the fixing of the remuneration of freight forwarders where they act as shippers' agents in organising the

transport of goods, negotiating the terms and conditions on which the transport takes place and completing administrative formalities.

The TACA was notified to the Commission with a view to obtaining an individual exemption under Article 81(3) EC.

By decision of 16 September 1998 [20] ("the TACA decision"), the Commission, first, refused to grant an exemption for the agreement in question under the abovementioned provisions, with the exception of the terms relating to the fixing of the price for maritime transport, which fell within the block exemption provided for in Article 3 of Regulation No 4056/86; second, found that the parties to the TACA held a collective dominant position on the relevant market and that they had abused that dominant position and, third, imposed fines on each of the parties to the TACA for the two infringements of Article 82 EC which had been established.

Before the Court, the applicants submitted, inter alia, that the refusal to exempt the TACA provisions, with the exception of those fixing prices for maritime transport, which were covered by the block exemption provided for in Regulation No 4056/86, was unlawful.

With respect, first of all, to the agreement fixing the price for inland transport services, the Court had already held, in its judgment in *Compagnie générale maritime and Others* v *Commission*, cited above, that such an agreement does not fall within the block exemption provided for in Regulation No 4056/86, since that exemption covers only the maritime transport sector, and is not eligible for an individual exemption, whilst other, less restrictive agreements such as an agreement applying the "no below cost rule" (rule laying down that the price of inland transport may not be lower than the costs of such transport) may be eligible. In view of those factors, the applicants withdrew their plea at the hearing.

Second, with respect to the agreement determining the conditions under which service contracts may be concluded and their content, the Court found that, contrary to the applicants' claim, the TACA decision did not prohibit the shipping conferences, under Article 81 EC, from entering into conference service contracts and from freely determining the content of those agreements. Since the majority of the applicants' pleas were intended to challenge the existence of such a prohibition in the TACA decision, they were rejected as being devoid of purpose.

Finally, as regards the agreement on the remuneration of freight forwarders, the Court confirmed that such a horizontal price-fixing agreement is not eligible for the block

[20] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty (Case No IV/35.134 – Trans-Atlantic Conference Agreement (OJ 1999 L 95, p. 1).

exemption provided for in Regulation No 4056/86 for agreements laying down a uniform or common freight rate. The Court found, in particular, that the purpose of the agreement in question was not to remunerate maritime transport services but separate services which could not be regarded as equivalent to maritime transport services.

(c.3) Fines for infringement of Article 81 EC

The level of fines imposed by the Commission for infringement of Article 81 EC is generally challenged by the penalised undertakings and the complaints raised relate, inter alia, to the method of calculation used for or the assessments of the gravity and duration of the infringement, the extenuating or aggravating circumstances or cooperation with the Commission. Such challenges have enabled the Court to rule on the criteria taken into account in determining the level of fines.

The Court's clarifications can be found, principally, in the "*Lysine*" cases (judgments of 9 July 2003 in Cases T-220/00 *Cheil Jedang* v *Commission*, T-223/00 *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission*, T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (under appeal, Case C 397/03 P) and T-230/00 *Daesang and Sewon Europe* v *Commission*, not yet published in the ECR). Some of the undertakings penalised for participating in a cartel on the lysine market focused their actions for annulment of the Commission decision of 7 June 2000 [21] on aspects of the determination of the level of the fines. By that decision, the Commission found that, during the period from July 1990 to June 1995, there had been a series of agreements between undertakings covering the whole of the European Economic Area (EEA) on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine ─ an amino acid used as an additive in animal feedstuffs ─ and imposed on those undertakings fines amounting in total to around EUR 110 million. For that purpose, the Commission applied the method set out in the Guidelines for calculating fines [22] and the 1996 Leniency Notice. [23]

Whilst a number of the Court's findings merely confirm principles already established (in particular, in the "*district heating*" cases; see the *Annual Report 2002*), others helped to clarify the rules on applying the criteria contained in the Guidelines and confirm that the Commission's assessment of the degree of cooperation by undertakings during the administrative procedure are subject to judicial review.

21 Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 – Amino Acids) (OJ 2001 L 152, p. 24).

22 Guidelines for calculating fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

23 Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). That notice of 1996 was, however, replaced in 2002 by Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

Moreover, the Court was thereby able to define the scope of the principle of *non bis in idem*, according to which a person who has already been tried cannot be the subject of further proceedings or be penalised for the same act. It should be noted that the level of the fines imposed on the applicant undertakings, which amounted to just over EUR 81 million, was reduced to around EUR 74 million.

From a general point of view, it may be noted from the "*Lysine*" cases that the facts on which the Commission relied when determining the level of the fine may not be called into question before the Court if the applicant expressly acknowledged them during the administrative procedure (judgment in *Archer Daniels Midland*, cited above). It is irrelevant whether such express acknowledgement has been rewarded with a reduction in the level of the fine on the ground that the applicant cooperated with the Commission.

Reference is likewise made to certain points made in the judgment in *General Motors Nederland and Opel Nederland* v *Commission*, cited above, by which the contested decision was annulled in part and the level of the fine imposed consequently reduced.

Finally, it should be noted that the level of the fines imposed by the Commission in the decision leading to the judgments, cited above, in *Marlines* v *Commission*, *Ventouris* v *Commission*, *Adriatica di Navigazione* v *Commission*, *Strintzis Lines Shipping* v *Commission* and *Minoan Lines* v *Commission* was reduced only with respect to the shipping companies Ventouris and Adriatica, the gravity and scope of whose infringements had been incorrectly assessed by the Commission when determining the level of the fines. The Court found, essentially, that, since the Commission had, in its decision, sanctioned two distinct infringements — in terms of the various shipping routes involved — it could not, for reasons of equity and proportionality, penalise with the same severity the undertakings which were found to have been involved in only one infringement (Ventouris and Adriatica in respect of the Patras to Bari and Patras to Brindisi routes) and those which had participated in both cartels. The Court took account of the size of those undertakings and the relative volume of trade on each of the routes concerned.

– The Guidelines

Observing, first of all, that, under Regulation No 17, [24] the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules, that the Commission may adjust at any time the level of fines to the needs of Community competition policy (inter alia, *Archer Daniels Midland*) and that it has power to decide the level of fines so as to reinforce their deterrent effect, the Court nevertheless held that the Commission may not depart

[24] Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962 (I), p. 87).

from guidelines which it has imposed on itself and which are intended to specify, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion in assessing the gravity of an infringement (same judgment). In the judgment in *CMA CGM and Others* v *Commission* [25] the Court stated that the Commission may depart from guidelines in a particular regard only where it sets out expressly the reasons justifying its decision for doing so, which is precisely what it had failed to do with respect to one of the sanctioned companies.

As is clear from the Guidelines, the starting amount of fines is determined according to the gravity and duration of the infringement. When assessing the gravity of an infringement, [26] the Commission is to take into account its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

As regards the nature of the infringement, the Court confirmed, in the judgment in *Archer Daniels Midland*, that the setting by competing undertakings of price objectives for a product in the EEA and of sales quotas for that market must be classified as "very serious" since such conduct adversely affects the undertakings' independence. [27] Similarly, it confirmed that an agreement aimed at the partitioning of the internal market is to be classified as very serious since it runs counter to the most fundamental aims of the Community (*General Motors Nederland and Opel Nederland* v *Commission*).

The judgment in *Archer Daniels Midland* also upheld the Commission's appraisal of the actual impact of the cartel on the relevant market, namely, in that case, an increase in prices to a level higher than they would otherwise have reached and a restriction on sales volumes. In that context, the Court stated that, in order to establish that pricing agreements have had an effect, the Commission must find that they have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel and take into account all the objective conditions in the relevant market, having regard to the economic context and legislative background.

Another issue raised by the applicants related to the question whether the Commission may, without infringing the principle of proportionality and the Guidelines, rely on

25 In that judgment, the Court conceded that the Commission may rely on the Guidelines by analogy when calculating fines imposed under Regulations No 4056/86 and No 1017/68.

26 According to the Guidelines, infringements are to be classed in one of three categories: "minor infringements", "serious infringements" and "very serious infringements".

27 In the judgment in *CMA CGM and Others* v *Commission*, the Court took the view that the classification of an agreement on prices as a "serious infringement" was a rather mild classification, which, in that case, could be explained by the lack of evidence of the effects on price levels and the probable short duration of the potential harmful effects of the infringement.

worldwide turnover rather than turnover from the sale of the products concerned in the EEA. The Court was thus asked to review whether the Commission had correctly assessed one of the criteria set out in the Guidelines (Section 1.A, fourth paragraph), namely the effective economic capacity of the persons committing the infringement to cause significant damage to other operators. As regards assessments involving an appraisal of the influence of the undertakings concerned on the affected market, the Court found that, unlike market shares, total turnover does not make it possible to determine the influence which the undertakings may exert on that market. It found, moreover, that, although the Commission was under an obligation to do so, it was not clear from the Commission's decision that it had established the scale of the infringement committed by each of the undertakings, a fair indication of which is the proportion of turnover derived from sales of goods on the geographic market affected. However, that failure to comply with the Guidelines did not lead the Court to find, in the exercise of its unlimited jurisdiction, that there had been any infringement by the Commission of the principle of proportionality. The Court, which based its findings on data which were not contained in the Commission's decision, found that the taking into account of the applicant's turnover on the global lysine market did not constitute an infringement of the principle of proportionality since the proportion of turnover achieved from sales of lysine in the EEA was considered to be "significant" or "considerable", namely that it amounted to around 20% (judgments in *Archer Daniels Midland*, *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission* and *Daesang and Sewon Europe* v *Commission*, cited above,) or between 30 and 40% (judgment in *Cheil Jedang* v *Commission*, cited above) of the global turnover in question.

As regards the taking into account of the duration of the infringement, the Court held that, where the Commission states in its decision that it has increased the basic amount of the fine by 10% per annum, it cannot increase the basic amount by 30% in respect of an undertaking which participated in the cartel for less than three years. In view of the criterion applied by the Commission, the Court, in the exercise of its unlimited jurisdiction, reduced proportionately the increase in the fine imposed on Cheil Jedang (judgment in *Cheil Jedang* v *Commission*).

The Court nevertheless stated that, as it had ruled in *General Motors Nederland and Opel Nederland* v *Commission*, "the guidelines do not prejudge the assessment of the fine by the Community judicature", which has unlimited jurisdiction in that respect.

– Aggravating or mitigating circumstances

The Guidelines state that aggravating circumstances (such as the fact that an undertaking played a leading role in or instigated the infringement) or mitigating circumstances (such as the fact that an undertaking played a passive role (see, in that regard, the judgment in *Cheil Jedang* v *Commission*)) surrounding the involvement of each undertaking may be taken into account in order to increase or reduce the basic amount.

First of all, the scope of the section of the Guidelines concerning "non-implementation in practice of agreements", which is referred to as a mitigating circumstance, was defined not as covering cases where a cartel as a whole is not implemented but rather as covering the individual conduct of each undertaking (judgments in *Archer Daniels Midland* and *Cheil Jedang* v *Commission*).

Moreover, the Court held that, given the wording of the Guidelines, any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement and not to any increase already applied for the duration of the infringement or to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances. Since the Commission had failed to do so, the Court applied that method and adjusted the level of the fines in *Archer Daniels Midland* and *Daesang and Sewon Europe* v *Commission*.

– The Leniency Notice

The conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines or be granted reductions in the fines which would otherwise have been imposed on them are defined in the Commission's Leniency Notice of 1996. [28]

The amount of reductions in the levels of fines granted by the Commission under the Leniency Notice has given rise to several disputes, many undertakings claiming that their cooperation justified a greater reduction in the fine.

Thus, the Court reduced the fine imposed on Daesang, taking the view that the Commission had unjustly refused to grant a reduction to that undertaking, since none of the reasons given constituted a legal justification for that refusal. It stated that cooperation in a Commission investigation into a possible infringement of the Community rules on competition which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine. A reduction in the fine is, however, justified where an undertaking provides the Commission with information well in excess of that which the Commission may require under Article 11 of Regulation No 17. The fact that a request for information has been addressed to the cooperating undertaking under Article 11(1) of Regulation No 17 cannot of itself exclude the possibility of a substantial reduction of between 50% and 75% of the fine pursuant to Section C of the Leniency Notice, particularly as a request for information is a less coercive measure than an

[28] Already cited at footnote 21. That notice of 1996 was subsequently replaced by Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

investigation ordered by decision (judgment in *Daesang and Sewon Europe* v *Commission*).

The judgment in *Archer Daniels Midland* is also noteworthy as the Court, while finding that the applicant had failed to satisfy the conditions set out in the Leniency Notice for a further reduction in the fine, nevertheless took the view that the provision of certain information to the Commission had to be rewarded since it constituted a mitigating circumstance referred to in the Guidelines. It consequently granted an additional 10% reduction in the fine.

– The principle of *non bis in idem*

In response to the complaint raised by several applicants that the Commission infringed the principle prohibiting multiple penalties for the same infringement by refusing to deduct from the fines which it had imposed the amount of the fines which had already been imposed on them in the United States and Canada, the Court ruled that the Commission does not act in breach of the principle of *non bis in idem* by imposing fines on undertakings for participating in a cartel which has already been penalised by the American and Canadian authorities (judgments in *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission* and *Archer Daniels Midland*).

The Court pointed out that, in the field of competition, that general principle of Community law precludes an undertaking from being sanctioned by the Commission, or made the defendant to proceedings brought by the Commission, a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to appeal.

However, it explained further that, as Community law stands, that principle does not preclude the possibility of concurrent sanctions, one a Community sanction and the other a national one, since they are imposed at the end of two sets of parallel proceedings, each pursuing different ends. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where these were imposed for infringement of the cartel law of a Member State and where, consequently, the infringement was committed within the Community.

In the light of the principles thus laid down, the Court ruled that the principle of *non bis in idem* cannot apply where the procedures conducted and the penalties imposed by the Commission on the one hand and the authorities or courts of a non-member country on the other clearly pursue different ends. That conclusion is supported by the fact that, under Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the scope of that principle is limited to

the territory of a single state and that, at present, there is no principle of public international law that prevents authorities or courts of different States from trying and convicting the same person on the basis of the same facts.

Moreover, although the Commission is, in accordance with a requirement of natural justice, under an obligation to take into account, when determining the amount of a fine, penalties already imposed on the same undertaking in respect of infringements of the cartel law of a Member State (which, consequently, have been committed within the Community), that is the result of the particular situation arising from the close interdependence between the national markets of the Member States and the common market and from the special system for the sharing of jurisdiction between the Community and the Member States with regard to cartels on the common market. That justification is clearly lacking in cases where the first decision imposing penalties on an undertaking was adopted by the authorities or courts of a non-member State in respect of infringements of that state's rules on competition and the Commission is therefore under no obligation, when determining the amount of a fine to be imposed on that undertaking for infringement of Community competition law, to take account of such a decision.

– Reasonable period and limitation

As the Court observed in its judgment in *CMA CGM and Others* v *Commission*, it is a general principle of Community law, related to the principle of sound administration, that the Commission must act within a reasonable time when adopting decisions following administrative procedures relating to competition policy. Thus, the Commission may not defer defining its position indefinitely and, in the interests of legal certainty and of ensuring adequate judicial protection, the Commission is required to adopt a decision or to send a formal letter, if such a letter has been requested, within a reasonable time. In the judgment in *CMA CGM and Others* v *Commission*, the Court also observed that an unreasonable length of the procedure, particularly where it infringes the rights of defence of the parties concerned, justifies the annulment of a decision establishing an infringement of the rules of competition. However, the Court stated for the first time that the same does not apply where what is disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74, [29] which lays down a limitation period for that purpose. That regulation established a comprehensive system of rules governing in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. Article 2(3) of

[29] Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

Regulation No 2988/74 provides that the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision on fines indefinitely without incurring the risk of the limitation period expiring. In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period. That institution is not, however, precluded from exercising its discretion to reduce, on grounds of fairness, the level of fines where it considers the administrative procedure to have been excessively long, even though it ended within the limitation period.

It is apparent from the same judgment that the five-year limitation period laid down in Regulation No 2988/74 may be interrupted by a request for information within the meaning of Article 11(1) of Regulation No 17, provided that that request is necessary for the investigation or proceedings relating to the infringement. Since the Commission had failed to show that certain requests were necessary, the Court was compelled to find that it had imposed fines on 16 May 2000 even though the five-year limitation period provided for in the relevant provisions, which had begun on 24 March 1995, had expired. It therefore annulled the decision in so far as it imposed fines.

(d) *Article 82 EC*

(d.1) Dominant positions and abuse

In 2003, the Court gave a ruling in four judgments on the basic conditions for application of Article 82 EC.

First, in the judgment in *Van den Bergh Foods* v *Commission*, the Court found that the agreements referred to above, which constituted an infringement of Article 81 EC, also infringed Article 82 EC on account of HB's dominant position on the Irish market for single-wrapped ice creams for immediate consumption.

Second, in its judgment of 17 December 2003 in Case T-219/99 *British Airways* v *Commission*, not yet published in the ECR, the Court clarified several points relating to the general conditions for applying Article 82 EC.

The Court stated, first of all, that Article 82 EC applies both to undertakings whose dominant position is established in relation to their suppliers and to those undertakings which are capable of being in a dominant position in relation to their customers.

The Court then explained that an abuse of a dominant position committed on the dominated product market but the effects of which are felt on a separate market on which the undertaking concerned does not hold a dominant position may fall within Article 82 EC provided that separate market is sufficiently closely connected to the first.

Third, in its judgment of 30 September 2003 in Case T-203/01 *Michelin* v *Commission*, not yet published in the ECR, and, subsequently, in the judgment in *British Airways* v *Commission*, cited above, the Court clarified a number of points relating to the circumstances in which a commercial practice of granting discounts, adopted by an undertaking in a dominant position, may be regarded as an abuse.

The judgment in *Michelin* v *Commission* was concerned with a decision of 20 June 2001 [30] by which the Commission penalised Michelin for having abused its dominant position on the French market for replacement tyres and on the market for retreads. The Commission sanctioned Michelin's commercial and pricing policy in France with regard to dealers, which was based on a complex system of rebates, discounts and/or various financial benefits. Certain rebates relating to quality ("quantity rebates") and certain rebates fixed according to the quality of the dealer's service to users ("service bonus"), which were not "invoice rebates" but were paid in the calendar year following the financial year, were specifically regarded as abusive. An "agreement on business cooperation and assistance service" between Michelin and its dealers (known as "the Michelin Friends Club") was likewise penalised.

Ruling on the action brought by Michelin, the Court examined each of the business practices which the Commission had treated as an abuse in its decision.

In assessing, first of all, the rebates granted by Michelin, the Court relied on its own case-law and that of the Court of Justice on loyalty rebates [31] and observed generally that, in determining whether a quantity rebate system is abusive, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.

On the basis of those principles, the Court examined the rebates granted by Michelin and found that the discount in question was calculated on the dealer's entire turnover with Michelin and that the reference period applied for the purpose of the discount was one year. The Court held that a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a

30 Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO – Michelin) (OJ 2002 L 143, p. 1).

31 Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613 and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389.

reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period has the characteristics of a loyalty-inducing discount system.

Moreover, relying on settled case-law according to which discounts granted by an undertaking in a dominant position must be based on an economically justified countervailing advantage in order not to be prohibited under Article 82 EC, [32] the Court examined whether that was so in *Michelin* v *Commission* and found that Michelin had submitted no specific evidence in that regard. The Court concluded that the Commission was therefore correct to find that the system applied by the applicant infringed Article 82 EC.

Second, the Court assessed the "service bonus" applied by Michelin, which was an additional incentive offered by Michelin to dealers to improve their equipment and after-sales service based on a system of "points" granted in return for compliance with certain commitments. The Court ruled that a discount system which is applied by an undertaking in a dominant position, and which, as in the *Michelin* case, leaves that undertaking a considerable margin of discretion as to whether the dealer will obtain the discount, must be considered unfair and constitutes an abuse by an undertaking of its dominant position on the market within the meaning of Article 82 EC. The Court also held that, in addition to being unfair, that bonus had a loyalty-inducing effect since it included, inter alia, the grant of additional "points" where the dealer purchased new Michelin products of a specific percentage determined by reference to the regional market share of those products. Finally, the Court found that the Commission was also entitled to find that the fact that dealers could earn an extra "point" if they returned used Michelin tyres to Michelin for retreading encouraged them to favour retreading by Michelin and, consequently, had the effect of promoting tied sales.

Finally, the Court considered the "Michelin Friends Club", which is composed of tyre dealers wishing to enter into a closer partnership with Michelin. In accordance with its terms, Michelin participated in the financial outlay of dealers notably by contributing towards investment and training. In return, dealers were to comply with certain commitments as regards market shares, carry a certain stock of Michelin tyres and promote that brand. The Commission found that that agreement accorded Michelin an exceptionally far-reaching right to monitor the activities of the members and comprised practices having a tied-sales effect. The Court held that the Commission was right to find that various aspects of the club constituted abusive practices on the part of Michelin.

[32] Judgments in Case 322/81 *Michelin*, cited above, paragraph 85, *Portugal* v *Commission*, cited above, paragraph 52, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 114.

Furthermore, in response to a plea alleging a failure to examine the actual economic effect of that conduct, the Court stated that, for the purposes of establishing an infringement of Article 82 EC, it is unnecessary to show that the conduct in question had a specific effect. It is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.

The Court made the same point in its judgment in *British Airways* v *Commission*. On 14 July 1999, the Commission adopted a decision [33] in which it found that BA was a purchaser in a dominant position on the United Kingdom market for air travel agency services. Travel agents supply airlines with certain promotional services and administrative assistance in return for which the airlines pay commissions to the agents based on ticket sales.

BA had concluded with a number of travel agents agreements comprising, inter alia, a performance award calculated on the basis of the volume of sectors flown on BA and a sliding scale based on the extent to which travel agents increased their income made on sales of BA tickets.

Having found that there was an undeniable close connection between the services performed by travel agents in the United Kingdom and the transport services provided on the United Kingdom air transport market and that BA held a dominant position on the market for air travel agency services, the Court found that the bonus system which was the subject of the Commission's decision was indeed abusive.

The Court held, first, that the system put in place by BA was discriminatory. The Court found that attainment by United Kingdom travel agents of their BA tickets sales growth targets led to an increase in the rate of commission not only on BA tickets sold after the target was reached but also on all BA tickets handled by the agents during the reference period in question, which could result in different rates of commission being applied to an identical amount of revenue generated by the sale of BA tickets by two travel agents.

Second, the Court concluded from its own case-law and that of the Court of Justice on rebates that, generally, any "fidelity-building" rebate system applied by an undertaking in a dominant position tends, in breach of Article 82 EC, to prevent customers from obtaining supplies from competitors, irrespective of whether the rebate system is discriminatory, and that the same applies to a loyalty-inducing performance reward scheme adopted by a purchaser in a dominant position in relation to its suppliers of services.

33 Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 — Virgin/British Airways) (OJ 2000 L 30, p. 1).

In *British Airways* v *Commission*, the Court found that the rebates granted by BA were loyalty inducing. Given their progressive nature with a very noticeable effect at the margin, the increased commission rates paid were capable of rising exponentially from one reference period to another. Moreover, BA's five main competitors on the United Kingdom market for air travel agency services were not in a position to grant the same advantages to travel agents since they could not attain a sufficient level of revenue to establish a similar reward scheme and counteract the exclusionary effect operating against them on the United Kingdom market for air travel agency services.

The Court went on to find that BA had failed to demonstrate that the loyalty-inducing character of its performance reward schemes was based on an economically justified consideration and, in particular, that its performance reward schemes constituted the consideration for efficiency gains or cost savings resulting from the sale of BA tickets after attainment of those objectives.

Fourth, the *TACA* judgment gives some further clarification as to the possibility of a collective dominant position. On that point, the applicants submitted, essentially, that, despite the fact that the TACA operated by applying uniform or common rates, the parties to the TACA were engaged in internal competition which precluded them from holding a collective dominant position. The Court found that there was some competition between the parties to the TACA not only in terms of services but also in terms of prices, particularly as a result of the service contracts (which granted a discount on the tariff in return for the provision of minimum quantities) and of independent actions. Nevertheless, the Court found that that competition was relatively limited and that it was insufficient to call into question the collectivity arising from the application of the uniform or common tariff and from the other links between the parties to the TACA created by the shipping conference agreement.

As regards the question whether the position held by the parties to the TACA was a dominant one, the Court found that, irrespective of the data used (that of the applicants or that of the Commission), the size of the market shares held by the parties to the TACA over the period in question, namely at least 56% for three consecutive years, gave rise to a "strong presumption" of a dominant position. The Courts stated that, contrary to what the applicants had claimed, the dominance threshold required for Article 82 EC to apply to a collective position is the same as in the case of an individual position. Although the Court found that the Commission's assessment of the potential competition and the prices charged under the TACA was not free of errors, it held that the presumption of a dominant position based on the market share of the parties to the TACA was nevertheless sufficiently confirmed by other factors identified in the TACA decision, such as, in particular, the difference in the size of market share compared with that of the main competitors, the fact that the parties to the TACA held 70% of available capacity, the "leadership" of the parties to the TACA in pricing matters (their competitors being "followers" in that regard) and the ability of the parties to the TACA to discriminate between shippers by way of prices based on the value of the goods.

The members of the TACA were accused of having abused their collective dominant position in two ways from 1994 to 1996: first, by placing restrictions on the availability and content of the service contracts ("the first abuse") and, second, by taking measures to induce potential competitors to become members of the TACA rather than entering transatlantic trade as independent lines, thus altering the competition structure on the relevant market ("the second abuse").

The Court first of all confirmed, for the most part, the first abuse, not, however, without first having to define the exact scope of that abuse, particularly following the explanations given by the Commission at the hearing. The Court thus found that the first abuse covered not only the practices restricting the availability of the individual service contracts and their content (which were also regarded as restricting competition) but also practices relating to the *conference* service contracts, namely the obligation to comply with the rules laid down in the TACA with respect to duration, multiple clauses, contingency clauses and the level of liquidated damages.

The reasons put forward by the applicants to justify the practices constituting the first abuse were rejected by the Court, with the exception of that relied on to justify the disclosure of the terms of individual service contracts.

The Court conceded that the law of the United States imposed on the parties to the TACA an obligation to notify their individual service contracts to the Federal Maritime Commission, which published the "essential terms" of those contracts. The Court found that, as a result of that publication, the content of the individual service contracts had become public and, therefore, was available to both shippers and shipping lines. That being so, the parties to the TACA could not, in the Court's view, be taken to task for having agreed to "disclose" the content of those contracts. Under the case-law, exchanges of public information cannot infringe the Treaty competition rules.

By contrast, the Court held that US law could not be relied on to justify other practices constituting the first abuse, such as the prohibition of individual service contracts or the prohibition of contingency clauses. It stated that those practices were not imposed but merely permitted or even made easier by that law, which cannot preclude application of the Treaty competition rules.

With respect to the second abuse, the Court first of all observed that, although the strengthening of a dominant position may, according to the *Continental Can* case-law, [34] constitute an abuse, that was not the abuse complained of in the *TACA* case since the Commission did not criticise the parties to the TACA for accepting new conference members but solely for adopting measures, some specific and others general, to induce potential competitors to join the TACA. The specific measures

[34] Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215.

adopted by the TACA consisted of the disclosure by the parties to the TACA of confidential information to Hanjin and the expression by those parties of a collective willingness to build up a slot capacity for Hanjin on the traffic in question, and of the authorisation granted to Hyundai to participate immediately in the current conference service contracts. The general measures consisted of the conclusion of a large number of dual-rate service contracts and the fact that the former structured members of the TAA (essentially the traditional members of the conference) did not compete to enter into service contracts in relation to a certain category of freight.

As regards the specific measures, the Court found, after having examined the circumstances in which Hanjin and Hyundai became members of the TACA, that the Commission had failed to prove to the requisite legal standard that it was those measures which led those two shipping lines to join the conference and not their own business considerations. The Court stated, in particular, that the Commission had failed to explain why the specific measures in question were not practices enabling Hanjin and Hyundai to exercise activities covered by the block exemption for shipping conferences and, therefore, to become members of the TACA under the same conditions as the existing members.

The Court found in that regard that the Commission had infringed the rights of defence of the parties to the TACA by using, in support of its complaints, inculpatory documents obtained after the administrative hearing, without giving the parties an opportunity to comment on them. The Court held that, although the documents in question were produced by the TACA (they were documents drawn up by the TACA or the parties thereto which had been provided by the parties to the TACA themselves in response to requests for information) and, therefore, the parties were aware of their content, the Commission should have given them an opportunity to comment on the relevance and probative value of those documents because neither the statement of objections nor the terms of the requests for information which led to the production of those documents nor their content enabled the parties to the TACA reasonably to infer the conclusions which the Commission would draw from them. Consequently, the Court excluded those documents as evidence of the specific measures and held that, since those measures could be established only by the documents in question, they had not been properly proven.

As regards the general measures, the Court found that, in order to be regarded as measures "inducing" potential competitors to join the TACA, the effect of such measures must have been to lead potential competitors to become members of the conference. A measure described as an inducement to join the conference which is not followed by any new membership would show that that measure was not in fact an inducement to join the conference. In the *TACA* case, the Court found that there was no evidence in the case-file on the basis of which it could be concluded that the only two shipping lines to have joined the conference during the period of the infringements, namely Hanjin and Hyundai, had taken that decision as a result of the general measures referred to in the decision.

On those grounds, the Court annulled the TACA decision in so far as it accused the parties to the TACA of having abusively altered the market structure.

(d.2) Fines

Once again, reference must be made to the *TACA* judgment. Although the Commission did not impose a fine in respect of the infringements of Article 81 EC, it did impose fines, amounting to EUR 273 million in total, on each of the parties to the TACA for the two infringements of Article 82 EC. Having regard to the finding relating to the second abuse, only the fines imposed in respect of the first abuse, other than for the mutual disclosure of the content of the individual service contracts, had to be examined by the Court.

– Immunity from fines

First of all, the Court considered whether the fines were covered by the immunity from fines provided for in Article 19 of Regulation No 4056/86.

Having examined the wording and the purpose of that article, the Court rejected the Commission's argument that immunity is relevant only to infringements of Article 81 EC and not to those of Article 82 EC. Although the Court conceded that immunity must be strictly interpreted, it held that Article 19 of Regulation No 4056/86 expressly provides that immunity may be granted in cases of infringements of Article 82 EC. It is true that immunity may be relied on only in respect of acts which have been notified with a view to obtaining an exemption under Article 81(3) EC and only "within the limits of the activity described in the notification". However, that does not mean that immunity may be granted only in respect of infringements of Article 81 EC. The Court observed that, according to the case-law, agreements restricting competition which have been notified with a view to obtaining an exemption may, where dominant undertakings are involved, be treated by the Commission as abusive practices.

The Court held, moreover, that the grant of immunity for infringements of Article 82 EC is compatible with the objective pursued by that provision since a dominant undertaking which notifies agreements liable to be treated as abusive practices itself gives notice of a possible infringement of Article 82 EC and thus makes the Commission's task easier. In the *TACA* case, since all the abusive practices constituting the first abuse had been notified to the Commission, the Court held that the fines imposed in that respect had to be annulled.

However, the Court noted that that immunity did not apply to the total amount of the fines imposed for the first abuse. The fines were imposed not only under Regulation No 4056/86 but, in so far as the inland aspects of the practices relating to the service contracts were concerned, also under Regulation No 1017/68. In its judgment in Case

T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125, the Court ruled that Regulation No 1017/68 does not provide for a scheme of immunity and that no such scheme can be inferred from any general principle of Community law.

The Court therefore examined the legality of the part of the fines imposed under Regulation No 1017/68.

– Division into groups

The TACA decision was one of the first decisions to apply the Guidelines on the calculation of fines published by the Commission. The Court stated, first of all, that the method followed in this case to calculate the level of the fines was consistent with the applicable legal framework.

As in the case leading to the judgment in *CMA CGM and Others* v *Commission*, the Commission had fixed the level of the fines after having divided the parties to the TACA into four distinct groups. In doing so, the Commission intended to take account of the considerable differences in size between the parties to the TACA.

In its judgment in *CMA CGM and Others* v *Commission*, the Court found that the Commission's division of the parties into four groups was not objectively justified and lacked consistency. In that case, the division of the applicants into groups was regarded as being in breach of the principle of non-discrimination or, at the very least, as inadequately justified.

However, in the *TACA* judgment, the Court found that the Commission was justified in dividing the parties to the TACA into groups since that division was coherent, the Commission having distinguished each of those groups starting with the size of the largest of the TACA parties and making successive reductions by half of that size.

– Extenuating circumstances

Nevertheless, the Court, in the exercise of its unlimited jurisdiction, found that no fine should have been imposed in the *TACA* case in respect of the practices covered by the first abuse.

The Court rejected the Commission's argument that the parties to the TACA could not rely on any extenuating circumstances. The Court observed that:

– the parties to the TACA had cooperated with the Commission by notifying all the practices in question even though such notification was not compulsory under Regulations No 4056/86 and No 1017/68 for the grant of an exemption;

– the TACA decision was the first decision in which the Commission directly assessed the lawfulness of the practices on service contracts adopted by shipping conferences;

– the legal treatment that should be reserved for such practices raised complex legal issues, which is shown by the difficulty in determining the precise scope of the decision in that regard;

– the abuse resulting from the practices on service contracts did not constitute a classic abuse within the meaning of Article 82 EC;

– the parties to the TACA were legitimately entitled to believe that the Commission would not fine them, particularly in view of the fact that, in several previous decisions in which a notified agreement had been treated as an abuse by the Commission, no fine had been imposed.

2. Regulation No 4064/89

(a) *Actions for annulment of authorisation decisions*

– *The* BaByliss *and* Philips *cases*

In January 2002, the Commission approved, without initiating the second phase of the examination procedure, the purchase by SEB of certain assets of Moulinex, subject to the condition, inter alia, that SEB grant an exclusive licence to sell all the household electrical appliances under the Moulinex trade mark for a period of five years in nine Member States in which competition problems had been identified and that SEB be prohibited from using that trade mark for a further three years. The decision did not relate to the French market, the Commission having granted the French authorities' request for a partial referral.

BaByliss and Philips contested the Commission's conditional authorisation decision before the Court. The judgments in *BaByliss* and *Philips* have enriched the case-law on a number of matters.

Essentially, the judgments in *BaByliss* and *Philips*, first, confirm that the Commission is entitled to accept, during Phase I of the procedure, the lodging of commitments submitted by the parties to a concentration within the three-week time-limit prescribed by the applicable rules (Article 18(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation

No 4064/89 [35]) but subsequently amended after expiry of that period. The time-limit is binding on the parties to the concentration and is intended to prevent commitments from being submitted at a time which does not leave the Commission a sufficient period within which to assess them and consult third parties. However, the time-limit is not binding on the Commission. Consequently, where it considers that it has the time necessary to examine the changes made to the commitments after the time-limit and that there is sufficient time remaining to make assessments and consult third parties, it must be in a position to approve the concentration in the light of the amended commitments.

Second, the Court clarified the conditions for initiating the Phase II procedure. It held that the Commission has no discretion as regards the initiation of the Phase II procedure where it encounters serious doubts as to the compatibility of a concentration with the common market. It nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious doubts or, where commitments have been proposed, whether they continue to present them (*Philips* judgment).

The Court stated that, given the complex economic assessments which the Commission is required to carry out in exercising its discretion in examining the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, show that the Commission has committed a manifest error of assessment (*Philips* judgment). However, in exercising its power of judicial review, the Court must take into account the specific purpose of the commitments entered into during the Phase I procedure, which, unlike the commitments entered into during the Phase II procedure, are not intended to prevent the creation or strengthening of a dominant position but, rather, to dispel any serious doubts in that regard. It follows that the commitments entered into during the Phase I procedure must constitute a direct and sufficient response capable of clearly excluding the serious doubts expressed. Consequently, where the Court is called on to consider whether, having regard to their scope and content, the commitments entered into during the Phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the Phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts expressed (*Philips* judgment).

The cases in question raised the issue of whether the Commission was entitled to regard the commitments as sufficient to overcome the competition problems created by the concentration. Whilst the Court was unable, on the basis of the pleas and

[35] OJ 1998 L 61, p. 1.

arguments submitted by Philips, to find that there had been a manifest error of assessment, the Court upheld in part the line of argument put forward by BaByliss.

In the judgment in *BaByliss*, the Court confirmed that commitments which are behavioural, such as a trade mark licence, may be capable of overcoming the problems created by a concentration and that, in the *BaByliss* case, the duration of the commitments was sufficient to enable the licensees to compete effectively with the entity emerging from the concentration after the licence period. However, the Court found that, where no commitments are submitted, the Commission may not conclude that no serious doubts are raised on certain geographic markets. It first examined the way in which the assessment criteria (dominance threshold, absence of significant overlap, position of the merged entity in relation to its competitors and range effect) which had been used to rule out any serious doubts on each of the geographic markets in respect of which it did not impose commitments (Spain, Italy, Ireland, Finland and the United Kingdom) had been applied by the Commission to all the other markets affected by the concentration and found that two of the four criteria applied for that purpose were insufficiently precise (absence of significant overlap and range effect). Second, it held that the Commission had erred in its assessment of the markets which were not covered by the commitments. It therefore upheld BaByliss's action in part and annulled the decision in so far as it concerned the markets in Spain, Finland, Ireland, Italy and the United Kingdom.

– *The* ARD *case*

By decision of 21 March 2000, the Commission approved, subject to conditions, the merger by which BSkyB and KVV acquired joint control of KirchPay TV, a company active on the pay-TV market in Germany. That decision was taken without initiating the Phase II procedure.

ARD, a company active on the free-television market, brought an action for annulment of that decision.

The applicant submitted that the numerous commitments accepted by the Commission during the Phase I procedure were insufficient to dispel all the serious doubts described in the contested decision. In its judgment of 30 September 2003 in Case T-158/00 *ARD* v *Commission*, not yet published in the ECR, the Court confirmed that, given the complex economic assessments which the Commission has to carry out when appraising the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, show that the Commission has committed a manifest error of appraisal. It also stated that the Commission enjoys a broad discretion in assessing whether it is necessary to obtain commitments in order to dispel the serious doubts raised by a concentration and that failure to take into consideration commitments suggested by a third party does not lead

to annulment of the contested decision where the Commission could reasonably find that the commitments accepted in the decision dispel the serious doubts. The applicant's line of argument was therefore rejected in its entirety.

ARD also claimed that, since the Commission had expressed serious doubts as to the compatibility of the concentration with the common market, it was under an obligation to initiate the Phase II procedure. The Court pointed out that a finding that there are serious doubts does not preclude the possibility of dispelling those doubts by way of the proposed commitments. Above all, it rejected the analogy which the applicant had suggested between the consequences for interested third parties of a failure to initiate the formal examination procedure provided for in Article 88(2) EC in the field of State aid and the consequences for interested third parties of a failure to initiate the Phase II procedure under Article 6(1)(c) of Regulation No 4064/89. The procedures for examination by the Commission under Article 6 of Regulation No 4064/89 cannot be regarded as equivalent to those under Article 88 EC. In particular, the Court stated, first of all, that interested third parties have no right to participate in the initial phase of State aid proceedings. It pointed out, next, that, if the Commission finds, in the course of the examination provided for in Article 88 EC, that the plan involves aid within the meaning of Article 87(1) EC and that there are therefore doubts as to its compatibility with the common market, it is required to initiate the formal procedure, whereas, if the Commission finds that a concentration raises serious doubts, it is under no obligation to initiate the second phase if the modifications to the concentration or the commitments offered by the undertakings concerned eliminate those doubts.

Finally, the Court confirmed that the Commission is entitled to accept, during Phase I, the lodging of commitments submitted by the parties to a concentration within the three-week time-limit prescribed by the applicable rules (Article 18(1) of Regulation No 447/98) but subsequently amended after expiry of that period. The time-limit is binding on the parties to the concentration but not on the Commission. Consequently, where it considers that it has the time necessary to examine them, it must be in a position to approve the concentration in the light of those commitments, even where amendments are made after expiry of the three-week time limit. [36]

– *The* Verband der freien Rohrwerke eV and Others *case*

By decisions of 5 September 2000 and 14 September 2000, the Commission approved, on the basis of Regulation No 4064/86 and Article 66(2) CS respectively, the acquisition by Salzgitter of control of Mannesmannröhren Werke. Verband der freien

[36] In contrast to the judgments in *Philips* and *BaByliss*, the Court held only that the time-limit must be sufficient to enable the Commission to examine the commitments proposed, without stating that the remaining period must be sufficient to allow it to consult third parties. It is therefore implied that a failure to consult third parties on the latest amended versions of the commitments is permissible.

Rohrwerke eV, an association of undertakings, brought, together with two of its members, an action for annulment of those two decisions. While the action brought under Article 33 CS was dismissed as inadmissible, the action brought under Article 230 EC was dismissed as unfounded (judgment of 8 July 2003 in Case T-374/00 *Verband der freien Rohrwerke and Others v Commission*, not yet published in the ECR). The Court held that the Commission had not committed any manifest error when assessing the impact of the concentration in question.

(b) *Actions for annulment of decisions to refer a concentration to a national authority*

Under Article 9 of Regulation No 4064/89, a notified concentration may, subject to certain conditions, be referred to the competent national authorities of a Member State.

On two occasions, the Court gave a ruling on the legality of decisions to refer to national authorities. The background to the first case was the Commission's decision to refer the concentration between SEB and Moulinex to the French competition authorities in so far as the French markets for small household electrical appliances was concerned, with a view to the application of national law (*Philips* judgment). In the second case, the examination of a concentration consisting of a merger between Vía Digital and Sogecable was referred to the Spanish authorities (judgment of 30 September 2003 in Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission*, not yet published in the ECR).

Essentially, the Court was asked to examine whether the conditions for a referral (under Article 9(2)(a)) were satisfied and whether the Commission was entitled to decide to refer (under Article 9(3)) the examination of the effects of the concentration to the national authorities instead of dealing with the matter itself.

Under those provisions, the Commission may decide to refer the examination of a concentration to the national authorities where two cumulative conditions are satisfied: the concentration must threaten to create or strengthen a dominant position which significantly impedes effective competition on a market within the Member State concerned and that market must present the characteristics of a distinct market.

– *The* Philips *case*

The Court found that those two conditions were satisfied. As regards the threat to create or strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within the Member State concerned, the Court pointed out that the new entity would have an unrivalled range of products and portfolio of trade marks in France. As regards the existence of a distinct market, the Court observed that France was indeed such a market, particularly in view of the differences

in prices, the different trade marks and the national distribution, supply and logistic structures.

The Court took the view that the Commission had properly exercised the broad discretion which it enjoys in deciding on a referral, after finding that the Commission "cannot decide to make such a referral if, when the Member State's request for a referral is examined, it is clear, on the basis of a body of precise and coherent evidence, that such a referral cannot safeguard or restore effective competition on the relevant markets" and stating that review by the Community judicature of that question "must be restricted to establishing whether the Commission was entitled, without committing a manifest error of assessment, to consider that the referral to the national competition authorities would enable them to safeguard or restore effective competition on the relevant market so that it was unnecessary to deal with the case itself". While the Court found that referrals to the Member States in cases where the goods in question relate to distinct national markets might undermine the "one-stop-shop" principle (exclusive control by the European authorities), that risk was regarded as being inherent in the referral procedure currently provided for in Regulation No 4064/89.

Consequently, the Court dismissed in its entirety the action brought by Philips against the referral decision.

– *The* Cableuropa *case*

As in the preceding case, the Court held that the two conditions necessary for referral of the examination of the concentration to the national authorities were satisfied.

When examining the Commission's assessment of the second condition, the Court stated that the question whether there is a distinct market must be determined on the basis of, first, a definition of the relevant product or service market and, second, a definition of the relevant geographic market. In the *Cableuropa* case, the Court ruled that the Commission had not committed any manifest error of assessment in considering the relevant markets to be distinct markets with a national dimension. It thus rejected the appellants' arguments (based on the strong European presence of the parties to the concentration and of their parent companies in relation to both the telecommunications and pay-TV activities; the cross-border dimension of the markets for audiovisual rights to sports broadcasts and for certain films; the irrelevance of the linguistic factor to the definition of the geographic scope of the markets for pay-TV, broadcasting of audiovisual rights and telecommunications; and the cross-border dimension of the telecommunications market and the market for internet networks and associated services).

The Court held that the Commission had not committed any manifest error when exercising the broad discretion which it enjoys in deciding whether to refer a

concentration. In accordance with the rule laid down in the *Philips* judgment, it ruled that it was reasonable for the Commission to decide to refer the concentration since there was no precise and coherent evidence suggesting that a referral might undermine the maintenance of effective competition on the relevant markets and pointed out that the Spanish authorities had identified the precise competition problems raised by the concentration.

The Court found, moreover, that a complete referral to a national competition authority of a concentration the effects of which are limited to markets of a national dimension does not run counter to the principle that concentrations with a Community dimension are, where the relevant markets cover a substantial part of the common market, to be referred to national authorities only in exceptional cases.

Accordingly, the Court dismissed the action brought against the Commission's decision relating to the merger of Vía Digital and Sogecable.

(c) *Actions for annulment of decisions to refuse approval*

Proposals for commitments and their acceptance or refusal can be an important source of case-law. Another source of case-law is the implementation of commitments which have already been accepted by the Commission. In certain cases, such implementation requires, in particular, that the purchasers of the divested assets have to be approved. For that purpose, the Commission establishes that the purchaser is independent of the parties to the concentration, that it could become a competitor on the market and that, prima facie, the purchase of assets by that purchaser does not raise competition problems.

Refusal to approve the choice of prospective purchasers may give rise to a dispute. Thus, in the *TotalFina/Elf* case, the Commission refused to approve the purchasers originally proposed by the parties to the concentration.

The declaration that the concentration involving the repurchase of the undertaking Elf Aquitaine by TotalFina was compatible with the common market was made subject to the condition of compliance with certain commitments. [37] Those commitments required TotalFina Elf to divest 70 service stations on French motorways within a specified time-limit. In September 2000, the Commission decided to refuse to approve two of the purchasers proposed by TotalFina Elf within the framework of the proposed "package" on the ground that they were not in a position to maintain or develop effective competition on the relevant market. One of the two purchasers rejected, SG2R trading

[37] Commission Decision 2001/402/EC of 9 February 2000 declaring a concentration to be compatible with the common market (Case No COMP/M.1628 – TotalFina/Elf) (OJ 2001 L 143, p. 1).

under the name "Le Mirabellier", brought an action before the Court for annulment of the Commission's decision and lodged an application for interim relief with the President of the Court. Both the application for interim relief and the main action were dismissed (order of the President of the Court in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67 and judgment in Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1163).

In their plea alleging that the Commission had erred in its assessment of the applicants' suitability, the applicants contested the merits of the arguments put forward to substantiate the finding that they were not capable of competing effectively on the relevant market.

In response, the Court began by observing that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, which relates to the appraisal of concentrations, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. It follows that review by the Community Courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation No 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power. In particular, it is not for the Court of First Instance to substitute its own economic assessment for that of the Commission.

In the context of the system of merger control established by Regulation No 4064/89, the Commission must assess, using a prospective analysis of the relevant market, whether the concentration which has been referred to it will lead to a situation in which effective competition in that market is significantly impeded by the undertakings involved in the concentration. In addition, the Commission may, pursuant to Article 8 of that regulation, attach conditions and obligations to its decision on the compatibility of a concentration.

In *Petrolessence and SG2R* v *Commission*, the Court held that the applicants had failed to establish that the Commission's appraisal of their suitability was manifestly incorrect. It thus confirmed that the Commission may refuse to accept purchasers where it appears that they will be unable to achieve the objective of the corrective measures.

(d) *Right to be heard*

Regulation No 4064/89 confers on third parties the right to be heard (Article 18(4)). They may therefore lodge written observations with the Commission, particularly in response to the publication in the *Official Journal of the European Union* of the notification of a concentration falling under Regulation No 4064/89 or in response to a request made to them by the Commission (see Article 16 of Regulation No 447/98). In

particular, they may be given the opportunity to submit their observations on the commitments which have been proposed by the notifying parties with a view to showing that the concentration neither creates nor strengthens a dominant position which significantly impedes competition on the relevant market.

In the case leading to the judgment in *ARD* v *Commission*, cited above, the applicant had just 24 hours in which to comment on the initial commitments. The Court took the view that such a time-limit was not capable of affecting the legality of the decision. [38]

The judgment in *ARD* v *Commission* also points out that, in Phase II, Article 18(4) of Regulation No 4064/89 does not require the Commission to send to qualifying third parties, for prior comment, the final terms of the commitments given by the undertakings on the basis of the objections raised by the Commission following, inter alia, receipt of the third parties' comments on the commitments proposed by the undertakings (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137). That is therefore a fortiori the case with decisions taken at the end of Phase I. The failure to consult ARD, as a qualifying third party already heard by the Commission during the same procedure, on one of the amendments to the initial engagements was not therefore such as to render the decision unlawful.

D. State aid

1. Constituent elements of State aid

According to consistent case-law, investment by the public authorities in the capital of an undertaking does not constitute State aid within the meaning of Article 87 EC in the case where, in similar circumstances, a private investor operating under normal market conditions and on a scale comparable to that of bodies managing the public sector might have been persuaded to provide the capital in question (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959).

Two judgments provided the Court with an opportunity to define in greater detail the notion of a “private investor operating under normal market conditions”.

The judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-445, dealt with the consequences of a Law of 18 December 1991 by which the German *Land* of Nordrhein-Westfalen had transferred to the Westdeutsche Landesbank Girozentrale, which is a public-law banking institution, the Wohnungsbauförderungsanstalt, a

[38] It is therefore perfectly understandable that the Court held, in response to BaByliss's claim that the time-limit of 12 days in which it was to lodge its observations was insufficient, that such a time-limit is "manifestly more than sufficient".

separate public-law body wholly owned by the *Land*. This transfer had not resulted in any increase in the *Land*'s holding but brought a return fixed at 0.6% per annum after tax. In a decision of 8 July 1999, [39] the Commission had taken the view that this transaction constituted unlawful State aid that was incompatible with the common market inasmuch as an investor operating within a market economy would have sought appropriate remuneration for that capital and that a return in line with market value ought to have been fixed at 9.3% per annum after tax.

The Court first of all rejected the applicants' contention that Article 295 EC, which provides that the EC Treaty “shall in no way prejudice the rules in Member States governing the system of property ownership”, limits the scope of the concept of State aid within the meaning of Article 87(1) EC. [40]

Second, the Court pointed out that, in order to determine whether a State measure constitutes aid, the profitability or otherwise of the beneficiary undertaking is not in itself, in principle, conclusive as that issue must, rather, be taken into account for the purpose of determining whether the public investor behaved in the same way as a market economy investor or whether the beneficiary undertaking received an economic advantage which it would not have obtained under normal market conditions.

Applying, third, the concept of a private investor operating under normal market conditions, the Court formed the view that, in order to determine whether – and, if so, to what extent – the beneficiary undertaking was receiving an economic advantage which it would not have obtained under normal market conditions, the Commission may use as a criterion the average return noted in the sector concerned. The Court did, however, take pains to point out that use of this analytical tool does not release the Commission from its obligation to provide adequate reasons for its final decision and to carry out a full analysis of all the factors that are relevant to the transaction at issue and its context and, in particular, to take into account the possibility that the aid in question might satisfy the conditions for exemption under Article 86(2) EC. In the present instance, the Court took the view that the Commission had not provided sufficient grounds for its choice of two of the elements taken into account in its calculation of the appropriate rate of return, that is to say, the value of the basic rate of return and the increase applied to that rate for the purpose of applying it to the particular characteristics of the transaction. The Court accordingly took the view that, in view of the fact that those factors were of essential importance in the Commission's decision, that decision had to be annulled.

39 Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank – Girozentrale (WestLB) (OJ 2000 L 150, p. 1).

40 See also the Court's judgment of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, not yet published in the ECR, paragraph 152.

The judgment of 5 August 2003 in Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, not yet published in the ECR, (under appeal, Case C-442/03 P) constitutes one of the sequels to the Court's judgment in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, by which the Court annulled a Commission decision holding that an agreement signed between the Diputación Foral de Vizcaya (the Regional Council of Biscay) and the Ministry of Trade and Tourism of the Basque Government, of the one part, and P&O European Ferries ("P&O Ferries"), of the other, did not constitute State aid. That agreement related to the establishment of a ferry service by which the authorities which were signatories to the agreement acquired travel vouchers for use on the Bilbao-Portsmouth ferry route.

After reopening the procedure in order to take account of developments subsequent to the Court's judgment, the Commission found that, while the Diputación indicated that it was seeking, by its purchase of travel vouchers, to facilitate or subsidise trips for some of those living within its jurisdiction, the total number of vouchers obtained had not been fixed on the basis of its real needs and therefore did not correspond to the social needs which had been relied on. [41]

The Court confirmed that analysis by ruling that the mere fact that a Member State purchases goods and services under market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted if it transpires that the Member State in question did not genuinely need those goods and services. Finding, further, that numerous factors together led to the conclusion that the Diputación had not entered into the new agreement in order to meet actual needs, the Court ruled that the Commission had acted correctly in law in classifying the agreement in dispute as State aid.

The Court also stated in this judgment that the fact that the Commission had initially adopted a positive decision approving the aid at issue could not have induced the beneficiary of that aid to entertain any legitimate expectation, since that decision was challenged in proper time before, and subsequently annulled by, the Community Courts.

2. Procedural matters

In its two judgments in Case T-366/00 *Scott* v *Commission* [2003] ECR II-1766 (under appeal, Case C-276/03 P) and Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1793, the Court set out in detail the conditions governing the application of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules

41 Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya (OJ 2001 L 89, p. 28).

for the application of Article [88 EC], [42] which establishes the procedural rules in matters of State aid. In those two judgments, the Court pointed out that procedural rules, in contrast to substantive rules, are generally regarded as being applicable to all proceedings pending at the time when they enter into force. Regard being had to the fact that the rules laid down by Regulation No 659/1999, including the rule on limitation periods set out in Article 15, are procedural in nature, the Court concluded that those rules apply to all administrative procedures in matters of State aid pending before the Commission at the time when Regulation No 659/1999 entered into force, that is to say, on 16 April 1999.

The Court stated further that a request for information sent by the Commission to the authorities of a Member State interrupts the 10-year limitation period, in regard also to the beneficiary, even if the latter was unaware of the existence of that request.

E. Trade protection measures

In the course of 2003 the Court delivered two judgments in cases concerning trade protection measures.

In its judgment of 23 October 2003 in Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council*, not yet published in the ECR, the Court specified the conditions under which the normal value of a product within the meaning of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [43] may be calculated according to the rules of a market economy in the case where the imports in question are from the People's Republic of China.

Note should also be taken of the judgment of 8 July 2003 in Case T-132/01 *Euroalliages and Others* v *Commission*, not yet published in the ECR, concerning the conditions under which a trade protection measure which is about to expire may or must be maintained and concerning the extent of the Court's control over the Commission's appraisal of the “Community interest” for the purposes of Regulation No 384/96.

In this latter case, the applicants had sought the annulment of a Commission decision [44] terminating antidumping proceedings in respect of imports of ferro-silicon originating in Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela, in which the

42 OJ 1999 L 83, p. 1.

43 OJ 1996 L 56, p. 1.

44 Commission Decision 2001/230/EC of 21 February 2001 terminating the antidumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ 2001 L 84, p. 36).

Commission had taken the view that maintenance of the measures in question after their expiry would be contrary to the Community's interests, even if the expiry of those measures risked favouring the continuation or reappearance of dumping and the resultant damage.

The Court ruled that the conditions for maintaining an antidumping measure which was approaching its expiry were, *mutatis mutandis*, the same as those for the introduction of new measures. After establishing that Regulation No 384/96 did not confer on the complainant Community industry any right to the introduction of protection measures, including in the case where dumping and resulting damage had been established, the Court concluded that the same applied in regard to the maintenance of a measure approaching expiry, even where the probability of continuation or reappearance of the dumping and the resultant damage had been established.

The Court then went on to state that the Commission's assessment of the Community interest presupposed an appraisal of complex economic situations and proceeded from a choice of political economy, with the result that it was not for the Community Courts to substitute their assessment for that of the institutions competent to make that choice. That said, it was for the Community Courts to examine, in particular, whether the Commission had complied with the procedural rules of Regulation No 384/96. In conducting that examination, the Court stated that, for the purpose of assessing the Community interest, the Commission has not only the right but also the duty to carry out a full appraisal of the position of the market concerned by the measures and of the other markets on which the effects of those measures are felt, which means that it may take into account any element liable to be relevant to its appraisal, irrespective of its source, subject to the condition that it has satisfied itself as to the representative and stable character of that element.

F. Community trade marks

The registration of Community trade marks now constitutes a fertile source of litigation. 100 actions brought in 2003 sought annulment of decisions delivered by the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“the Office”).

Although lower than the number of cases brought within this area, the number of cases closed by the Court is increasing inasmuch as 47 cases were disposed of (24 by way of judgment and the remainder by way of order) as against 29 in 2002. It may be noted that the cases in which judgment was delivered were in the main “inter partes” cases, thus indicating that litigation has its origin primarily in the opposition proceedings conducted before the Office on the initiative of individual parties.

For purposes of clear presentation, it should be borne in mind that, according to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade

mark, [45] a Community trade mark is to be refused registration inter alia if it is devoid of any distinctive character (Article 7(1)(b)), if it is descriptive (Article 7(1)(c)) (these being absolute grounds for refusal), or in the case of opposition based on the existence of an earlier mark protected in a Member State or protected as a Community trade mark (Article 8) (relative grounds for refusal). A Community trade mark may also be declared invalid by the Office upon application made in that regard pursuant to Article 51(1) of Regulation No 40/94.

1. Absolute grounds for refusal of registration

On ten occasions the Court ruled by way of judgment on the legality of decisions taken by the Boards of Appeal relating to absolute grounds for refusal of registration, annulling two decisions (judgments of 6 March 2003 in Case T-128/01 *DaimlerChrysler* v *OHIM (vehicle grille)* [2003] ECR II-703*,* and of 3 December 2003 in Case T-305/02 *Nestlé Waters France* v *OHIM (bottle shape)*, not yet published in the ECR) but upholding all of the others (judgments of 5 March 2003 in Case T-194/01 *Unilever* v *OHIM (ovoid tablet)* [2003] ECR II-386, of 30 April 2003 in Joined Cases T-324/01 and T-110/02 *Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)* [2003] ECR II-1900, of 3 July 2003 in Case T-122/01 *Best Buy Concepts* v *OHIM (BEST BUY)*; of 9 July 2003 in Case T-234/01 *Stihl* v *OHIM (combination of the colours orange and grey)*; of 15 October 2003 in Case T-295/01 *Nordmilch* v *OHIM (OLDENBURGER)*; of 26 November 2003 in Case T-222/02 *HERON Robotunits* v *OHIM (ROBOTUNITS)*; of 27 November 2003 in Case T-348/02 *Quick* v *OHIM (Quick)*; and of 3 December 2003 in Case T-16/02 *Audi* v *OHIM (TDI)*, not yet published in the ECR).

With regard to procedural aspects, the Court held that, as the purpose of the action before it was to review the legality of decisions taken by the Boards of Appeal of the Office, evidence adduced for the first time before the Court was inadmissible (*DaimlerChrysler* v *OHIM (vehicle grille)*, cited above).

With regard to substance, the Court had the opportunity to rule that a word, the form of a product, the shape or packaging of a product, or a colour or combination of colours could be registered as Community trade marks on condition, inter alia, that these are not signs that are normally used for the marketing of the goods or services in question. In this regard, the Court pointed out that a trade mark's distinctiveness must be assessed by reference to the goods or services for which registration of the sign is sought and to the perception of the target public, which comprises consumers of those goods or services. Furthermore, a minimum degree of distinctive character is sufficient to render inapplicable the ground for refusal set out in Article 7(1)(b) of Regulation No 40/94.

In the light of those principles, the Court ruled that a trade mark representing the front grille of a motor vehicle was to be considered capable of leaving an impression on the

[45] OJ 1994 L 11, p. 1.

memory of the target public as an indication of commercial origin and thus of distinguishing and setting apart motor vehicles bearing that grille from those of other undertakings in view of the fact that, by reason of its unusual character, it could not be regarded as the image that naturally comes to mind as the typical representation of a contemporary grille. The Court for that reason annulled the contested decision (*DaimlerChrysler* v *OHIM (vehicle grille)*, cited above). In *Nestlé Waters France* v *OHIM (bottle shape)*, cited above, the Court adopted a similar approach in concluding that the shape of a bottle, by reason of its particular appearance, was capable of holding the attention of the public concerned and was for that reason distinctive in character.

By contrast, in upholding the decisions of the Boards of Appeal, the Court ruled that the following did not have a distinctive character: an ovoid shape for preparations for dishwashers (*Unilever* v *OHIM (ovoid tablet)*, cited above); a three-dimensional shape representing a brown cigar and a three-dimensional form representing a gold ingot designed for chocolate (*Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)*, cited above); the verbal mark BEST BUY for, inter alia, business management consultancy services (*Best Buy Concepts* v *OHIM (BEST BUY)*, cited above); and a combination of orange and grey for mechanical appliances (*Stihl* v *OHIM (combination of the colours orange and grey)*, cited above).

The Court expressed the view on several occasions that the distinctness of a sign cannot be derived solely from a marketing concept, whether it be a “range effect”, by which it is suggested to the consumer that several products have the same commercial origin because they are generally marketed together (*Stihl* v *OHIM (combination of the colours orange and grey)*, cited above), or by reason of the high price charged for the products (*Axions and Belce* v *OHIM (brown cigar shape and gold ingot form)*, cited above).

So far as concerns the decisions of the Boards of Appeal confirming the descriptive character of certain marks in respect of which registration was sought, all of these decisions were upheld by the Court on the ground that the trade mark requested consisted exclusively of a word indicating or capable of indicating to the relevant public the geographical origin of certain goods (*Nordmilch* v *OHIM (OLDENBURGER)*, cited above) or because it might serve to designate one of the possible intended purposes of the goods covered (*HERON Robotunits* v *OHIM (ROBOTUNITS)*, cited above), or alternatively because it indicated a quality of the goods in question, *in casu* the rapidity with which meals could be prepared and served (*Quick* v *OHIM (Quick)*, cited above) or the fundamental characteristic of cars and repair services (*Audi* v *OHIM (TDI)*, cited above).

Finally, Article 7(1)(f) of Regulation No 40/94 provides that registration must be refused for a mark that is contrary to public policy and to accepted principles of morality. According to the Court, that provision does not cover the situation in which a trade mark applicant acts in bad faith (Case T-224/01 *Durferrit* v *OHIM (NU-TRIDE)* [2003] ECR II-1592).

2. Relative grounds for refusal of registration

It is first of all necessary to point out that an agreement concluded between the applicant for a Community trade mark and the opposing party, which has been notified to the Office and consists of a withdrawal of opposition to the registration of the mark, will lead the Court to conclude that there is no need to adjudicate on the matter (orders in Case T-7/02 *Zapf Creation* v *OHIM – Jesmar (Colette Zapf Creation)* [2003] ECR II-271 and Case T-8/02 *Zapf Creation* v *OHIM – Jesmar (Colette Zapf Creation Kombi Collection)* [2003] ECR II-279, and order of 3 July 2003 in Case T-10/01 *Lichtwer Pharma* v *OHIM – Biofarma (Sedonium)*, not yet published in the ECR).

Next, the case-law confirmed the factors to be taken into account for the purpose of concluding that there is a likelihood of confusion or, if relevant, a likelihood of association (Article 8(1)(b) of Regulation No 40/94) and established whether the Boards of Appeal had taken proper account of those factors. Thus, addressing the comparisons made between, on the one hand, the products concerned and, on the other, between the signs in question (regarding an appraisal of their visual, auditory or conceptual similarities), the Court ruled, as the Boards of Appeal had already decided, that there was indeed a risk of confusion in the public mind between the mark applied for and an earlier protected mark (Case T-99/01 *Mystery Drinks* v *OHIM – Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43; judgments of 3 July 2003 in Case T-129/01 *José Alejandro* v *OHIM – Anheuser-Busch (BUDMEN)*; of 4 November 2003 in Case T-85/02 *Pedro Díaz* v *OHIM – Granjas Castelló (CASTILLO)*; of 25 November 2003 in Case T-286/02 *Oriental Kitchen* v *OHIM – Mou Dybfrost (KIAP MOU)*, not yet published in the ECR) or, on the contrary, that there was no such risk (*Durferrit* v *OHIM (NU-TRIDE)*, cited above; judgments of 9 July 2003 in Case T-162/01 *Laboratorios RTB* v *OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* and of 22 October 2003 in Case T-311/01 *Éditions Albert René* v *OHIM – Trucco (Starix)*, not yet published in the ECR) or no risk of association (*Durferrit* v *OHIM (NU-TRIDE)*, cited above).

By contrast, the judgment of 14 October 2003 in Case T-292/01 *Phillips-Van Heusen* v *OHIM – Pash Textilvertrieb und Einzelhandel (BASS)*, not yet published in the ECR, altered, pursuant to Article 63(3) of Regulation No 40/94 – and for the first time –, the decision of a Board of Appeal annulling the decision of the Opposition Division and upheld the opposition for a category of products. In contrast to the Board of Appeal, the Court took the view that there was no risk of confusion between the verbal sign BASS, registration of which as a Community trade mark was sought, and the verbal sign PASH, already registered as a trade mark in Germany, both of which were used for clothes. The Court accordingly altered the decision of the Board of Appeal in such a way that the action brought before the Office by the opposing party was dismissed.

In conclusion, it should be pointed out that submissions made by the Office that the Court should “take into account the parties' pleadings” were inadmissible inasmuch as

the Office, which was formally the defendant before the Court, did not express any views on either the applicant's claims or on the fate of the contested decision (*Mystery Drinks* v *OHIM – Karlsberg Brauerei (MYSTERY)*, cited above).

3. Applications for a declaration of invalidity brought before the Office

The invalidity of a Community trade mark may be absolute or relative depending on the grounds in justification.

The absolute grounds for invalidity of a Community trade mark are set out in Article 51 of Regulation No 40/94. The origin of the case which led to the judgment in Case T-237/01 *Alcon* v *OHIM – Dr Robert Winzer Pharma (BSS)* [2003] ECR II-415 (under appeal, Case C-192/03 P), was a decision of the Cancellation Division of the Office declaring a Community trade mark invalid on the basis of Article 7(1)(d) of Regulation No 40/94, which precludes – as an absolute ground for refusal – registration of trade marks consisting exclusively of signs or indications which have become customary in the current language or in bona fide and established commercial practices. The Board of Appeal had dismissed the appeal brought against that decision. The Court, in its turn, dismissed the action seeking annulment of the Board of Appeal's decision and confirmed, in its ruling, that the term “BSS” had become customary in medical circles and that BSS as a trade mark had not acquired a distinctive character through use within a substantial part of the European Union.

The relative grounds for invalidity of a Community trade mark are set out in Article 52 of Regulation No 40/94. By judgment of 9 July 2003 in Case T-156/01 *Laboratorios RTB* v *OHIM – Giorgio Beverly Hills (GIORGIO AIRE)*, not yet published in the ECR, the Court dismissed an action brought by the company Laboratorios RTB against a decision of the Board of Appeal annulling a decision taken by the Cancellation Division of the Office and dismissing the application for annulment of a Community trade mark. The Court thereby upheld the submission that no evidence of genuine use of earlier marks during the five-year period prior to the application for annulment had been adduced – specifying in that regard the level of proof required for genuine use to be established for legal purposes – and that there was no likelihood of confusion between the Community mark GIORGIO AIRE for toiletries and the earlier Spanish marks featuring the words “giorgi line” and “miss giorgi” for identical articles.

4. Formal issues

Article 73 of Regulation No 40/94 requires decisions of the Office to state the reasons on which they are based. [46] In *Audi* v *OHIM (TDI)*, cited above, the Court took the view

[46] See also Rule 50(2)(h) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1).

that the Board of Appeal was under an obligation to state why the evidence adduced by Audi did not allow the conclusion that the mark applied for had become distinctive through use. However, it went on, the finding that the Board of Appeal of the Office had failed in its duty to set out reasons was not sufficient to entail the annulment of that Board's decision in view of the fact that a fresh decision of the Office would necessarily lead to the same result as the first decision.

The second sentence of Article 73 of Regulation No 40/94 provides that decisions of the Office may be based only on reasons or evidence on which the parties have had an opportunity to present their comments. Breach of that provision by an examiner of the Office, however, does not oblige the Board of Appeal to annul the decision taken by that examiner in the absence of any substantive illegality (*Audi* v *OHIM (TDI)*, cited above).

Furthermore, as held in the judgment in Case T-174/01 *Goulbourn* v *OHIM – Redcats (Silk Cocoon)* [2003] ECR II-791, the Court ruled that procedural equity and the general principle of protection of legitimate expectations require that that provision be construed as meaning that the Board of Appeal is obliged to indicate at the outset to the party concerned that it intends to take into account a fact which, having been relied on by the other party after expiry of the period prescribed for that purpose in opposition proceedings, was not taken into account in the decision of the Opposition Division, in order that the party concerned might be in a position to determine whether it would at all be appropriate to submit substantive observations on that fact. Such an obligation exists even if the other party had relied anew on that fact in its pleadings before the Board of Appeal. Inasmuch as it had failed to comply with that obligation, the decision of the Board of Appeal was annulled.

5. Operational continuity of the departments of the Office

For an application in opposition to be successful, the owner of the earlier trade mark must, where appropriate, be able to demonstrate “genuine use” (Article 43(2) of Regulation No 40/94). A question arose as to whether a Board of Appeal, before which an application had been brought by a party whose opposition had previously been dismissed by the competent Office department on the ground of want of evidence, could lawfully form the view that it was not required exhaustively to examine the decision taken by that department. In response to that question, the Court held, in its judgment of 23 September 2003 in Case T-308/01 *Henkel* v *OHIM – LHS (UK) (KLEENCARE)*, not yet published in the ECR, that its case-law to the effect that there is continuity, in terms of their functions, between the examiner and the Boards of Appeal may also be applied appropriately to the relationship between the other Office departments taking decisions at first instance, such as the Opposition Divisions, Cancellation Divisions, and the Boards of Appeal, and that consequently the powers of the Office's Boards of Appeal imply that they must re-examine decisions taken by departments at first instance. From this the Court concluded that, even if the party who

had brought the appeal before the Board of Appeal had not raised a specific ground of appeal, that Board was none the less "bound to examine whether or not, in the light of all the relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling". It followed that the Board of Appeal was required to base its decision on all the matters of fact and law which the party in question had introduced in the proceedings before the department which had ruled at first instance or, subject only to Article 74(2) of Regulation No 40/94, [47] on the appeal. *In casu*, the Court found against the Board of Appeal which had itself failed to examine the evidence which the applicant had produced in the proceedings before the Opposition Division.

G. Access to documents

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 [48] provides for a right of access to documents held by an institution, that is to say, documents drawn up or received by it and in its possession.

In a case brought by an individual against the Commission, the Court examined whether the Commission could lawfully refuse access to documents which were in its possession but which had been drawn up by the Italian authorities. The Court pointed out in this regard that the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States. The Court noted, however, that the Member States are subject to special treatment inasmuch as Article 4(5) of Regulation No 1049/2001 confers on a Member State the power to request an institution not to disclose documents originating from that State without its prior agreement. In that case, as the Italian authorities had opposed communication to the applicant of the documents emanating from them, the Commission had been entitled to reject the application for access (judgment of 17 September 2003 in Case T-76/02 *Messina* v *Commission*, not yet published in the ECR).

This was the only case decided in 2003 which concerned the legality of decisions to refuse access taken pursuant to Regulation No 1049/2001.

H. Public health

Authorisations for the marketing of certain substances, or the withdrawal of such authorisations, were matters which gave rise to proceedings before the Court.

47 Article 74(2) of Regulation No 40/94 provides: "The Office may disregard facts or evidence which are not submitted in due time by the parties concerned".

48 OJ 2001 L 145, p. 43.

Whereas the judgment in Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85 (under appeal, Case C-156/03 P) annulled a Commission decision concerning the withdrawal of authorisations for the marketing of medicinal products for human use containing certain substances on grounds identical to those in Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR II-4945 (commented on in the *Annual Report 2002*), the judgment of 21 October 2003 in Case T-392/02 *Solvay Pharmaceuticals* v *Council*, not yet published in the ECR, dismissed the action challenging the legality of a Council regulation which had the effect of setting aside authorisation of nifursol, a substance used in animal feedingstuffs. [49]

In that case, the applicant's main argument was that the risk to human health which formed the basis of the contested regulation was merely hypothetical. In its appraisal of that argument, the Court confirmed that the precautionary principle is a general principle of Community law which obliges the authorities concerned to take, in the specific exercise of the powers conferred on them by the relevant legislation, appropriate measures to prevent potential risks to public health, safety and the environment by attaching greater importance to the requirements associated with the protection of those interests than to economic interests. Within the area of public health, this principle, in line with what is now well-established case-law, means that where uncertainties exist as to the existence or scope of risks to human health, the institutions may adopt precautionary measures without having to wait for the reality and gravity of those risks to be demonstrated in full.

So far as concerns the scope of discretion enjoyed by the competent institution, the Court noted that, in cases where the scientific evaluation did not make it possible to establish with sufficient certainty whether a risk exists, recourse or non-recourse to the precautionary principle will depend on the level of protection chosen by the competent authority in the exercise of its discretion, regard being had to the priorities which it defines with regard to the objectives which it pursues in accordance with the relevant Treaty rules and rules of secondary law, subject to the proviso, however, that this choice must be in accordance, first, with the principle that the protection of public health, safety and the environment takes precedence over economic interests and, second, with the principles of proportionality and non-discrimination.

As implementation of the precautionary principle is subject to limited judicial control, the Court ruled that no manifest error had been committed in the appraisal of the scientific opinions and that it could for that reason have been lawfully concluded that the withdrawal of authorisation for nifursol was justified by the existence of serious

[49] Council Regulation (EC) No 1756/2002 of 23 September 2002 amending Council Directive 70/524/EEC concerning additives in feedingstuffs as regards withdrawal of the authorisation of an additive and amending Commission Regulation (EC) No 2430/1999 (OJ 2002 L 265, p. 1).

indications giving rise to reasonable doubts as to its harmlessness. In that context, the Court noted that the precautionary principle is intended to obviate potential risks, whereas, in contrast, risks that are purely hypothetical – based on mere conjectures without any scientific basis – cannot be taken into account.

In its judgment of 18 December 2003 in Case T-326/99 *Olivieri* v *Commission and European Agency for the Evaluation of Medicinal Products*, not yet published in the ECR, which dismissed on grounds of inadmissibility an action seeking the annulment of a Commission decision authorising the marketing of a medicinal product (see above), the Court pointed out that the Commission, assisted by the European Agency for the Evaluation of Medicinal Products, must verify that the information provided by an applicant for marketing authorisation is correct and adequately and sufficiently demonstrates the quality, safety and efficacy of the medicinal product in question.

I. Community funding

For the period 2000 to 2006, the financial and structural actions referred to in Article 159 EC are to be governed by Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds. [50] The Court, however, did not in 2003 give rulings in any disputes concerning implementation of the new rules. The judgments delivered by the Court related essentially to the legality of Commission decisions reducing, suspending or withdrawing financial assistance on the basis of the legislative rules preceding Regulation No 1260/1999, that is to say, Regulation No 2052/88 [51] and Regulation No 4253/88. [52]

In general, the pleas in law most frequently relied on in support of forms of order seeking annulment of Commission decisions reducing or withdrawing financial assistance are derived from, first, errors in the appraisal of the facts, second, infringement of the general principle of respect for the rights of the defence and, third, infringement of the principle of proportionality.

With regard to the plea concerning errors of appraisal in regard to irregularities identified by the Commission, the Court, at the conclusion of a detailed examination, declared that plea to be partially founded in its judgment of 30 September 2003 in Case

50 OJ 1999 L 161, p. 1.

51 Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9).

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

T-196/01 *Aristoteleio Panepistimio Thessalonikis* v *Commission*, not yet published in the ECR, which led the Court to annul the decision to withdraw assistance from the Guidance Section of the European Agricultural Guidance and Guarantee Fund ("EAGGF").

Respect for the rights of the defence in all open proceedings against a person which are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views. When infringement of that principle is pleaded in actions brought before the Court, the latter is obliged to examine whether the applicants were provided with a proper opportunity to set out their views prior to the adoption of the decisions the legality of which they dispute in regard to all of the heads of complaint laid against them. While the Court rejected a plea of this kind in its judgment in Case T-217/01 *Forum des migrants de l'Union européenne* v *Commission* [2003] ECR II-1566 (under appeal, Case C-369/03 P), it took the view, in its judgment of 9 July 2003 in Case T-102/00 *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap* v *Commission*, not yet published in the ECR, that, as the applicant in that case submitted, it had not been placed in a position in which it could submit its observations on a key element for the purpose of establishing the existence and extent of an alleged overpayment of assistance from the European Social Fund prior to the adoption of the decision reducing that assistance.

Concerning the plea in law alleging infringement of the principle of proportionality laid down in Article 5 EC, it was argued that the irregularities committed did not justify the reduction or withdrawal of the financial assistance. According to well-established case-law, the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to Community assistance. It followed that the discontinuance of financial assistance was not, in principle, disproportionate where it was established that the beneficiary of that aid had infringed an obligation fundamental to the proper operation of the Community system in question, such as the EAGGF. The Court thus ruled that the withdrawal of EAGGF assistance was justified in the light of that principle in the case where the recipient had failed to comply with fundamental obligations by not being involved in economic activity and by providing inaccurate information in its application for aid (judgment in Joined Cases T-61/00 and T-62/00 *APOL and AIPO* v *Commission* [2003] ECR II-639) or by suspending the activity of a production line and using a separate production line for the processing of a product excluded from the aid (judgment of 11 December 2003 in Case T-305/00 *Conserve Italia* v *Commission*, not yet published in the ECR). Such withdrawal is also justified where the recipient of the aid misled the Commission as to the commencement of work and began that work before the date on which the application for aid was received by that institution, in violation of the relevant rules (judgment in Case T-186/00 *Conserve Italia* v *Commission* [2003] ECR II-723) and

where unjustified expenditure was charged against the project (judgment in Case T-340/00 *Comunità montana della Valnerina* v *Commission* [2003] ECR II-814 (under appeal, Case C-240/03 P)).

By contrast, in its judgment of 11 December 2003 in Case T-306/00 *Conserve Italia* v *Commission*, not yet published in the ECR, the Court annulled a Commission decision reducing EAGGF assistance. The Court took the view that the method used for calculating the reduction in aid was in clear breach of the principle of proportionality inasmuch as it failed to take proper account of the relationship between the seriousness of the breach committed by the applicant and the reduction adopted, it being pointed out that the breach in question consisted in the commencement of the work which was the subject of the assistance before the date on which the application had been received by the Commission.

It should also be pointed out that, in the absence of any indication – whether in the relevant legislation or in the decision granting funding – that the recipient of aid is financially liable to the Community for the whole of a project, the completion of which falls to several parties, the principle of proportionality is infringed where the Commission, having established irregularities in the performance of that project, sought from the person designated as the recipient reimbursement of the full amount of assistance already paid without limiting that claim to the section of the project which was to be carried out by that person (*Comunità montana della Valnerina* v *Commission*, cited above).

Furthermore, in its judgment in *Aristoteleio Panepistimio Thessalonikis* v *Commission*, cited above (see also judgment in Case T-125/01 *José Martí Peix* v *Commission* [2003] ECR II-868, paragraphs 96 to 114, (under appeal, Case C-226/03 P); judgment in Joined Cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira and Others* v *Commission* [2003] ECR II-1216, paragraphs 165 to 180, (under appeal, Case C-254/03 P); judgment of 17 September 2003 in Case T-137/01 *Stadtsportverband Neuss* v *Commission*, not yet published in the ECR, paragraphs 125 to 134), the Court expressed the view that, although Article 24 of Regulation No 4253/88 does not specify particular time-limits, the Commission was under an obligation, in the procedure for the withdrawal of financial assistance, to reach its decision within a reasonable period. *In casu*, although it took the view that the administrative procedure had been very long, the Court found that the plea alleging infringement of the principle that decisions must be taken within a reasonable period was unfounded, regard being had to its "PVC II" case-law [53] (see the *Annual Report 1999*), to the effect that infringement of the principle that decisions must be taken within a reasonable period, assuming that infringement to have been established, would not justify the automatic annulment of the contested

[53] Judgment in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931.

decision, and to the complexity of the case in conjunction with the uncooperative attitude shown by the applicant.

J. Community staff cases

The numerous decisions delivered in 2003 in Community staff cases dealt with a wide range of legal issues which included access to the European public service by way of competition (judgment of 23 January 2003 in Case T-53/00 *Angioli* v *Commission*; judgment of 27 March 2003 in Case T-33/00 *Martínez Páramo* v *Commission*; judgment of 25 June 2003 in Case T-72/01 *Pyres* v *Commission*; judgment of 17 September 2003 in Case T-233/02 *Alexandratos and Panagiotou* v *Council*; and judgment of 30 September 2003 in Case T-214/02 *Martínez Valls* v *Parliament*, not yet published in the ECR), the appointment of senior officials (judgment of 18 September 2003 in Case T-73/01 *Pappas* v *Committee of the Regions*; judgment of 5 November 2003 in Case T-240/01 *Cougnon* v *Court of Justice*, not yet published in the ECR), the promotion of officials or reports concerning them, the conditions for receiving allowances under the Staff Regulations of officials, cover in respect of risks relating to accidents or illness, disciplinary measures incurred through non-compliance with the Staff Regulations and transfer to the Community scheme of pension rights acquired prior to entry into the service of the Communities (judgment of 30 January 2003 in Joined Cases T-303/00, T-304/00 and T-322/00 *Caballero Montoya and Others* v *Commission*, not yet published in the ECR).

Among all of these decisions, it should be noted that the Court on several occasions dismissed actions for annulment of staff reports which had been drawn up late but ordered the Commission to compensate those officials who had been adversely affected by the late establishment of their reports (judgments of 7 May 2003 in Case T-278/01 *den Hamer* v *Commission* and Case T-327/01 *Lavagnoli* v *Commission*; judgment of 30 September 2003 in Case T-296/01 *Tatti* v *Commission*; judgments of 23 October 2003 in Case T-279/01 *Lebedef* v *Commission*, Case T-24/02 *Lebedef-Caponi* v *Commission* and Case T-25/02 *Sautelet* v *Commission*, not yet published in the ECR). On this first aspect, the Court pointed out that a staff report cannot, in the absence of exceptional circumstances, be annulled for the sole reason that it was drawn up late. While a delay in drawing up a staff report may give rise to a right to reparation on the part of the official concerned, that delay cannot affect the validity of the staff report or, consequently, justify its annulment. On the second aspect, the Court stressed that the delay in drawing up staff reports is a source of non-material damage for an official and that, in the absence of special circumstances justifying the delay found to have occurred, the administration commits a service-related fault of such a kind as to render it liable. The Court stated in its above judgments in *den Hamer* v *Commission* and *Lavagnoli* v *Commission* that the case-law which, in the light of the wording of Article 43 of the Staff Regulations, allows the Commission a reasonable period within which to draw up the staff reports of its officials cannot apply from that point in time at which provisions that are binding on the Commission, such as general implementing provisions, make the reporting procedure subject to specific time-limits

and that consequently any exceeding of that time-limit which that institution has imposed on itself must in principle be attributed to it.

The pursuit of multiple outside activities without prior permission of the appointing authority justifies the disciplinary sanction of removal of the official in question from her or his post, as held in the judgment of 16 January 2003 in Case T-75/00 *Fichtner* v *Commission* (ECR-SC II-51, under appeal, Case C-116/03 P). In the course of its assessment, the Court pointed out that, under the third paragraph of Article 12 of the Staff Regulations, the official concerned is required to seek permission from the appointing authority, regardless of the outside activity which he proposes to pursue, and to refrain from pursuing such an activity without valid permission. The Court also took the view that the confirmed failures to comply with Article 12 of the Staff Regulations, which had been practically continuous over a period of almost ten years, provided grounds for that conduct to be classified as particularly serious and justified the finding that the sanction of removal from post was not disproportionate.

Delivered by a Chamber consisting of five judges, infrequent in staff cases, the judgment of 30 January 2003 in Case T-307/00 *C* v *Commission* (ECR-SC II-221), declared the fourth paragraph of Article 80 of the Staff Regulations to be unlawful [54] and accordingly annulled a decision based on that article. Faced with the question whether the administration was entitled to reject an application for an orphan's pension on the ground that the provisions of the Staff Regulations refer only to the death of a spouse and therefore do not cover the case of the death of an unmarried partner, the Court first of all expressed the opinion that, in view of the purpose served by the fourth paragraph of Article 80 of the Staff Regulations, the situation of an unmarried official whose child has lost his or her other parent, who was not an official or a member of the temporary staff of the Communities and who in fact contributed to the child's upkeep pursuant to a legal obligation resulting from the recognition of paternity, is comparable to those situations which do come within the scope of that article. The Court went on to express the view that the exclusion of unmarried officials from the scope of Article 80 was not justified in so far as the additional expense incurred by an official who loses his or her spouse also arises in the case of the death of the other parent who is not the official's spouse but has recognised the child and is by virtue of that fact under a legal obligation of maintenance. From this the Court concluded that the fourth paragraph of Article 80 of the Staff Regulations drew an unjustified distinction and infringed the principle of equal treatment.

[54] The fourth paragraph of Article 80 of the Staff Regulations provides:

"Where the spouse, not being an official or member of the temporary staff, of an official or of a former official in receipt of a retirement pension or an invalidity pension dies, the children being dependent within the meaning of Article 2 of Annex VII on the surviving spouse shall be entitled to an orphan's pension in accordance with Article 21 of Annex VIII."

II. *Actions for damages* [55]

For the Community to incur non-contractual liability under Article 288 EC, three conditions must be fulfilled: the conduct alleged against the Community institutions must be unlawful; there must be actual damage; and there must be a causal link between that conduct and that damage.

The concurrence of those three conditions allowing the non-contractual liability of the Community to be incurred was regarded as established by the Court in its judgment in Joined Cases T-344/00 and T-345/00 *CEVA and Pharmacia entreprises* v *Commission* [2003] ECR II-229 (under appeal, Case C-198/03 P). The Court took the view that the damage resulting from the impossibility of marketing certain veterinary products which faced the applicant pharmaceutical companies was the direct consequence of inaction on the Commission's part which amounted to a manifest and serious infringement of the principle of sound administration.

In all of the other decisions, the Court took the view that one or more of those conditions had not been satisfied (see, inter alia, judgment in Case T-333/01 *Meyer* v *Commission* [2003] ECR II-117 (under appeal, Case C-151/03 P); judgment in Case T-61/01 *Vendedurias de Armadores Reunidos* v *Commission* [2003] ECR II-327; judgments in Case T-56/00 *Dole Fresh Fruit International* v *Council and Commission* [2003] ECR II-579, and Case T-57/00 *Banan-Kompaniet and Skandinaviska Bananimporten* v *Council and Commission* [2003] ECR II-609, judgment in Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1095, judgments in Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission* [2003] ECR II-1639 (under appeal, Case C-295/03 P) and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1681, judgment of 2 July 2003 in Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission*; and judgment of 17 December 2003 in Case T-146/01 *DLD Trading* v *Council*, not yet published in the ECR).

With regard to the first of the three conditions mentioned above – the unlawfulness of the conduct alleged against the Community institutions – the case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law protecting individuals. As to the condition that the breach must be sufficiently serious, it follows from the case-law of the Court of Justice that the criterion to be applied is that of a manifest and grave disregard by a Community institution of the limits imposed on its discretion, it being stated that in the case where that institution has only a considerably reduced margin of discretion, or even no discretion at all, the mere infringement of Community law may suffice to establish that there has been a sufficiently serious breach.

The above judgments in *Dole Fresh Fruit International* v *Council and Commission* and *Banan-Kompaniet and Skandinaviska Bananimporten* v *Council and Commission* are particularly noteworthy as the Court there ruled for the first time that an illegality

[55] Excluding Community staff cases.

capable of resulting in the annulment or invalidity of a measure will not necessarily constitute a sufficiently serious breach, with the result that the inference may be drawn that it is not every illegality that is capable of rendering the Community liable.

In the event, the Court took the view that there was no doubt as to the fact that a legal rule had been breached, inasmuch as the Court of Justice had established the illegality and invalidity of the provisions in issue, and that the principle of non-discrimination, in breach of which those provisions had been adopted, was a general principle of Community law for the protection of individuals. It thus remained to be determined whether, in view of the broad discretion which the institutions enjoyed in these cases by virtue of the international dimension and the complex economic assessments involved in the introduction or amendment of the Community import scheme for bananas, the Council and the Commission had, in adopting the provisions under challenge, manifestly and gravely disregarded the limits of their discretion. At the conclusion of its examination of all these matters, the Court concluded that the principle of non-discrimination had not been infringed in a sufficiently serious way and accordingly dismissed the actions.

With regard to the condition that there must be a causal link, the Court took the view that this condition is satisfied if there is a direct link of cause and effect between the measure for which the institution concerned is criticised and the damage alleged. In the absence of evidence by the applicant that such a link exists, the action must be dismissed (judgment in *DLD Trading* v *Council*, cited above).

Although the principle of no-fault liability has not been established in Community law, the Court pointed out once again that, if this were to be recognised, a precondition for such liability would be the cumulative satisfaction of three conditions, that is to say, the reality of the damage allegedly suffered, the causal link between that damage and the act alleged against the Community institutions, and the special and unusual nature of that damage. The above judgments in *Travelex Global and Financial Services and Interpayment Services* v *Commission* and in *Hameico Stuttgart and Others* v *Council and Commission*, in which those conditions are set out, merely held that the damage alleged had not been shown to have actually occurred.

III. *Applications for interim relief*

The purpose served by the procedure for interim relief is to make it possible to avoid, whether through suspension of application of the contested act (Article 242 EC) or by the granting of any other interim measure (Article 243 EC), irremediable damage to a party's interests. In 2003, 39 applications for interim relief were lodged with the Registry, while 31 cases were concluded. It should be noted that one of these cases was concluded by the “judge responsible for granting interim relief”, whose function is

provided for by the Court's Rules of Procedure, [56] as most recently amended on 21 May 2003. [57]

The granting of interim relief is conditional on several conditions being satisfied: there must be a prima facie case in the action to which the application for interim relief relates ("*fumus boni juris*") and there must be an element of urgency. In addition, the balancing of the interests involved, to be made by the judge dealing with the application, must come down on the side of the party seeking the interim relief.

By orders of 1 August 2003 in Case T-198/01 R II *Technische Glaswerke Ilmenau* v *Commission* and in Case T-378/02 R *Technische Glaswerke Ilmenau* v *Commission* and of 31 October 2003 in Case T-253/03 R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, not yet published in the ECR, the President of the Court formed the view that those conditions had been satisfied and ordered interim relief. None of the other decisions given in 2003 acceded to the requests made.

Case T-198/01 R II follows on from the order in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 (see the *Annual Report 2002*) granting suspension of operation of the Commission's decision ordering Germany to recover from the recipient company State aid that had been declared incompatible with the common market. This suspension was limited in time and was subject to compliance by the applicant with certain conditions, including reimbursement of an initial portion of the disputed aid. On expiry of this first period, the applicant sought an extension of the measures granted. These were ordered to be granted again, subject to compliance with a number of conditions.

The proceedings between the companies Akzo Nobel Chemicals and Akcros Chemicals, on the one hand, and the Commission, on the other, arose following an inspection carried out on the premises of those companies with a view to securing evidence of possible anti-competitive practices. The applicant companies essentially submitted that the documents seized by the Commission's agents in the course of that investigation were covered by professional confidentiality protecting correspondence with legal advisers ("legal professional privilege") and that the Commission could not therefore have access to such material. In the light of that challenge, the Commission's agents seized a number of documents and deposited them in a sealed envelope which they then removed. With regard to other documents, the Commission took copies and placed them on the file. The Commission subsequently adopted a decision stating its intention to open the envelope containing the first documents.

By his order in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, cited above, the President of the Court ordered that decision to be suspended.

56 Article 106 of the Court's Rules of Procedure.

57 OJ 2003 L 147, p. 22.

He first of all expressed the view that the pleas raised by the applicants constituted a prima facie case in law. He stated his opinion that the plea alleging infringement of professional privilege in regard to the first documents raised very important and complex questions concerning the possible need to extend, to a certain degree, the scope of professional privilege as currently delimited by the case-law. *In casu*, the question raised was whether the scope of professional privilege, which at present covers communication with an outside lawyer or any document reporting the text or content of such communication, could be extended to documents drawn up for the purpose of consultation with a lawyer. Second, the President expressed the view that, in so far as it concerned the documents copied by the Commission, the plea alleging infringement of professional privilege also raised the issue of principle as to whether the protection afforded to correspondence between independent lawyers and their clients [58] could be extended to cover also written communications with a lawyer employed by an undertaking on a permanent basis. Third, the President of the Court stated that it could not be ruled out that, in the course of its examination, the Commission had failed to comply with the procedure defined in the above judgment in *AM & S* v *Commission* by having consulted, even if only summarily, the documents which the applicants claimed were covered by professional privilege.

The President of the Court then went on to express the view that the applicants had demonstrated that it was necessary to suspend implementation of the contested decision in order to prevent their suffering serious and irreparable damage. On this point, the President found *inter alia* that the fact that the Commission was aware of the information in the documents contained in the sealed envelope would as such constitute a substantial and irreversible breach of the applicants' right to respect for the confidentiality protecting those documents.

Finally, the President ruled that the general interest and the Commission's interest in ensuring compliance with the rules of competition could not take precedence over the applicants' interest in ensuring that the documents contained in the sealed envelope would not be disclosed.

In conclusion, mention should be made of the order of 15 May 2003 made by the President of the Court in Case T-47/03 R *Sison* v *Council*, not yet published in the ECR. The background to that case was provided by the Council decision of 12 December 2002 updating the list of persons covered by Regulation No 2580/2001 [59] providing for the freezing of funds and assets of individuals or groups involved in terrorist activities and which included on that occasion on that list the name of Jose Maria Sison. The latter, who is a Philippines national resident in the Netherlands,

58 Protection recognised by the Court of Justice in its judgment in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575.

59 Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

brought an action before the Court seeking annulment of that decision and applied in parallel for interim relief. The latter application was dismissed on the ground of want of urgency. The President of the Court expressed the view that, in regard to financial harm, it had not been established that the applicable legislation would not enable Mr Sison to avoid suffering serious and irreparable damage in so far as the national authorities could, on an *ad hoc* basis and in accordance with specified arrangements, authorise the use of certain funds to meet the essential needs of the persons included on that list. With regard to the non-material harm alleged, it was pointed out that the purpose of proceedings for interim relief is not to ensure reparation for damage but rather to guarantee the full effectiveness of the ruling to be given on the merits.

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