A — Proceedings of the Court of First Instance in 2002

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

The statistics for 2002 reveal three major trends.

The first trend is confirmation of an existing trend: the number of actions continues to increase. Almost 400 cases were registered by the Court of First Instance (to be precise 393 cases, excluding special forms of procedure such as legal aid and the taxation of costs), an increase of 20.2% compared with the number of cases registered in the previous year (327 cases).

The second trend, which is also the main explanation for the growth in the total number of new cases, is the considerable increase in the number of cases brought in the field of the Community trade mark [1] (83 cases in 2002 compared with 37 in 2001). While a leading role for this field of litigation has been forecast for several years, [2] that prediction is now becoming a reality since trade mark cases represent more than 20% of all cases brought and that proportion should increase further in the future. Trade mark and staff cases now account for 49.6% of all actions brought before the Court of First Instance.

The third trend is that emergency cases are becoming a genuine branch of litigation. Since 1 February 2001 the Rules of Procedure have provided for the possibility of ruling on the substance of a case under an expedited procedure. In the course of 2002, no less than 25 applications for expedition were made (compared with 12 in 2001) and the Court of First Instance granted expedited treatment on 14 occasions (13 of the successful applications were in cases challenging decisions adopted by the Commission in the field of concentrations of undertakings). The cases dealt with under the expedited procedure were decided by the Court of First Instance within a period ranging from under two months to eight months from the date on which the application was granted. It is undeniable that the possibility of dealing with cases under an

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

2 A similar forecast may be made with regard to actions brought before the Court of First Instance challenging decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in the field of Community designs. However, since the legislation governing Community designs entered into force this year (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1); Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ 2002 L 341, p. 28); and Commission Regulation (EC) No 2246/2002 of 16 December 2002 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in respect of the registration of Community designs (OJ 2002 L 341, p. 54)), the first actions before the Court of First Instance are not expected in 2003.

expedited procedure has contributed to the reduction in the number of applications for interim relief (25 applications for interim relief in 2002 compared with 37 in 2001). [3]

The number of cases decided (314) was slightly down compared with the previous year (325) and remained below the number of cases brought, so that the number of pending cases increased from 786 to 865.

Developments in the case-law call for a more detailed exposition.

As in previous years, the most significant judicial decisions of the year will be grouped into proceedings concerning the legality of measures (I), actions for damages (II) and applications for interim relief (III). The imbalance in the presentation of these subject groupings merely reflects the respective positions held by them in terms of volume in the judicial activity of the Court of First Instance. [4]

I. Proceedings concerning the legality of measures

Apart from consideration of the conditions governing the admissibility of actions brought under Article 230 EC (A), this account of proceedings concerning the legality of measures concentrates on the essential aspects of substantive law in the main subject areas dealt with by the Court of First Instance in the course of the year (B to H). It should be noted at the outset that customs, access to documents and reductions in financial assistance (in particular assistance granted by the European Social Fund and the European Agricultural Guidance and Guarantee Fund) are not among the fields dealt with in this report, since the limited number of judgments delivered in those fields confirm well-established case-law.

A. Admissibility of actions for annulment

It is essentially the concept of a reviewable act (1) and standing to bring proceedings (2) that have undergone particular development during the period under consideration.

[3] See also the comments below in the section on interim relief proceedings.

[4] To assist the reader, articles of the EC Treaty are given *in the version which has been in force since 1 May 1999, including when they are referred to in secondary legislation*.

1. Measures which may be the subject of an action for annulment

(a) Measures of the Commission

It is settled case-law that only measures producing binding legal effects capable of affecting the interests of the applicant (a natural or legal person) by bringing about a distinct change in his legal position are acts against which an action for annulment may be brought under Article 230 EC. In particular, in the case of acts or decisions adopted under a procedure involving several stages, especially where they are the culmination of an internal procedure, it is clear from the same case-law that, in principle, an act is reviewable only if it is a measure definitively establishing the position of an institution at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.

In the light of that case-law, the following were held not to constitute measures which could be brought before the Court: a reduction in the quantities of bananas allegedly marketed by the applicants, made by the Commission in a 'worksheet' falling within the information checking process prescribed by Regulation (EEC) No 1442/93 [5] laying down detailed rules for the application of the arrangements for importing bananas into the Community (Case T-160/98 *Van Parys and Pacific Fruit Company* v *Commission* [2002] ECR II-233); a letter sent by the Commission to a complainant informing it that the assessments contained in the letter are of a provisional nature (Case T-95/99 *Satellimages TV 5* v *Commission* [2002] ECR II-1425); and a letter from the Commission which merely informs a business about the state of the procedure for inclusion of a substance in one of the annexes to a Community regulation (Case T-212/99 *Intervet International* v *Commission* [2002] ECR II-1445). Also, a Commission decision intended to withdraw immunity from fines from undertakings having notified an agreement within the meaning of Article 81 EC is capable of producing binding legal effects only if notification of the agreement did in fact confer such immunity on those undertakings. That is not the case where the decision refers to an agreement between shipping companies containing provisions relating to the fixing of inland transport tariffs, as such provisions fall within Regulation (EEC) No 1017/68 [6] which does not provide for immunity from fines where agreements are notified (Case T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125).

The fact that the contested act does not, in principle, adversely affect an applicant does not dispense the Community judicature from examining whether the assessment contained in it has binding legal effects such as to affect the applicant's interests. Looking at the act's substance, the Court held that a decision declaring notified State

[5] Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6).

[6] 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).

aid compatible with the common market adversely affected the applicant, who was the recipient of the aid. The Court explained that, in the case of a decision adopted under the rules laid down by the multisectoral framework on regional aid for large investment projects, the Commission's finding concerning the adjustment coefficient upon which the maximum allowable aid intensity depends is likely to have binding legal effects since it affects the amount of aid which may be declared compatible with the common market (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347).

The Court likewise held that an action may be brought for annulment of a decision which amends some of the grounds of an earlier decision but does not alter its operative part. As stated in the judgment of 20 November 2002 in Case T-251/00 *Lagardère and Canal+* v *Commission*, not yet published in the ECR, that is so where the amendment of the grounds of the earlier decision has changed the substance of what was decided in the operative part of that decision, thereby affecting the applicant's interests. In the case in point, the amendment, contained in a Commission decision, of an assessment relating to whether or not restrictions notified by the applicants in connection with a concentration were ancillary — an assessment which had been set out in the decision authorising those concentrations — was considered to amend the substance of what had been decided in the operative part of the decision authorising the concentrations. That amendment produced binding legal effects such as to affect the applicants' interests.

In the field of State aid, three judgments held decisions to initiate the formal investigation procedure provided for in Article 88(2) EC to be open to challenge (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309; and judgments of 23 October 2002 in Joined Cases T-269/99, T-271/99 and T-272/99 *Territorio Histórico de Guipúzcoa and Others* v *Commission* and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission*, both not yet published in the ECR).

In *Government of Gibraltar* v *Commission*, the Government of Gibraltar applied for the annulment of two Commission decisions to initiate the formal investigation procedure in relation to Gibraltar company law which granted tax exemptions. The Commission, disputing that those decisions were open to challenge, argued that the State measures at issue had not been classified as new aid, that it had not sought suspension of the measures and that the solution adopted by the Court of Justice in its judgment in Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303 (see the *Annual Report 2001*) was therefore not applicable to the present case. In response, the Court of First Instance stated first of all that, under Article 88 EC and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 EC, [7] initiation of a formal investigation is provided for in four possible situations, namely for the purpose of examining new notified aid, for the purpose of examining possible unlawful

[7] OJ 1999 L 83, p. 1.

aid, in the event of misuse of aid, and where a Member State rejects the appropriate measures proposed by the Commission in respect of an existing aid scheme. In the present case the Court observed, with regard to the category of 'possible unlawful aid', that the Commission in fact initiated the formal investigation procedure inasmuch as, in each of the contested decisions, it provisionally concluded that the legislation in issue constituted unlawful aid that was incompatible with the common market. The Court then examined whether the decisions to open the formal investigation procedure were acts open to challenge: it held that even though the classification of State aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the formal investigation procedure and though the mere initiation of that procedure does not have the same immediately binding character as a suspension injunction addressed to the Member State concerned, the fact that the Commission chooses to initiate the formal investigation procedure and provisionally classifies a State measure as new aid, instead of following the procedure in respect of possible existing aid, has legal effects. First, even a final decision declaring that new aid compatible with the common market does not have the consequence of regularising *ex post facto* the unlawfully adopted implementing measures. Second, the decision initiating the procedure may be invoked before a national court and thus exposes the beneficiaries of the measure and territorial entities to the risk that the national court will order suspension of the measure and/or recovery of the payments made. The Court concluded that the procedural choice of initiating a formal procedure and provisionally classifying a measure as new aid must be amenable to judicial review.

The judgments in *Territorio Histórico de Guipúzcoa and Others* v *Commission* and *Territorio Histórico de Álava and Others* v *Commission* confirm that a decision to initiate the formal investigation procedure entails independent legal effects, particularly in relation to the suspension of measures. The Court stated that that is plainly the case not only where a measure in the course of implementation is regarded by the authorities of the Member State concerned as existing aid, but also where the authorities take the view that the measure to be formally investigated does not fall within the scope of Article 87(1) EC. The Court then held that a decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified by the Commission as new aid constitutes an act open to challenge for the purposes of Article 230 EC, in that it necessarily alters the legal implications of that measure and the legal position of the recipient firms. The significant element of doubt as to the legality of the measure being investigated that is engendered by such a decision must lead the Member State to suspend application of the measure but also may be invoked before a national court and lead both the recipient and his trading partners to take the view that the advantage obtained is not definitively acquired.

(b) Measures of the European Parliament

In the specific case of measures of the European Parliament, the first paragraph of Article 230 EC provides that the Community judicature is to review the legality of such measures only if they are 'intended to produce legal effects *vis-à-vis* third parties'. It

follows that, in accordance with settled case-law, measures of the Parliament which relate only to the internal organisation of its work cannot be challenged in an action for annulment.

In an action brought by 22 Members of the European Parliament, the Court was asked to rule on the legality of the Framework Agreement of 5 July 2000 on Relations between the Parliament and the Commission, which regulates the forwarding of confidential information between those institutions. By order in Case T-236/00 *Stauner and Others* v *Parliament and Commission* [2002] ECR II-135, the Court dismissed their action as inadmissible. Without expressing a view on the question whether the relevant Members of the Parliament were 'third parties', the Court found that the legal effects produced by the Framework Agreement did not affect the applicants' interests inasmuch as it did not alter the conditions for the performance of their parliamentary duties. It held, in particular, that the Framework Agreement, which is limited to governing relations between the Commission and the Parliament, did not alter the legal position of Members of the Parliament, acting individually, as regards the right under the third paragraph of Article 197 EC and did not impair their right, guaranteed by that provision, to put questions to the Commission.

On the other hand, even though the action was ultimately dismissed as inadmissible for lack of standing to bring proceedings (see below), the Court held (Case T-17/00 *Rothley and Others* v *Parliament* [2002] ECR II-579; under appeal, Case C-167/02 P) that a measure of the Parliament which amended its Rules of Procedure, by adding a rule concerning the internal investigations conducted by the European Anti-Fraud Office (OLAF), and approved the Parliament's decision concerning the terms and conditions for internal investigations in relation to the combating of fraud, corruption and any other illegal activities detrimental to the interests of the Community went beyond, in both its object and its effects, the internal organisation of the work of the Parliament. It could therefore be the subject of an action for annulment.

2. Standing to bring proceedings

The conditions under which an individual may apply for annulment of a Community measure are laid down by the fourth paragraph of Article 230 EC, which provides that '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'.

(a) Classification as a measure

The judgment in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313 (under appeal, Case C-141/02 P) answers the question whether a measure by which the Commission decides not to make use of the power conferred upon it by Article 86(3) EC constitutes a decision rejecting a complaint alleging infringement of Article 86(1) EC

and, therefore, a measure addressed to the complainant. Here, a GSM operator, the company max.mobil Telekommunikation Service GmbH, lodged a complaint with the Commission seeking among other things a finding that the Republic of Austria had infringed Article 82 EC in conjunction with Article 86 EC because, in essence, an Austrian State measure enabled a competitor (Mobilkom) to abuse its dominant position on the mobile telephony market. The Commission stated in a letter to max.mobil that one of the grounds put forward was not sufficiently substantiated. Max.mobil took the view that this letter rejected its complaint and asked the Court to annul the letter.

In its assessment of the action's admissibility, the Court stated first of all that the fact that the Commission enjoys a broad discretion regarding the application of Article 86(3) EC does not in itself prevent an action from being brought for annulment of a decision refusing to continue the examination of a complaint concerning the taking of action under that article of the Treaty, particularly where such a decision is addressed to the author of the complaint. The Court then held that the existence of decisions rejecting complaints concerning the taking of action by the Commission under Article 86(3) EC must be conceded, pointing out that, in contrast to the course of action followed for the examination of complaints alleging infringement of Article 87 EC in relation to State aid, a complaint calling on the Commission to take action on the basis of Article 86(3) EC does not always give rise to a decision addressed to the Member State concerned since it is only where it is 'necessary' to do so that the Commission addresses such a decision to it.

(b) Concept of direct concern

In order for a Community measure to be of direct concern to an individual to whom it is not addressed, it must directly affect his legal situation and its implementation must be purely automatic and result from Community rules alone without other intermediate rules.

In the light of that interpretation, the Court held, by order in Case T-105/01 *SLIM Sicilia* v *Commission* [2002] ECR II-2697, that a company to which the authorities had awarded a concession contract for the carrying out of a project which benefited from assistance under the European Regional Development Fund (ERDF) was not directly concerned by a Commission decision addressed to the Member State refusing to extend the period for submission of the application for final payment in relation to the assistance granted under the ERDF. The Court stated in support of that conclusion that the Italian authorities had paid to the company the total amount provided for by way of Community assistance and that no obligation to refund the difference between that amount and the amount paid by the Commission to the Italian State derived from the contested decision itself or from any provision of Community law intended to govern the effect of that decision.

The Court likewise dismissed an action brought by two companies belonging to a group operating in the cigarette market for annulment of a provision of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [8] (order of 10 September 2002 in Case T-223/01 *Japan Tobacco and JT International* v *Parliament and Council*, not yet published in the ECR). The Court pointed out that the fact that the wording of the fourth paragraph of Article 230 EC does not provide for the possibility of an application by an individual for annulment of a genuine directive is not sufficient to declare his action inadmissible since, in certain circumstances, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them. It then stated that where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State in response to the measure is automatic or is, at all events, a foregone conclusion, then the measure is of direct concern to any person affected by that action. If, on the other hand, the measure leaves it to the Member State whether or not to act, it is the action or inaction of the Member State that is of direct concern to the person affected, not the measure itself. Applying the concept interpreted in that way, the Court then held that, until such time as the provision of the directive at issue had been transposed into the national law of at least one Member State, or until the expiry of the transposition period, the provision would not bring about any change in the applicants' legal position.

(c) Concept of individual concern

In order for an individual to be able to gain access to the Court, he must in particular demonstrate, where the contested measure is not addressed to him, that it is of individual concern to him. It has been repeatedly held ever since the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 that, 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.

During the period under consideration, the Court followed that interpretation until it departed from it 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). However, once the Court of Justice confirmed its interpretation of the concept of individual concern in its judgment of 25 July 2002 in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, the Court of First Instance subsequently took account of the Court of Justice's interpretation when it examined whether actions for annulment were admissible.

[8] OJ 2001 L 194, p. 26.

For the purposes of this account, a division will be made between the judgment in *Jégo-Quéré* and cases of assessment of an action's admissibility which belong to the line of case-law that began with *Plaumann*.

– Instances where the *Plaumann* case-law was applied

Several applicants had their actions dismissed as inadmissible because they were not individually concerned by the measures of general application whose legality they challenged. [9]

Thus, the Court concluded that an action brought by a number of businesses for annulment of a regulation imposing a definitive anti-dumping duty [10] was inadmissible (Case T-598/97 *BSC Footwear Supplies and Others* v *Council* [2002] ECR II-1155). Here the applicant companies, which were unrelated importers of shoes into the European Union, submitted that a body of factors differentiated them from all other businesses, in particular: (i) they actively participated in the administrative procedure which led to the adoption of the regulation; (ii) the imposition of the anti-dumping duties entailed adverse consequences for their activities; and (iii) two of them were expressly referred to in the regulation.

The Court recalled first of all, by reference to the judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, that an action brought by an unrelated importer against an anti-dumping regulation has been held to be admissible in exceptional circumstances. It then found that the applicants' situation was in no way comparable to that of Extramet Industrie, in particular because there was no proof that the contested regulation seriously affected their economic activities, and concluded therefrom that they had not proved that that regulation affected them other than in their objective capacity as importers of the products in question, just as it did any other trader finding himself in the same situation. The Court added that, although participation by an undertaking in an anti-dumping proceeding may be taken into account, amongst other factors, in order to establish whether that undertaking is individually concerned by the regulation introducing anti-dumping duties at the conclusion of the proceeding, such participation does not, of itself, give rise to a right enabling the undertaking to bring a

9 For instances where actions for the annulment of regulations were inadmissible, see also the judgment in Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, the order in Case T-339/00 *Bactria* v *Commission* [2002] ECR II-2287 (under appeal, Case C-258/02 P) and the orders of 25 September 2002 in Case T-178/01 *Di Lenardo Adriano* v *Commission* and Case T-179/01 *Dilexport* v *Commission*, both not yet published in the ECR.

For an instance where an action for annulment of a directive was inadmissible, see the order in Case T-84/01 *Association contre l'heure d'été* v *Parliament and Council* [2002] ECR II-99.

10 Council Regulation (EC) No 2155/97 of 29 October 1997 imposing a definitive anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia and collecting definitively the provisional duty imposed (OJ 1997 L 298, p. 1).

direct action against the regulation. Similarly, the mere fact that a number of the applicant undertakings were specifically named in the contested regulation could not lead to a different conclusion.

In *Rothley and Others* v *Parliament*, cited above, the Court considered whether the Members of the European Parliament were individually concerned by the measure adopted by that institution. [11] After finding that the contested measure, although called a 'decision', constituted a measure of general application, the Court held that it was not of individual concern to the applicants since it applied without distinction to the Members of the Parliament in office at the time of its entry into force and to any other person subsequently coming to hold the same office.

On the other hand, several actions for the annulment of measures of general application were declared admissible.

By judgments of 11 September 2002 in Case T-13/99 *Pfizer Animal Health* v *Council* and Case T-70/99 *Alpharma* v *Council*, both not yet published in the ECR, Pfizer Animal Health and Alpharma were held to be entitled to challenge Regulation (EC) No 2821/98 [12] withdrawing virginiamycin and bacitracin zinc, respectively produced by those companies, from the list of antibiotics authorised as additives in feedingstuffs. The Court held that, notwithstanding the general nature of the contested measure, at the time of its adoption the legal and factual situation of each of the applicants differentiated them, as regards the measure, from all other businesses concerned. In reaching its finding the Court, which made an identical assessment in both cases, observed that the ban on those substances occurred in the course of the procedure for re-evaluating their authorisation as additives in feedingstuffs. Having regard to that situation, it relied on two fundamental factors.

First, Pfizer and Alpharma alone were in a legal position which would have enabled them to obtain, under the applicable legislation, authorisation to market the substances in question as the person first responsible for putting them into circulation. They were therefore able to rely on an inchoate right in that regard. In addition, by virtue of having made an application for a further authorisation they had obtained a position in respect of which secondary legislation offered legal safeguards. [13]

11 Decision of the Parliament of 18 November 1999 on the amendments to the Rules of Procedure following the Interinstitutional Agreement of 25 May 1999 between the Parliament, the Council and the Commission on the internal investigations conducted by the European Anti-Fraud Office (OLAF).

12 Council Regulation (EC) No 2821/98 of 17 December 1998 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/524/EEC concerning additives in feedingstuffs (OJ 1998 L 351, p. 4).

13 Council Directive 70/524/EEC concerning additives in feedingstuffs (OJ, English Special Edition 1970 (III), p. 840), as amended, guarantees protection for the scientific data and other information

Second, the contested regulation terminated or, at the least, suspended the procedures which had been opened, at the request of each applicant, for the purposes of obtaining new authorisations of their antibiotics as additives in feedingstuffs, and in the course of which those parties had the benefit of procedural guarantees.

By judgments of 14 November 2002 in Joined Cases T-94/00, T-110/00 and T-159/00 *Rica Foods and Others* v *Commission* and Joined Cases T-332/00 and T-350/00 *Rica Foods* v *Commission*, both not yet published in the ECR, the applicants, sugar processing undertakings established in Aruba and the Netherlands Antilles which export their products into the Community, were found to be individually concerned by regulations [14] introducing safeguard measures under Article 109 of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories (OCTs) with the European Economic Community. First, the three applicants were undertakings affected by the contested regulations since they were established in the OCT and were operating in the sector referred to in the contested regulations, and second, those regulations prevented them from performing certain supply contracts.

– The new interpretation of the condition

In *Jégo-Quéré* the Court of First Instance departed from the *Plaumann* case-law, adopting a different interpretation of the concept of 'individual concern'.

The Commission adopted a regulation laying down minimum mesh sizes used in certain fishing zones. [15] Since Jégo-Quéré et Cie was prohibited from using certain nets in one of those zones, it applied to the Court for annulment of two provisions of that regulation.

The Court found first that, on the basis of the criteria hitherto established by Community case-law, the applicant could not be regarded as individually concerned, within the meaning of the EC Treaty, by the generally applicable provisions of the regulation.

However, the Court observed: (i) that the Court of Justice has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and

provided by manufacturers in the dossier submitted with a view to obtaining for their product the first authorisation as an additive linked to a person responsible for putting the additive into circulation.

14 Commission Regulations (EC) No 465/2000 and No 2081/2000 of 29 February 2000 and 29 September 2000, respectively introducing and providing for the continued application of safeguard measures for imports from the overseas countries and territories of sugar sector products with EC/OCT cumulation of origin (OJ 2000 L 56, p. 39, and OJ 2000 L 246, p. 64).

15 Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels (OJ 2001 L 159, p. 4).

is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions; (ii) that the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'); and (iii) that this right has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union. The Court therefore then considered whether, in a case such as the present one, where an individual applicant contests the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.

It found that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation. With regard specifically to references for a preliminary ruling, the Court held it not to be acceptable that in a case where, as claimed in this instance, there are no national implementing measures to form the basis of an action before the national courts, an individual is compelled to infringe Community provisions in order to have access to those courts and, where appropriate, to obtain a reference to the Court of Justice pursuant to Article 234 EC.

In the absence of a compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as a person to which it is addressed, the Court decided *to reconsider the strict interpretation, applied until now, of the notion of a person individually concerned*. It consequently held, without limiting its interpretation solely to situations in which there is no remedy before national courts, that *a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him*. The Court stated that the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.

Since the Court found that the conditions thus interpreted were met, it dismissed the objection of inadmissibility raised by the Commission. In view of the appeal brought by the Commission against this judgment, the Court has decided to stay the proceedings before it until the Court of Justice has given judgment on the appeal.

B. Competition rules applicable to undertakings

The Commission decisions upon which the Court of First Instance ruled in 2002 involved application of Article 81 EC (1), of Article 82 EC (2) and of Regulation No 4064/89 on the control of concentrations between undertakings (3). [16]

1. Article 81 EC

Called upon to review the legality of Commission decisions finding that cartels existed in the transport and the district heating pipes sectors, the Court delivered a number of judgments from which much can be learned. Since this section is primarily concerned with the judgments in Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875 ('the *Trans-Atlantic Agreement* case'), in Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011 ('the *Far Eastern Freight Conference* case'), and in the cases concerning district heating [17] ('the *district heating* cases'), it starts by setting out the facts necessary for an understanding of those cases.

Background to the Trans-Atlantic Agreement *case*

In August 1992, the Trans-Atlantic Agreement ('the TAA'), an agreement between shipping companies on the scheduled transport of containers across the Atlantic between northern Europe and the United States of America and on the inland on-carriage and off-carriage of containers, was notified to the Commission with a view to obtaining, on the basis of Article 12(1) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 EC to maritime transport (OJ 1986 L 378, p. 4), a decision applying Article 81(3) EC.

Given the fixing of prices for transport services, the TAA provided for the fixing in common of the tariffs applicable to maritime transport and intermodal (or multimodal) transport, the price of an intermodal transport service being made up of two elements,

16 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as corrected at OJ 1990 L 257, p. 13, and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

17 Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487 (under appeal, Case C-202/02 P); Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613 (under appeal, Case C-207/02 P); Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633 (under appeal, Case C-208/02 P); Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647 (under appeal, Case C-205/02 P); Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681 (under appeal, Case C-189/02 P); Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705 (under appeal, Case C-206/02 P); Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881 (under appeal, Case C-213/02 P).

one relating to the maritime service, the other to the inland service. Thus, the TAA established, in addition to a maritime tariff, a tariff for inland transport services supplied within the Community as part of an intermodal transport operation.

By decision of 19 October 1994, [18] the Commission, first, held that provisions of the TAA relating, in particular, to price agreements infringed Article 81(1) EC and, second, refused to grant an exemption to those provisions under Article 81(3) EC and Article 5 of Regulation No 1017/68. [19]

The legality of that decision was disputed by 15 shipping companies which were party to the TAA. Those companies essentially claimed that the Commission had infringed Article 81(1) EC and Article 3 of Regulation No 4056/86 by not applying the block exemption to the TAA, and that it had unlawfully refused to grant an individual exemption.

Background to the Far Eastern Freight Conference *case*

By decision of 21 December 1994, [20] the Commission found that the members of the Far Eastern Freight Conference ('the FEFC') had infringed Article 81 EC and Article 2 of Regulation No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of an intermodal transport operation for the carriage of cargo in containers between northern Europe and the Far East.

Thirteen of the shipping companies to which that decision was addressed sought its annulment, claiming, *inter alia*, breach of Article 81(1) EC, of Article 3 of Regulation No 4056/86, which provides for block exemption for liner conferences, and of Article 81(3) EC and Article 5 of Regulation No 1017/68 concerning the grant of individual exemptions.

Background to the district heating *cases*

According to the Commission decision of 21 October 1998, [21] at the end of 1990 four Danish producers of district heating pipes entered into an agreement on general cooperation on their domestic market and, from the autumn of 1991, two German

18 Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 81 EC (Case IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1).

19 Cited in footnote 6.

20 Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding pursuant to Article 81 EC (Case IV/33.218 — Far Eastern Freight Conference) (OJ 1994 L 378, p. 17).

21 Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 81 EC (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1).

producers regularly participated in their meetings. The Commission states that it was in those meetings that negotiations took place which led to an agreement, in 1994, to fix quotas for the whole of the European market. Both European and national quotas were allegedly allocated to each of those undertakings by the 'directors' club' (consisting of the chairmen or managing directors of the participants in the cartel).

In 1995, the Swedish undertaking Powerpipe AB made a complaint to the Commission about the situation. The Commission carried out an investigation which led to the adoption of the decision of 21 October 1998 finding that there had been a series of agreements and concerted practices seeking to divide national and European markets between producers by way of quotas, arrange the withdrawal of other producers from the market, agree prices for products and projects, manipulate tender procedures, and erect barriers to the activity of Powerpipe AB, the only major undertaking in the sector which was not a member of the cartel. The fines imposed on the undertakings which had participated in the cartel totalled approximately EUR 92 million. Eight of those undertakings brought an action before the Court of First Instance seeking annulment of the decision.

(a) Article 81(1) EC

(a.1) Prohibited agreements and concerted practices

– *The* district heating *cases*

As regards the scope *ratione personae* of competition law, the judgment in *HFB and Others* v *Commission* should be mentioned. In the decision contested in that case, the Commission regarded the Henss/Isoplus group as the undertaking that had committed the infringement for which the component companies of the group were held responsible. The Court confirmed the validity of that approach.

It recalled that, in prohibiting undertakings *inter alia* from entering into or participating in anti-competitive agreements or concerted practices, Article 81(1) EC applies to economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision. In that regard, the Court stated that there is no need for an economic entity identified as a 'group' to have legal personality. In competition law, the term 'undertaking' designates an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of more than one natural or legal person.

Since the Court's observations as to what constitutes anti-competitive conduct form part of what is now a firmly established line of authority, [22] the following remarks focus instead on the Court's observations concerning the required standard of proof.

In that connection, the Court found that, with the exception of, first, Dansk Rørindustri's participation in the cartel between April and August 1994 and, second, Sigma Tecnologie's participation in the cartel in the whole of the common market (and not just the Italian market), both the existence of the various constituent elements of the global cartel and the individual participation of the undertakings in the anti-competitive conduct for which they had been held liable had been established.

In the course of its appraisal, the Court first of all pointed out that where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be concluded that the undertaking is a participant in the cartel resulting from those meetings (see, in particular, *LR AF 1998* v *Commission*).

Second, the Court once again clearly stated that a declaration by an undertaking, other than the applicant undertaking, accused of having participated in a cartel, the correctness of which is contested by several of the other undertakings accused, cannot be regarded as adequate proof unless supported by other evidence (*Dansk Rørindustri* v *Commission*).

Lastly, the Court observed that an undertaking which has participated in a multiform infringement [23] of the competition rules by its own conduct, which falls within the definition of an agreement or concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that that undertaking was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct and was prepared to accept the risk (*Dansk Rørindustri* v *Commission*). It follows that a boycott may be attributed to an undertaking which approved it without there being any need for that undertaking to have participated in it (*LR AF 1998* v *Commission*). However, the Court found that the Commission had failed to provide evidence sufficiently precise and consistent to establish that Sigma Tecnologie knew or should have known that by

22 On the definition of such conduct, see *HFB and Others* v *Commission* and *Lögstör Rör* v *Commission*.

23 In *HFB and Others* v *Commission* and *Brugg Rohrsysteme* v *Commission*, cited above, the Court referred not to a multiform infringement, but to a 'single complex infringement' (paragraphs 231 and 73 respectively).

participating in the agreement on the Italian market it was joining the European cartel (*Sigma Tecnologie* v *Commission*).

Similarly, relying on its judgments of 14 May 1998 in the *Cartonboard* cases (see the *Annual Report 1998*), the Court confirmed that an undertaking may be held responsible for a global cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it knew, or should have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (*Dansk Rørindustri* v *Commission*).

– *The* Far Eastern Freight Conference *case*

In this case, the applicants, which did not deny that the agreement forming the subject-matter of the contested decision, by which they collectively fixed the price for the FEFC's inland transport services supplied in the context of intermodal transport, was capable of restricting competition, took the view, not shared by the Commission, that that agreement did not come within the scope of Article 81(1) EC inasmuch as it was not capable of restricting competition and affecting trade between Member States to an appreciable extent in the relevant market, properly defined.

The Court found, first of all, that the Commission had in fact identified the market affected by the agreement, namely the market for inland transport services supplied, within the European Community, to shippers by the member shipping companies of the FEFC as part of the intermodal transport of cargo in containers between northern Europe and the Far East. After a detailed analysis, the Court upheld the definition of the market, concluding that the inland transport services for the on-carriage and off-carriage of containers as part of the intermodal transport of goods constituted a market distinct from that for maritime transport services supplied in that context by the member shipping companies of the FEFC. The Court pointed out that a sub-market which has specific characteristics from the point of view of demand and supply, and which covers products which occupy an essential and non-interchangeable place in the general market of which it forms a part, must be regarded as a distinct product market. Accordingly, the Court confirmed by reference to the market for inland transport services that there had been an appreciable restriction of competition, the applicants controlling almost 40% of that market.

Similarly, the Court confirmed that trade between Member States could be affected, since the agreement in question was an agreement between shipping companies several of which were established in various Member States, and concerned the conditions of sale of inland transport services to shippers also established in various Member States. The Court pointed out that the condition regarding the effect on trade between Member States is intended to determine the scope of Community law in relation to that of the laws of the Member States.

(a.2) Attribution of the unlawful conduct

It falls, in principle, to the natural or legal person managing the undertaking concerned at the time when the infringement of the Community competition rules was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person has assumed responsibility for running the undertaking. That rule was applied by the Court in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843 [24] and in *HFB and Others* v *Commission*, cited above.

In *Stora Kopparbergs Bergslags* v *Commission*, the Court of First Instance gave a fresh decision after the case had been referred back to it by the judgment of the Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, in which it held that the Court of First Instance had erred in law in ruling that Stora was liable for conduct of two of the companies which it acquired during the infringement period. The Court of Justice found that the two companies had continued to exist after control of them had been acquired by Stora. Observing that what matters for application of the above rule is not the fact that the companies continued to exist after their acquisition by Stora, but the existence, *on the date of adoption of the Commission's decision*, of the legal person responsible for their operation during the period prior to that acquisition, the Court of First Instance put a number of questions to Stora in order to determine whether or not that legal person had existed on the date of adoption of the Commission's decision. Since the applicant's replies indicated that that legal person had existed, the Court considered that the onus was on the Commission to provide evidence to the contrary. However, it had failed to do so. The Court therefore reduced the amount of the fine imposed on Stora.

HFB and Others v *Commission* arose from the Commission's 'district heating' decision, in which the six companies which make up the Henss/Isoplus group were held jointly and severally liable for all the anti-competitive acts of the group and for payment of the fine imposed. First of all, the Court held that in the absence of a person at the head of the group to which, as the person responsible for coordinating the group's activities, responsibility could be imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the companies jointly and severally responsible for all the acts of the group. The Court then found that the Commission had erred in law in imputing responsibility for the infringement to two of the six companies which made up the group at the date on which the decision was adopted, since those two companies had not yet come into existence at the time of the infringement. In view of the rule set out above, the situation could have been different only if the legal person or persons responsible for running the undertaking had ceased to exist in law after the infringement had been committed. The contested decision was annulled in that regard.

[24] See, also, T-308/94 *Cascades* v *Commission* [2002] ECR II-813.

(b) Exemptions from the prohibition

The judgments delivered in 2002 (i) help to clarify the material scope of Regulation No 4056/86 on block exemption (the *Trans-Atlantic Agreement* and *Far Eastern Freight Conference* cases) and (ii) provide examples of judicial review of Commission decisions refusing (the abovementioned cases) or granting (Case T-131/99 *Shaw and Falla* v *Commission* [2002] ECR II-2023, Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085 (under appeal, Case C-204/02 P), and the judgment of 8 October 2002 in Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others* v *Commission*, not yet published in the ECR) an exemption under Article 81(3) EC.

(b.1) Interpretation of Regulation No 4056/86

In the decision which gave rise to the *Trans-Atlantic Agreement* case, the Commission held that the TAA was not covered by the block exemption granted to liner conferences by Article 3 of Regulation No 4056/86, [25] *inter alia* because it was not a liner conference within the meaning of that regulation in that it established *at least two rate levels*. The applicants disputed that finding, claiming that a group of shipping companies may constitute a liner conference, so long as the freight rates are established in common by the members of the group, *even if they vary from one member to another*.

The Court began by defining the constituent elements of a 'liner conference' within the meaning of Regulation No 4056/86 and then considered whether the TAA could be regarded as a liner conference.

While a 'liner conference' is defined in Article 1(3)(b) of Regulation No 4056/86 as 'a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services', the meaning and full significance of the expression 'uniform or common freight rates' still required clarification. In providing that clarification, the Court had regard not only to the terms used, but also to the mechanism of the block exemption, the context of Regulation No 4056/86, and the objectives which it pursues.

It deduced that the block exemption provided for by Article 3 of Regulation No 4056/86 can apply only to liner conferences whose members operate by applying a *tariff of freight rates identical for all conference members for the same product*. Since the TAA

[25] Pursuant to Article 3 of Regulation No 4056/86 'agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are ... exempted from the prohibition in Article [81(1) EC] ... when they have as their objective the fixing of rates and conditions of carriage.'

provided for a scheme of tariffs which varied according to the members, it could not be regarded as a liner conference qualifying for a block exemption.

In the *Far Eastern Freight Conference* case, the applicants maintained that their agreement was covered by Article 3 of Regulation No 4056/86 and that therefore the Commission had been wrong to find that the fixing of prices for inland intermodal transport services came within the scope of Regulation No 1017/68. However, the Court found that the Commission had been correct in considering that the price-fixing agreement concluded by the FEFC members for inland transport services provided in combination with other services as part of an intermodal transport operation did not come within the scope of Regulation No 4056/86. The Court held that it is clear both from the wording of the provisions setting out, first, the scope of Regulation No 4056/86 and, second, the agreements covered by the exemption provided for in Article 3 of the regulation, and from the *travaux préparatoires* of that regulation and a Council declaration of December 1991, as well as from the general rules of interpretation, that the exemption laid down in Article 3 for certain agreements between members of liner conferences cannot apply to an agreement such as the one in question.

(b.2) Conditions for exemption under Article 81(3) EC

The four conditions for exemption, and particularly the condition requiring that there be no possibility of eliminating competition in respect of a substantial part of the products in question (Article 81(3)(b) EC) were the subject of a number of interesting observations in the *Trans-Atlantic Agreement* case with regard to both definition of the market and the criteria for assessing the possibility of eliminating competition. However, the necessary brevity of this report prevents any detailed discussion of those matters, which are mentioned here solely to alert the reader to them.

The Commission's assessment of that condition was approved by the Court in *Trans-Atlantic Agreement* but declared unlawful in *M6 and Others* v *Commission*. In the latter judgment, the Court held that the Commission had made a manifest error in its assessment of whether the condition had been met, by determining that the sub-licensing scheme included in the agreements put in place by the European Broadcasting Union (EBU) guaranteed the access of competitors of that association's members to rebroadcasting rights for sporting events which its members had jointly acquired, and consequently avoided the elimination of competition in the relevant product market. The decision granting an individual exemption was therefore annulled.

(c) Fines

(c.1) Administrative procedure

In several of the *district heating* cases (see *LR AF 1998* v *Commission* and *ABB Asea Brown Boveri* v *Commission*), the Court rejected a plea alleging infringement of the

rights of the defence, in which the applicants claimed that the Commission had given no indication in its statement of objections that it would calculate the amount of the fine in accordance with the method set out in its guidelines. [26] The Court held that where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned, and indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether the infringement was committed 'intentionally or negligently', it provides the undertakings concerned with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of a fine. It follows that, so far as concerns determination of the amount of the fines, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. The Court considered that the Commission had fulfilled its obligations in that regard.

(c.2) Application of the guidelines on the method of setting fines

In the decision which gave rise to the *district heating* cases, the Commission had determined the fines imposed on the undertakings in accordance with the general method for setting fines described in the guidelines. [27]

In their actions for annulment of the decision imposing the fines, several applicants raised the plea under Article 241 EC that the guidelines were unlawful. In the first stage of its deliberation, the Court declared that plea admissible, ruling that there was a direct legal connection between the individual decision contested and the general measure represented by the guidelines. In that regard, the Court found that although the guidelines do not constitute the legal basis of a decision imposing a fine on a business, which is based instead on Articles 3 and 15(2) of Regulation No 17, [28] they do determine, in general and abstract terms, the method which the Commission has bound itself to use in determining the fine imposed by that decision and, consequently, ensure legal certainty for undertakings (see, in particular, *HFB and Others* v *Commission*). In a second stage, the Court rejected the applicants' pleas challenging the legality of those guidelines. Two of the Court's observations merit attention.

First, the Court held that the Commission is not required, when determining the amount of fines by reference to the gravity and duration of the infringement, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where

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

27 Cited in the preceding footnote.

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

fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market.

Second, Article 15(2) of Regulation No 17, in providing that the Commission may impose fines of up to 10% of turnover in the preceding financial year for each undertaking which has participated in the infringement, requires that the fine eventually imposed on an undertaking be reduced if it exceeds 10% of its turnover, independently of the intermediate stages in the calculation intended to take the gravity and duration of the infringement into account. Consequently, that provision does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the fine eventually imposed on the undertaking does not exceed that maximum limit. In such a case, the Commission cannot be criticised because certain factors taken into consideration in its calculation, such as duration or mitigating or aggravating circumstances, do not affect the final amount of the fine, since that is the consequence of the prohibition on exceeding 10% of the turnover of the undertaking concerned, laid down in Article 15(2) of Regulation No 17.

(c.3) Setting of fines

It is clear from the *district heating* cases that the Commission is required to observe the general Community law principle of non-retroactivity in any administrative procedure capable of leading to fines under the Treaty rules on competition, even though Article 15(4) of Regulation No 17 provides that Commission decisions imposing fines for infringement of competition law are not of a criminal nature. Observance of that principle requires that the fines imposed on an undertaking for infringing the competition rules correspond to those laid down at the time when the infringement was committed. That was so in the *district heating* cases, in that the guidelines which were applied in calculating the fines did not go beyond the legal framework for the fines set out in Article 15 of Regulation No 17, which was adopted before the infringement started (see, in particular, *LR AF 1998* v *Commission* and *Dansk Rørindustri* v *Commission*).

In its ‘district heating’ decision, the Commission had, for each of the applicant undertakings, applied the guidelines in order to calculate the amount of the fine. Except with regard to one error which it confirmed in *Sigma Tecnologie* v *Commission*, the Court rejected the applicants' complaints relating to the way in which the Commission assessed mitigating or aggravating circumstances.

In the 'district heating' decision, the Commission also applied the leniency notice. [29] The way in which that notice was applied was challenged by the undertakings, which essentially pleaded that they deserved a greater reduction in the fine than had been accorded to them. ABB's plea was accepted, the Court ruling that the principle of equal treatment is infringed where the Commission, after expressly acknowledging in its decision that an undertaking has distinguished itself from the other undertakings in question by not disputing the main facts, does not differentiate the reduction granted to that undertaking for its cooperation during the investigation from the reduction granted to the other undertakings. The Court therefore reduced the fine imposed on ABB from EUR 70 million to EUR 65 million (*ABB Asea Brown Boveri* v *Commission*).

While that plea may have had varying degrees of success, it is however now established (see, *inter alia*, *LR AF 1998* v *Commission*) that the leniency notice creates legitimate expectations on which parties wishing to inform the Commission of the existence of a cartel rely. In the light of the legitimate expectation which undertakings wishing to cooperate with the Commission are able to derive from that notice, the Commission is obliged to comply with it when assessing an undertaking's cooperation for the purpose of setting the fine.

Finally, aside from the Court's observations regarding the circumstances in which companies in a group may be held jointly and severally liable for payment of a fine imposed on the group, the judgment in *HFB and Others* v *Commission* establishes that joint and several liability does not imply, as regards application of the maximum amount of 10% of turnover laid down in Article 15(2) of Regulation No 17, that the amount of the fine is limited, for the companies held jointly liable, to 10% of the turnover achieved by each of those companies during the last financial year. The limit of 10% of turnover for the purposes of that provision must be calculated on the basis of the total turnover of all the companies constituting the economic entity acting as an 'undertaking' for the purposes of Article 81 EC. Accordingly, in the case of an 'undertaking' constituted by a group of companies acting as a single economic unit, only the aggregate turnover of the component companies can constitute an indication of the size and economic power of the undertaking.

(c.4) Exercise of the Court's unlimited jurisdiction

In the exercise of its unlimited jurisdiction within the meaning of Article 229 EC and Article 17 of Regulation No 17, the Court, despite finding that the Commission had made an error of assessment in finding that Dansk Rørindustri had participated in the cartel in the district heating pipes sector during the period between April and August 1994, and annulling the Commission's decision in that regard, did not reduce the

[29] Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). In *Lögstör Rör* v *Commission*, the Court expressly held that that notice did not go beyond the scope of the legal framework laid down by Article 15(2) of Regulation No 17.

amount of the fine. It found that, having regard to the calculations to be made in respect of the aggravating circumstances and in application of the leniency notice, and also to the limit of 10% of turnover achieved by the undertaking concerned during the previous financial year, as provided for in Article 15(2) of Regulation No 17, the amount of the fine to be imposed on the applicant was the same as the amount stated in the decision (*Dansk Rørindustri* v *Commission*). By contrast, as the Commission had not established that Sigma Tecnologie participated in a cartel covering the entire common market and, accordingly, that undertaking could be held liable only for participation in the agreement relating to the Italian market, the Court reduced its fine from EUR 400 000 to EUR 300 000.

Stora Kopparbergs Bergslags v *Commission* raised the question whether, where a case has been referred back by the Court of Justice to the Court of First Instance in order for it to determine the amount of the fine to be imposed on an undertaking whose appeal was granted by the Court of Justice, it is necessary to reconsider the size of the reduction in fine granted to the undertaking by the Commission in recognition of its cooperation in the administrative procedure. In that regard, the Court of First Instance considered, in the exercise of its unlimited jurisdiction, that there was no need, in this reference back to it, to reexamine the size of the reduction. The risk that an undertaking which has been granted a reduction in its fine in exchange for its cooperation will subsequently seek annulment of the decision finding the infringement of the competition rules and imposing a penalty on the undertaking responsible for the infringement, and will succeed before the Court of First Instance or before the Court of Justice on appeal, is a normal consequence of the exercise of the remedies provided for in the Treaty and the Statute of the Court of Justice. Accordingly, the mere fact that an undertaking which has cooperated with the Commission and which for that reason has been granted a reduction in its fine has successfully challenged the decision before the Community judicature cannot justify a fresh review of the size of the reduction granted to it.

Finally, in the *Far Eastern Freight Conference* case, although the Court rejected all the substantive and procedural pleas, it held, in the exercise of its unlimited jurisdiction, that in the light of all the circumstances of that case there was justification for not imposing fines on the applicant undertakings. It therefore annulled the article of the contested decision which imposed a token fine on each of them.

2. Article 82 EC

In Case T-175/99 *UPS Europe* v *Commission* [2002] ECR II-1915, the Court upheld a Commission decision rejecting a complaint by United Parcel Service Europe alleging, *inter alia*, that Deutsche Post had been in a position to acquire its shares in DHL only through its profits on the reserved postal market, in breach of Article 82 EC.

The Court held that, in the absence of any evidence to show that the funds used by Deutsche Post for the acquisition in question derived from abusive practices on its part in the reserved letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition did not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and therefore could not constitute an infringement of Article 82 EC or give rise to an obligation on the part of the Commission to examine the source of those funds in the light of that article.

3. Regulation No 4064/89

In the field of concentrations of undertakings, the Court delivered six judgments annulling decisions, which can be divided into two groups according to whether or not the Commission decision which gave rise to the legal action prohibited the concentration in question.

(a) Actions for annulment of decisions prohibiting a concentration

Ruling in two expedited cases, lasting ten and nine months respectively, the Court annulled the Commission decisions prohibiting concentrations between, first, Schneider Electric and Legrand (judgment of 22 October 2002 in Case T-310/01 *Schneider Electric* v *Commission*, not yet published in the ECR) and, second, Tetra Laval and Sidel (judgment of 25 October 2002 in Case T-5/02 *Tetra Laval* v *Commission*, not yet published in the ECR; under appeal, Case C-12/03 P). As a consequence, it also annulled the decisions ordering the separation of those undertakings (judgment of 22 October 2002 in Case T-77/02 *Schneider Electric* v *Commission*, not yet published in the ECR, and judgment of 25 October 2002 in Case T-80/02 *Tetra Laval* v *Commission*, not yet published in the ECR (under appeal, Case C-13/03 P)). [30]

Similarly, in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, the Court annulled the decision prohibiting Airtours from acquiring First Choice.

The reasons for the Commission's prohibition of those transactions were related to the type of concentration at issue: a horizontal concentration creating or strengthening a dominant position (*Schneider Electric* v *Commission*) or a collective dominant position (*Airtours* v *Commission*) on one or more than one market, and a conglomerate-type concentration creating a dominant position on a different market from the one on which the purchaser is active and reinforcing its dominant position on its pre-existing market (*Tetra Laval* v *Commission*), all having the effect of significantly restricting competition.

[30] It should be pointed out that the public exchange offer and public bid for shares launched by Schneider and Tetra Laval respectively had already been implemented, as permitted by Article 7(3) of Regulation No 4064/89.

Essentially, it is clear from those cases that while the Court took the view that the Commission's assessments were not based on evidence firm enough to provide grounds for the prohibitions in question, it approved the basic approach adopted by the Commission with regard to both the possibility of prohibiting concentrations which would create a collective dominant position and the power to control conglomerate-type concentrations. Each of the cases referred to above will be individually discussed below.

(a.1) *Airtours* v *Commission*

In its decision of 22 September 1999 prohibiting Airtours, a company whose main activity is as a tour operator and supplier of package holidays, from acquiring all the shares in one of its competitors, First Choice, [31] the Commission had taken the view that were the intended transaction to be effected it *would create a collective dominant position* in the United Kingdom market for short-haul foreign package holidays which would significantly impede competition in the common market.

Airtours principally submitted that it had not been adequately shown that if the transaction had been authorised it would have resulted in the creation of a collective dominant position (shared among Airbus and First Choice, the parties to the concentration, and Thomson and Thomas Cook, the two remaining large tour operators) restrictive of competition. The Court held that that plea was founded.

First of all, the Court set out the three conditions which are necessary for a finding that a concentration will result in a collective dominant position restrictive of competition for the purposes of Article 2(3) of Regulation No 4064/89, and at the same time confirmed that a transaction which would result in such a dominant position may be prohibited.

First, each member of the dominant oligopoly must be in a position to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. It is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them: each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must therefore be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.

[31] Commission Decision 2000/276/EC of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 — Airtours/First Choice) (OJ 2000 L 93, p. 1).

Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. It is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. The Commission must not necessarily prove that there is a specific 'retaliation mechanism' involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct. For a situation of collective dominance to be viable, there must therefore be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative.

Third, it must also be established that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

In its examination of whether these conditions were met in the case at issue, the Court then held (i) that the Commission had made errors of assessment when it concluded that if the transaction were to proceed, the three major tour operators remaining after the merger would have an incentive to cease competing with one another, (ii) that the retaliatory measures which could be taken against a member of the oligopoly if it departed from the common policy were not clearly identified and established, and (iii) that an error of assessment had been made in the evaluation of the reaction of smaller tour operators, potential competitors and United Kingdom consumers. That analysis led the Court to conclude that the Commission decision, far from containing a prospective analysis based on cogent evidence, was vitiated by errors of assessment concerning factors fundamental to any appraisal of whether a collective dominant position might be created.

(a.2) *Schneider Electric* v *Commission*

By decision of 10 October 2001, the Commission prohibited the merger of Schneider and Legrand, two manufacturers of low voltage electrical equipment, [32] on the ground that it would create a dominant position on certain sectoral markets in Denmark, Spain, France, Greece, Italy, Portugal and the United Kingdom and strengthen a dominant position on certain sectoral markets in France, significantly impeding competition on those markets in both cases.

[32] Commission Decision C (2001) 3014 final declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2283 – Schneider-Legrand).

The complaints put forward in the action for annulment of that decision related to both its form and substance.

As regards the alleged formal defects, the Court rejected the plea alleging that the decision had not been adopted within the time-limit of four months from the date on which the procedure was initiated. It held that where, in the absence of a reply from the parties notifying a concentration to a letter requesting information within the reasonable deadline set in that letter, the Commission adopts a decision on the basis of Article 11(5) of Regulation No 4064/89 instructing the parties concerned to provide it with the information requested, that decision automatically suspends the four-month time-limit from the date on which it is found that the necessary information has not been provided until the date on which that information is provided.

By contrast, the Court accepted the plea alleging inconsistency between the statement of objections and the decision. It observed that in procedures for reviewing concentrations, the statement of objections is not solely intended to spell out the complaints and give the undertaking to which it is addressed the opportunity to submit comments, but is also intended to give the notifying parties the chance to suggest corrective measures and, in particular, proposals for divestiture, and to allow them sufficient time, given the requirement for speed which characterises the general scheme of Regulation No 4064/89, to ascertain the extent to which divestiture is necessary with a view to rendering the transaction compatible with the common market in good time. With regard solely to the French markets, the Court found that the statement of objections emphasised the 'overlap' in the business of Schneider and Legrand on certain product markets and the strengthening of Schneider's position *vis-à-vis* wholesalers which would result from that overlap, whereas the decision talked of a situation of 'mutual support', which refers to a situation where two undertakings hold leading positions in one country in two distinct but complementary sectoral markets. Since the decision was inconsistent with the statement of objections, the Court held that it had not been possible for Schneider to propose corrective measures capable of resolving the competition problems identified on the relevant French sectoral markets.

As to the substance of the case, the Court found that except in so far as it concerned the French markets, the Commission's economic analysis contained errors and omissions which led it to overestimate the economic power of the new entity and consequently to exaggerate the impact of the concentration on each of the affected national sectoral markets.

First, as regards *the analysis of the geographic coverage* of the merged entity, the Court found that while the Commission had identified the national dimension of the various sectoral markets concerned, it had nevertheless had recourse to evidence of economic power drawn from all the national sectoral markets. While it is open to the Commission to take account of transnational effects which may increase the impact of a concentration on each of the national sectoral markets deemed relevant, in the

present case the existence of those effects had not been established to the requisite legal standard.

Second, the Court found that, given the errors in *the analysis of the distribution structure*, it had not been properly established that the new entity would be an unavoidable trading partner for wholesalers or that they would be incapable of exercising any competitive restraints on it.

Third, the Court held that *the analysis of the merged entity's economic power on the national sectoral markets affected* was incorrect. It observed, *inter alia*, that the Commission was not lawfully entitled, for the purposes of assessing that economic power on those markets, to rely on the notifying parties' product range and wide variety of brands which it deemed to be unrivalled because the various kinds of electrical equipment and the brands owned by them in the EEA as a whole had been taken together in the abstract.

However, since the applicant did not fundamentally dispute the analysis of the impact of the concentration on the French sectoral markets, which make up a substantial part of the common market, it was not the abovementioned shortcomings in the economic analysis which led to the annulment of the decision prohibiting the concentration, but the infringement of the rights of the defence (mentioned above) as a result of the inconsistency between the statement of objections and that decision.

(a.3) *Tetra Laval* v *Commission*

By decision of 30 October 2001, [33] the Commission declared incompatible with the common market and the EEA the acquisition by Tetra Laval, a company belonging to a group with a dominant position on the markets for aseptic carton packaging and for the corresponding packaging machines, of Sidel, a company with a leading position on the markets for certain types of polyethylene terephthalate (PET) packaging machines. The prohibited concentration was thus conglomerate in type, that is, a concentration of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as supplier and customer. Nevertheless, the Commission took the view that notwithstanding the commitments proposed by the notifying parties, the concentration would have harmful effects on competition in the markets referred to above.

Ruling on the action for annulment of that decision, the Court rejected the first plea, which was procedural in nature, but upheld the following pleas, which alleged

[33] Commission Decision C (2001) 3345 final of 30 October 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2416 – Tetra Laval v Sidel).

essentially that the Commission had erred in its assessment of the effects of the merger, as modified by the parties' commitments. Only the latter pleas are dealt with in this report.

After rejecting as unjustified the regard had by the Commission to horizontal and vertical effects (respectively, control of the market for PET equipment, and the risk of creating a vertically integrated market structure) which would immediately ensue from the merger in its evaluation of the anti-competitive effects on the markets concerned (first substantive plea), the Court ruled on the validity of the analysis of the conglomerate effects (second substantive plea).

To that end, it examined whether the Commission was justified in prohibiting the merger on the ground that it would, in the future, have the anti-competitive conglomerate effects identified by the Commission, that is to say, the merger would (i) enable the merged entity to use its dominant position on the global carton packaging market as a 'lever' in order to achieve a dominant position on the PET packaging equipment markets, (ii) reinforce the current dominant position of Tetra on the markets for aseptic carton packaging equipment and aseptic cartons by eliminating the competitive constraint, in the form of Sidel, coming from the neighbouring PET markets, and (iii) generally strengthen the overall position of the merged entity on the markets for packaging of 'sensitive' products.

The Court confirmed that the Commission is entitled to consider the conglomerate effects of the new structure in its assessment of the compatibility of a merger. Nevertheless, after pointing out that those effects may be either structural in the sense that they arise directly from the creation of an economic structure, or behavioural in the sense that they will occur only if the entity resulting from the merger engages in certain commercial practices, the Court set out the circumstances in which the Commission may rely on foreseeable conduct which is likely to constitute abuse of an existing dominant position in breach of Article 82 EC: when, in its assessment of the effects of such a merger, the Commission relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection make such a strategy unlikely. While it is appropriate for the Commission to take into account, in its assessment, incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, by the illegality of the conduct in question, the likelihood of its detection, action taken against it by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Since the Commission did not carry out such an assessment in the contested decision, the Court rejected those of the Commission's conclusions which took such conduct into account.

The Court did not agree with the conclusions which the Commission drew from its analysis of the conglomerate effects in the present case.

As regards leveraging — a mechanism which, when applied from a market on which the acquiring party is already dominant, enables that party to obtain a dominant position on another market in which the party acquired is active — the Commission started from the premiss that the current overlaps in the markets in question would, in the medium to long-term, have a tendency to grow, so that Tetra Laval, from its strong dominant position on the carton market, would probably put pressure on some of its customers wishing to switch over to PET packaging to use equipment produced by Sidel. The Court agreed, in principle, that the merger could make such leveraging possible, but found that the Commission had not proved, particularly given the lack of reliability of the Commission's forecast of strong growth in the PET market, that the merged entity would have an incentive to exploit that opportunity.

As regards the elimination of potential competition from Sidel, the Court found that it had not been proven that that would strengthen Tetra Laval's current dominant position on the aseptic carton markets.

Finally, since the Commission's reasoning as to strengthening of the merged entity's overall position was not separable from the analysis of leveraging and elimination of potential competition, it was rejected by the Court in the light of the conclusions it had already reached.

(b) Action for annulment of a decision partially revoking an earlier decision

Lagardère and Canal+ v *Commission*, cited above, raised the question whether after adopting a decision authorising certain concentrations on the day before expiry of the prescribed time-limit, the Commission may subsequently adopt a new decision which, without altering the terms of the operative part of the decision authorising the concentrations, amends, to the disadvantage of the parties to the concentrations, the assessment in the original decision of the restrictions notified as being directly related and necessary to the implementation of the concentrations, and if so, in what circumstances it may do so. It was therefore necessary, first, to determine the legal force of observations contained in a decision adopted under Regulation No 4064/89 which relate to restrictions notified by the parties to a concentration as ancillary to that concentration and, second, to determine the temporal scope of the Commission's power to adopt a decision partially revoking, with retroactive effect, an earlier decision.

As regards the first point, which the Court addressed in connection with the admissibility of the action, the Court gave in turn a literal, contextual, historical and purposive interpretation of the second subparagraph of Article 6(1)(b) of Regulation No 4064/89, which provides that 'the decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the

concentration'. In that context, it observed that the exclusive competence conferred on the Commission in respect of the supervision of concentrations with a Community dimension includes the power to classify restrictions, notified by the parties to the concentration, as restrictions directly related and necessary to the implementation of the concentration. After completing its analysis, the Court held that that provision must be interpreted as meaning that where, as in the present case, the Commission has, in the grounds of a decision approving a concentration, classified the restrictions notified by the paries to that concentration as ancillary restrictions, non-ancillary restrictions or ancillary restrictions for a limited period, it has not issued a mere opinion with no binding legal force but, rather, has made legal assessments which, pursuant to the said provision, determine the substance of the operative part of that decision.

As regards the second point, addressed by the Court in its consideration of the substance of the case, it was held that the Commission was entitled under Regulation No 4064/89 to adopt the contested decision, in accordance with the legal principle that, as a general rule, the body empowered to adopt a particular legal act is also empowered to revoke or amend it by adopting an *actus contrarius*, unless that power is conferred on another body by express provision.

However, since the Commission had neither proved that the revoked measure was unlawful, nor stated adequate reasons in its decision revoking that measure, the Court annulled the contested decision.

C. Article 86 EC

The judgment in *max.mobil* v *Commission*, which has already been mentioned in the section on admissibility of actions for annulment, established not only that an action may be brought for annulment of a Commission decision informing an individual that it does not intend to initiate the procedure under Article 86(3) EC, but also the scope of the judicial review to be carried out by the Community judicature where such an action is brought before it, and, further, the nature of the Commission's obligation when a complaint is lodged with it in the context of Article 86 EC.

On that last point, the Court, relying on the general principle of sound administration, a principle confirmed by the Charter of Fundamental Rights of the European Union, on an analogy with the obligation deriving from the application of the other Treaty rules on competition, and on the Commission's general duty of supervision, found that there is an obligation on the part of the Commission to undertake a diligent and impartial examination of complaints submitted to it in the context of Article 86 EC.

Since the fulfilment of that obligation must be amenable to judicial review, it is for the Court to verify that it has indeed been fulfilled. However, in order to take account of the broad discretion conferred on the Commission by Article 86(3) EC as to whether it is

'necessary' to take action against Member States, the Court observed that its role is limited to 'a circumscribed review in which it merely checks, first, that the contested measure includes a statement of reasons which is prima facie consistent and reflects due consideration of the relevant aspects of the case, second, that the facts relied on are materially accurate and, third, that the prima facie assessment of those facts is not vitiated by any manifest error'. After reviewing only whether the Commission had met its obligation to undertake a diligent and impartial examination of the complaint rejected by the contested decision, the Court found that the decision contained an adequate statement of reasons and was not vitiated by any manifest error of assessment.

D. State aid [34]

In the field of State aid, judicial review by the Court of both form and substance led to the total or partial annulment of a number of Commission decisions.

1. Concept of State aid

Leaving aside the specific cases in which the Court found that there was no sufficiently clear statement of the reasons why the State measures in question had been classified as State aid (Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545) or that the Commission had made a manifest error of assessment in treating, in decisions declaring State aid for shipbuilding incompatible with the common market, the concept of a capacity restriction as a limit on actual production, contrary to its approach in the decisions authorising that aid (Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205; under appeal, Case C-181/02 P), the cases settled in 2002 for the most part provided the Court with the opportunity to rule on the constituent elements of State aid (a) and on the distinction between new and existing aid (b).

(a) Constituent elements of State aid

Under Article 87(1) EC, State aid incompatible with the common market is defined as any advantage granted by a Member State or through State resources in any form whatsoever to certain undertakings or for the production of certain goods which affects trade between Member States and which distorts or threatens to distort competition. In the cases decided by the Court in 2002, the State measures classified as aid by the Commission took the form of subsidies, measures affecting the capital of undertakings, waiver of debts, the sale of assets, the provision of guaranties and the grant of tax relief.

[34] In this field, two cases were dealt with using the expedited procedure provided for in Article 76a of the Rules of Procedure (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission*, cited above).

The *advantage* and *the specific nature of the measure* were the subject of interesting observations in the judgments in Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-1275, '*Demesa*' (under appeal, Case C-183/02 P and Case C-187/02 P) and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava and Others* v *Commission* [2002] ECR II-1385, '*Ramondín*' (under appeal, Case C-186/02 P and Case C-188/02 P). The actions which gave rise to those judgments challenged the legality of two Commission decisions relating to Basque tax laws. [35] By those two decisions, adopted in 1999, [36] the Commission found that certain advantages granted by the Diputación Foral de Álava to Daewoo Electronics Manufacturing España SA (Demesa), Ramondín SA and Ramondín Cápsulas SA constituted State aid incompatible with the Treaty provisions. Those undertakings, the Diputación Foral de Álava and the Comunidad Autónoma del País Vasco challenged the legality of those decisions.

In *Demesa*, the applicants claimed that the Commission had infringed Article 87(1) EC by classifying as State aid (i) subsidies exceeding the maximum grant allowed under a regional aid scheme approved by the Commission in 1996, (ii) advantages resulting from the sale of a plot of land at less than market price to Demesa to build its refrigerator manufacturing plant and from postponement of payment of the purchase price, and (iii) advantages resulting from the application of Basque tax legislation under which Demesa was granted a tax credit of 45% and a tax-base reduction, which was available to newly established businesses.

In *Ramondín*, the applicant companies considered that the tax credit of 45% and the reduction in the tax base laid down for newly established businesses did not constitute State aid for the purposes of Article 87(1) EC.

As regards the purchase price of the plot of land bought by Demesa, the Court pointed out that the sale of assets by a public authority on preferential terms may constitute State aid. However, in the present case, it found that the Commission had arbitrarily

35 As regards litigation arising from the Commission's decisions on the compatibility of Basque tax law with the Treaty rules on State aid, two cases already discussed in the section on admissibility of actions for annulment may be noted:

— *Territorio Histórico de Guipúzcoa and Others* v *Commission* concerned the legality of decisions to initiate the formal investigation procedure with respect to the tax credits created by the tax legislation of, first, the Provinces of Vizcaya and Guipúzcoa and, second, the Province of Álava;

— Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission* concerned the legality of the decision to initiate the formal investigation procedure with respect to the reduction in the tax base provided for by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa.

36 Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1) and Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p. 36).

determined the market price and therefore had not established that Demesa bought the plot at a price which it would have been unable to obtain under normal market conditions. Moreover, the Commission had not shown that the provision by a public sector undertaking of the land occupied by Demesa, for a nine-month period free of charge, was not the normal conduct of a private undertaking.

As regards the tax measures at issue in both cases, the Court found that the Commission was correct to classify them as State aid, in particular because they were specific in nature.

According to the Court, the specific nature of the tax credit derived from the discretion of the administration (the Diputación Foral de Álava) to vary the amount of, or the conditions for granting, that tax concession according to the characteristics of the investment project submitted for its assessment and from the fact that the concession was granted only in respect of investments exceeding a minimum amount. In that connection, the Court rejected the applicants' plea that the measure in question fell outside Article 87(1) EC on the ground that its selective nature was justified 'by the nature or overall structure of the system'. The specific tax measure in question was not justified by the internal logic of the tax system, since it favoured only undertakings with significant financial resources and therefore breached the principles of progressiveness and redistribution which form an integral part of the Spanish tax system.

As to the measure reducing the tax base, the Court likewise found in *Ramondín*, first, that it was specific in nature since it was granted only to businesses which (i) were newly set up, (ii) made an investment costing more than a minimum amount, and (iii) created at least new jobs and, second, that it was not justified by 'the nature or overall structure of the system'. In *Demesa*, the Court simply found that the Commission had not established that Demesa actually benefited from that measure.

Finally, it is interesting to note that in those two judgments the Court found that the Commission had not based its conclusion that the tax credit was specific in nature on the fact that it applied only to one part of Spain. Accordingly, the Commission had in no way called into question the legislative power of the territorial entity concerned to adopt measures of a general nature applicable to all of the region concerned.

Case T-152/99 *Hijos de Andrés Molina* v *Commission* [2002] ECR II-3049 (under appeal, Case C-316/02 P) raised, *inter alia*, the questions whether, first, the capitalisation of part of the debt of an undertaking to a public entity and, second, the waiver by a public body of the debts of an undertaking in difficulty constituted State aid.

As regards the first question, the Court examined whether the Commission had made a manifest error of assessment in its application of the test of 'the private investor in a market economy' to the recapitalisation in question. It held that the Commission was correct in finding that the public entity had not acted in the manner of a private investor,

given the applicant's financial situation, in particular its level of debt, and the unlikelihood that its financial viability would be restored.

The Court, like the Commission, found that the waiver of debt was specific in nature. While the Spanish law governing suspension of payments does not apply selectively in favour of certain categories of undertakings or certain sectors of activity, the waiver of debt declared unlawful by the Commission did not flow automatically from the application of that law, but from discretionary decisions made by the public bodies in question and hence could not be regarded as general in nature.

On the other hand, the Court found that the method which led the Commission to conclude that the waiver of debt by public bodies did not meet the private investor test and thus constituted State aid was inadequate. The Court observed, first, that the share of the overall debt of an undertaking in difficulty represented by sums due to public bodies is not in itself a decisive factor for determining whether the waiver by those bodies of debts of the undertaking bears some of the hallmarks of State aid. It then added that public bodies waiving debts must be compared to private creditors seeking to obtain payment of sums owed to them by a debtor in financial difficulties and that it accordingly falls to the Commission to assess, with regard to each of the public bodies in question, whether the waiver of debt which had been granted by it is more generous than that which would have been granted by a hypothetical private creditor had it been in a situation *vis-à-vis* the undertaking comparable to that of the public body and seeking to recover the sums owed to it. The Court found that the Commission had not carried out that assessment. It ruled that the plea that the waiver of debt had been incorrectly classified as State aid was well founded and thus annulled the relevant articles of the contested decision.

In its judgment of 17 October 2002 in Case T-98/00 *Linde* v *Commission*, not yet published in the ECR, the Court held that it had not been established to the requisite legal standard that the subsidy granted by Germany to Linde AG constituted State aid and therefore annulled the decision in so far as it declared the aid to be partially incompatible with the common market. [37] The Court observed that the public entity, contractually bound to a third party by a supply agreement from which it could not release itself, had chosen, in view of the losses which it was incurring as a result of performance of that agreement, to transfer performance of its obligation to a different operator, Linde, in consideration for which it accorded Linde a grant of an amount less than the total losses which it would have incurred through performance of its supply obligation. The Court held that that grant could not be regarded as State aid since, taken as a whole, the tripartite arrangement of which it formed a part constituted a normal commercial transaction in which the public entity and the third party to which it was contractually bound had behaved as rational operators in a market economy.

[37] Commission Decision 2000/524/EC of 18 January 2000 on State aid granted by Germany to Linde AG (OJ 2000 L 211, p. 7).

As a final point in this section, it should be noted that the Court clarified the scope of Article 87(1) EC, which refers to aid granted 'by a Member State or through State resources in any form whatsoever', holding that where the conditions laid down in that provision are met, it is not only measures taken by the federal or central authority which fall within its ambit, but also measures taken by the intra-state authorities — decentralised, federated, regional or other — of Member States, whatever their legal status and description (*Demesa* and *Ramondín*).

(b) The distinction between new and existing aid

The question whether changes to an existing aid scheme constitute new aid came before the Court on a number of occasions.

In Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, the Court confirmed that the Commission was justified in considering that a non-notified increase in the ceiling for fixed assets was to be regarded as a substantive amendment to a previously approved aid scheme and thus that the aid granted to the applicant in fact constituted new aid not covered by that scheme. Similarly, in *Demesa*, the Court held that a subsidy which exceeded by several percentage points the ceiling of permissible costs covered by an aid scheme approved by the Commission constituted new aid.

On the other hand, the Court held that, by initiating the formal investigation procedure in respect of the whole of a tax scheme (the exempt companies legislation) and by provisionally classifying that scheme as new aid in its entirety, the Commission had infringed Article 88 EC and Article 1(c) of the regulation on State aid procedure, [38] the latter of which provides that 'alterations to existing aid' are to be regarded as new aid. In *Government of Gibraltar* v *Commission*, cited above, the Court stated that it is only where the alteration affects the actual substance of the original scheme that that scheme is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme. The amendments made to the initial tax scheme at issue had to be regarded as severable elements of that scheme and, consequently, could not have the effect that the original scheme no longer constituted existing aid.

2. Derogations from the prohibition

State aid is not caught by the general prohibition set out in Article 87(1) EC where it is covered by one of the derogations set out in Article 87(2) and (3) EC, or by the derogation provided for in Article 86(2) EC.

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

In *Keller and Keller Meccanica* v *Commission*, cited above, the Court, in the exercise of its limited judicial review of decisions taken by the Commission under Article 87(3) EC, held that the Commission had not manifestly erred in its assessment by finding that the requirement that the applicant companies be restored to viability, as laid down in the Community guidelines for State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), amended in 1997 (OJ 1997 C 283, p. 2), had not been met. [39]

By contrast, in Case T-155/98 *SIDE* v *Commission* [2002] ECR II-1179, a manifest error of assessment by the Commission resulted in the partial annulment by the Court of a decision declaring aid compatible with the common market on the basis of the 'culture derogation' provided for in Article 87(3)(d) EC. [40] In this case, the Commission had considered that the requirements laid down in Article 87(3)(d) were met, in particular because the aid granted to the Coopérative d'exportation du livre français did not affect competition to an extent that was contrary to the common interest. However, the Court considered that that analysis was incorrect inasmuch as the market on which the Commission assessed the effects of the aid in issue had been incorrectly defined. Consequently, by selecting as the reference market the export market for French-language books in general, rather than the market on which the same activity was carried out as that for which the aid was granted, the Commission had been unable to assess the true impact of the aid on competition.

In Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427 the Court also found that the Commission had manifestly erred in its assessment by concluding that part of the aid which Germany had intended to grant to the applicant company was incompatible with the common market. [41] The Court confirmed that the Commission is entitled to refuse the grant of aid where that aid has not induced the undertakings receiving it to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 87(3) EC. Nevertheless, it held that the Commission was wrong to find that the undertaking had not been so induced in the present case.

39 See, also, *Hijos de Andrés Molina* v *Commission*, cited above, which confirmed the Commission decision of 3 February 1999 finding that none of the conditions for approval of the restructuring aid in question, namely restoration of viability, avoidance of undue distortions of competition and proportionality of the aid to the costs and benefits of restructuring, had been met.

40 Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Coopérative d'exportation du livre français (CELF) (OJ 1999 L 44, p. 37).

41 Commission Decision 1999/690/EC of 3 February 1999 on State aid which Germany is planning to introduce for Graphischer Maschinenbau GmbH, Berlin (OJ 1999 L 272, p. 16).

3. Procedural matters

(a) Initiation of a formal investigation procedure

Having been declared admissible (see above), the actions for annulment of the decisions to initiate the formal investigation procedure in respect of certain elements of Basque tax aid [42] were dismissed on their merits (*Territorio Histórico de Guipúzcoa* v *Commission* and Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission*, cited above).

By one of the pleas raised in those cases, the applicants denied that the tax measures at issue constituted State aid. Faced with the Commission's preliminary assessments of each of the proposed measures, which sought to determine whether they had the character of aid, the Court had to clarify the extent of its judicial review of the legality of a decision to initiate the procedure provided for in Article 88(2) EC.

It stated that its review must necessarily be limited in order to avoid confusion between the administrative and judicial proceedings, and to preserve the division of powers between the Commission and the Court. The Court must avoid giving a final ruling on questions on which the Commission has merely formed a provisional view. *Thus, where in an action against a decision to initiate the formal investigation procedure the parties challenge the Commission's assessment of a measure as constituting State aid, review by the Court is limited to ascertaining whether or not the Commission has made a manifest error of assessment in forming the view that it was unable to resolve all the difficulties on that point during its initial examination of the measure concerned*. In the case at issue, the applicants' pleas disputing the provisional classification of the measures as State aid were rejected.

In addition, in those two judgments the Court recalled that a decision to initiate the formal investigation procedure implies a provisional assessment of both the aid character of the measure and its compatibility with the common market and that therefore the fact that the Commission had not explicitly set out in its decision its doubts regarding classification of the measure did not indicate that such classification was not temporary. In such a decision the Commission is required to set out explicitly its doubts *only* as to the measure's compatibility with the common market.

[42] The cases concerned aid in the form of a 45% tax credit in the Provinces of Álava, Vizcaya and Guipúzcoa (*Territorio Histórico de Guipúzcoa* v *Commission*) and in the form of a reduction in the basis of assessment of corporation tax provided for in the legislation of those regions (Joined Cases T-346/99, T-347/99 and T-348/99 *Territorio Histórico de Álava and Others* v *Commission*).

(b) The rights of the parties concerned

(b.1) During the preliminary investigation

Recalling the case-law establishing that the Commission is not under any obligation to conduct an exchange of views and arguments with a complainant during the preliminary investigation, the Court extended that rule to apply in respect of all the parties concerned and all the Member States, on which the applicable provisions confer no right to be involved in an exchange of views. It follows that the Member States and the parties concerned cannot require that the Commission hear their views so that they can influence the 'preliminary assessment' which leads the Commission to initiate the formal investigation procedure (*Government of Gibraltar* v *Commission*).

(b.2) During the formal investigation procedure

In *Demesa*, the Court recalled that the recipient of aid which has been declared incompatible with the common market and must be repaid is a party concerned within the meaning of Article 88(2) EC. As such, the recipient does not enjoy the same rights to a fair hearing as those of individuals against whom a procedure has been initiated, but has only the right to be involved in the administrative procedure. In that regard, under Article 88(2) EC, the recipient has the right to submit observations during the review stage envisaged by that provision.

E. Trade protection measures

The judgments delivered in the field of anti-dumping, by Chambers of five Judges, largely adopt solutions established previously (Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II-2905; judgment of 12 September 2002 in Case T-89/00 *Europe Chemi-Con* v *Council*, not yet published in the ECR (under appeal, Case C-422/02 P); and judgment of 21 November 2002 in Case T-88/98 *Kundan Industries and Tata International* v *Council*, not yet published in the ECR).

The point to be noted in the judgment in *Arne Mathisen* v *Council* is that the Commission is entitled to withdraw its acceptance of a price undertaking not only where the undertaking is infringed but also where it is circumvented and, therefore, to replace it with an anti-dumping duty without having to prove once more the dumping and injury already determined in the course of the investigation which culminated in the undertaking. Such a situation exists where an exporter whose undertaking not to export below a minimum price has been accepted does not directly infringe the terms of that undertaking, but circumvents them by implementing a business practice which makes it difficult, if not impossible, for it to ensure effective control of the actual price of its exports and, therefore, effective compliance with the undertaking. That is the case in particular where the implementation of such a practice involves the participation of

other traders over whom the exporter involved has no control and who, not being bound by a parallel undertaking, are not subject to monitoring by the Commission either.

In *Kundan Industries and Tata International* v *Council*, the Court annulled the contested regulation only in so far as the Council, by taking into account a commission the actual payment of which by the relevant applicant, an exporter, had not, however, been demonstrated, unlawfully adjusted the export price for the purpose of comparing it with the normal value.

F. Public health

In several cases the Court was required to define the circumstances in which the institutions may adopt measures designed to protect public health. While it held that the Council was able lawfully to remove two antibiotics from a list of substances authorised as additives in feedingstuffs (*Pfizer* v *Council* and *Alpharma* v *Council*, cited above), it found, on the other hand, that the Commission was not entitled to withdraw national authorisations for the marketing of medicinal products for the treatment of obesity (judgment of 26 November 2002 in Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission*, not yet published in the ECR; under appeal, Case C-39/03 P).

In the Council regulation contested by Pfizer and Alpharma, the reason given for the withdrawal of authorisation of the antibiotics at issue as additives in feedingstuffs was the *risk* to human health that their use involved, namely the risk of a transfer of antimicrobial resistance from animals to humans with the consequence that the effectiveness of certain medicinal products used in human medicine would be reduced.

The Court observed with regard to the risks to human health linked to the use of those antibiotics as additives in feedingstuffs that, where there is scientific uncertainty as to the existence or extent of such risks, the Community institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of the risks become fully apparent or, *a fortiori*, to wait for the adverse effects of the use of the products to materialise. However, a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified, and may be taken only if the risk, although its reality and extent have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure is taken.

The Court stated next that risk assessment involves, first, determining what level of risk is deemed acceptable and, second, conducting a scientific assessment of the risks. As regards the first aspect, the Court found that, although the Community institutions may

not take a purely hypothetical approach to risk and may not base their decisions on a 'zero-risk', they must nevertheless take account of their obligation, laid down by the Treaty, to ensure a high level of human health protection, which, to be compatible with the Treaty, does not necessarily have to be the highest that is technically possible. As to the aspect concerning a scientific risk assessment carried out by experts, the Court stated that, apart from being as thorough as possible having regard in particular to any urgent need for preventive measures to be taken, such an assessment must give the competent public authority sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts.

In light of those factors, it is *ultimately the public authority* which, even if there is scientific uncertainty and it is impossible to carry out a full risk assessment in the time available, must decide on preventive protective measures if such measures appear essential, regard being had to the level of risk to human health which that authority has decided is the critical threshold above which preventive measures must be taken.

In *Pfizer*, the Court found that the Council had been entitled, when deciding to ban virginiamycin, not to follow the opinion of the competent scientific committee, since the Council relied on a proper examination, carefully and impartially carried out, of all the relevant aspects of the individual case ─ including the reasoning on which the findings in that opinion were based ─ and justified the ban by the need to protect human health.

In *Alpharma* the Court likewise rejected the applicant's complaints, notwithstanding the fact that the competent scientific committee was not consulted before the adoption of the regulation banning the use of bacitracin zinc as an additive in feedingstuffs.

In both cases the Court held that, despite uncertainty as to the existence of a link between the use of the antibiotics as additives in feedingstuffs and the development of resistance to them in humans, their ban was not a measure that was disproportionate in relation to the objective of protecting public health.

In *Artegodan*, several pharmaceutical companies contended that the Commission lacked competence to adopt decisions ordering the Member States to withdraw national authorisations, issued to the companies by the competent national authorities, for the marketing of medicinal products for human use containing certain anorectic substances and, in any event, that the conditions necessary for their withdrawal were not met. The Court agreed with them.

It held that the Commission was not competent to adopt the contested decisions. After interpreting the applicable legislation, it found that, even though the national marketing authorisations had been amended and, therefore, partially harmonised by a decision adopted by the Commission in 1996 (which lacked legal basis but had become

definitive), they continued to fall within the residual field of exclusive Member State competence and that the Commission therefore could not order their withdrawal.

In any event, even assuming that the Commission had been competent to adopt the contested decisions, they were flawed since the condition for withdrawal of a marketing authorisation relating to lack of therapeutic efficacy of the substances in question (the first paragraph of Article 11 of Directive 65/65), [43] upon which the decisions were based, was not fulfilled.

In this connection the Court stated that, in the context of the grant and administration of marketing authorisations for medicinal products, the principle that protection of public health must unquestionably take precedence over economic considerations requires: (i) the taking into account exclusively of considerations relating to the protection of public health; (ii) the re-evaluation of the benefit/risk balance of a medicinal product where new data give rise to doubts as to its efficacy or safety; and (iii) the application of rules of evidence in accordance with the precautionary principle. The latter principle has acquired the rank of a general principle of Community law and can be defined as requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests; it requires the suspension or withdrawal of a marketing authorisation where new data give rise to serious doubts as to either the safety or the efficacy of the medicinal product in question and those doubts lead to an unfavourable assessment of the benefit/risk balance of that medicinal product. Against that background, the competent authority need do no more than provide, in accordance with the general rules of evidence, solid and convincing evidence which, while not resolving the scientific uncertainty, may reasonably raise doubts as to the safety and/or efficacy of the medicinal product.

According to the Court, however, that was not the case here. The medical and scientific data upon which the contested decisions were based were strictly identical to those taken into consideration in 1996 so far as concerns the therapeutic effects of the substances in question, and the assessment made as to acceptable risks in respect of the short-term effects of those substances had not changed. In those circumstances, mere changes in a scientific criterion applied when assessing the efficacy of medicinal products in the treatment of obesity and relating to consideration of a product's long-term effects — changes in respect of which there was said to be a consensus within the medical community but which were not based on new scientific data or information — could not on their own justify the withdrawal of a marketing authorisation for a medicinal product.

[43] Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20), as amended on several occasions.

G. Trade mark law

Litigation relating to registration of Community trade marks now has an important place in the Court's work, since 25 judgments were delivered in this field alone in 2002 (12 of which annulled decisions in whole or in part). Ruling on the legality of decisions made by Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office'), the Court reviewed whether the Boards of Appeal had applied correctly the conditions governing registration of Community trade marks. It is to be remembered that Regulation No 40/94 [44] provides that registration as a Community trade mark is to be refused, *inter alia*, where the mark is devoid of any distinctive character (Article 7(1)(b) of the regulation) or is descriptive (Article 7(1)(c)) (absolute grounds for refusal), or in the case of opposition duly based upon the existence of an earlier trade mark protected in a Member State or as a Community trade mark (Article 8) (relative grounds for refusal). Also, cases decided by the Court of First Instance show that marks capable of registration by the Office may be word marks, [45] figurative marks, [46] three-dimensional marks, [47] marks taking the form of a design applied to the surface of goods, [48] marks which are colours, [49] marks comprising the shape of a product [50] or marks of a complex nature. [51]

44 Cited in footnote 1.

45 In particular, Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683; Case T-79/00 *Rewe Zentral* v *OHIM (LITE)* [2002] ECR II-705; Case T-106/00 *Streamserve* v *OHIM (STREAMSERVE)* [2002] ECR II-723 (under appeal, Case C-150/02 P); Case T-219/00 *Ellos* v *OHIM (ELLOS)* [2002] ECR II-753; Case T-355/00 *DaimlerChrysler* v *OHIM (TELE AID)* [2002] ECR II-1939; Case T-356/00 *DaimlerChrysler* v *OHIM (CARCARD)* [2002] ECR II-1963; Case T-358/00 *DaimlerChrysler* v *OHIM (TRUCKCARD)* [2002] ECR II-1993; Case T-323/00 *SAT.1* v *OHIM (SAT.2)* [2002] ECR II-2839 (under appeal, Case C-329/02 P); judgment of 9 October 2002 in Case T-360/00 *Dart Industries* v *OHIM (UltraPlus)*, not yet published in the ECR; judgment of 20 November 2002 in Joined Cases T-79/01 and T-86/01 *Bosch* v *OHIM (Kit Super Pro and Kit Pro)*, not yet published in the ECR; and judgment of 5 December 2002 in Case T-130/01 *Sykes Enterprises* v *OHIM (REAL PEOPLE, REAL SOLUTIONS)*, not yet published in the ECR.

46 In particular, judgment of 23 October 2002 in Case T-6/01 *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN Markt CONCORD)*, not yet published in the ECR (under appeal, Case C-3/03 P).

47 Case T-88/00 *Mag Instrument* v *OHIM (torch shape)* [2002] ECR II-467 (under appeal, Case C-136/02 P).

48 Judgment of 9 October 2002 in Case T-36/01 *Glaverbel* v *OHIM (surface of a sheet of glass)*, not yet published in the ECR.

49 Judgments of 25 September 2002 in Case T-316/00 *Viking-Umwelttechnik* v *OHIM (juxtaposition of green and grey)* and of 9 October 2002 in Case T-173/00 *KWS Saat* v *OHIM (shade of orange)*, both not yet published in the ECR.

50 Judgment of 12 December 2002 in Case T-63/01 *Procter and Gamble* v *OHIM (soap bar shape)*, not yet published in the ECR.

51 Judgments of 23 October 2002 in Case T-388/00 *ILS Institut für Lernsysteme* v *OHIM — Educational Services, Inc (ELS)* and of 5 December 2002 in Case T-91/01 *BioID* v *OHIM (BioID)* (under appeal, Case C-37/03 P), both not yet published in the ECR.

1. Absolute grounds for refusal of registration

The Court observed that the question whether a trade mark is descriptive must be assessed, first, in relation to the goods or services in respect of which registration of the sign has been requested and, second, in relation to the perception of the relevant section of the public which is composed of the consumers of those products or services. It thus confirmed that the word ELLOS is descriptive in relation to clothing, footwear and headgear (*Ellos* v *OHIM (ELLOS)*, cited above), but annulled decisions finding that the term STREAMSERVE is descriptive in relation to goods falling within the category 'manuals' and 'publications' (*Streamserve v OHIM (STREAMSERVE)*, cited above), that 'UltraPlus' is descriptive in relation to plastic ovenware (*Dart Industries* v *OHIM (UltraPlus)*, cited above), that the word 'CARCARD' is descriptive in relation to data-processing media (*DaimlerChrysler* v *OHIM (CARCARD)*, cited above) and that 'SAT.2' is descriptive in relation to services intended for general consumption and for professionals in the film and media industries (*SAT.1* v *OHIM (SAT.2)*, cited above).

A trade mark has distinctive character if it is capable of distinguishing the goods or services in respect of which registration is applied for according to their commercial origin. Distinctiveness is accordingly established where the trade mark enables a consumer who purchases the goods or services identified by the mark to make the same choice on a subsequent purchase, if his experience is a positive one, or to choose differently if it is not (see, in particular, *Mag Instrument* v *OHIM (torch shape)*, cited above). On the other hand, distinctive character is lacked by marks which, from the point of view of the relevant public, are commonly used, in trade, for the presentation of the goods or services concerned or in connection with which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner (*SAT.1* v *OHIM (SAT.2)*, cited above). In the light of those criteria, Boards of Appeal were right in holding that no distinctive character was possessed by torch shapes in relation to torches (*Mag Instrument* v *OHIM (torch shape)*, cited above), a design applied to the surface of a sheet of glass (*Glaverbel* v *OHIM (surface of a sheet of glass)*, cited above), 'Kit Pro' and 'Kit Super Pro' in relation to vehicle parts (*Bosch* v *OHIM (Kit Super Pro and Kit Pro)*, cited above), the slogan 'REAL PEOPLE, REAL SOLUTIONS' in relation to services connected with information technology (*Sykes Enterprises* v *OHIM (REAL PEOPLE, REAL SOLUTIONS)*, cited above), the juxtaposition, in no particular arrangement, of the colours green and grey in relation to gardening machinery (*Viking-Umwelttechnik* v *OHIM (juxtaposition of green and grey)*, cited above) and a shade of the colour orange in relation to seeds and certain agricultural machinery (*KWS Saat* v *OHIM (shade of orange)*, cited above).

Finally, the Court held with regard to distinctiveness acquired through use of the trade mark (Article 7(3) of Regulation No 40/94) that that use must be before the trade mark application was filed (judgment of 12 December 2002 in Case T-247/01 *eCopy* v *OHIM (ECOPY)*, not yet published in the ECR).

2. Relative grounds for refusal of registration

On six occasions the Court ruled on the legality of decisions made in opposition proceedings relating to registration of a trade mark. [52] It will be noted that, in those *inter partes* cases, the Office, which is formally the defendant before the Court of First Instance, may be led to contend that the Opposition Division's decision was well founded and, therefore, to consider that the Board of Appeal erred in law by overturning that decision. It follows that in such a case the Office supports the applicant's line of argument (*Chef Revival USA* v *OHIM — Massagué Marín (Chef)*, cited above). However, the Office cannot formally claim that a decision adopted by a Board of Appeal should be annulled or altered (*Vedial* v *OHIM — France Distribution (HUBERT)*, cited above).

So far as concerns the substance of cases, the Court clarified the matters which should be taken into account when assessing whether there is a likelihood of confusion. After comparing, first, the goods concerned and, second, the signs in question (entailing an assessment of their visual, aural or conceptual similarity), the Court held that there was indeed a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94, in the mind of the public between the mark claimed and an earlier protected mark and accordingly upheld (in *Oberhauser* v *OHIM — Petit Liberto (Fifties)* and *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN Markt CONCORD)*, both cited above) or annulled (in *ILS Institut für Lernsysteme* v *OHIM — Educational Services, Inc (ELS)*, cited above) the decision of the Board of Appeal.

3. Procedure

On various occasions the Court reviewed whether the Office had complied with Article 73 of Regulation No 40/94, which provides that the Office's decisions are to be based only on reasons on which the parties concerned have had an opportunity to present their comments.

The Court held that a Board of Appeal is entitled to use any of the items of information included by the applicant in the trade mark application form without first inviting him to comment on them (Case T-198/00 *Hershey Foods* v *OHIM (Kiss device with plume)* [2002] ECR II-2567). On the other hand, it held that a Board of Appeal which decides to exercise the powers vested in the examiner after finding an error by him is not entitled

[52] Case T-232/00 *Chef Revival USA* v *OHIM — Massagué Marín (Chef)* [2002] ECR II-2749; judgment of 23 October 2002 in Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)*, not yet published in the ECR; *ILS Institut für Lernsysteme* v *OHIM — Educational Services, Inc (ELS)*, cited above; *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN Markt CONCORD)*, cited above; judgment of 12 December 2002 in Case T-39/01 *Kabushiki Kaisha Fernandes* v *OHIM — R.J. Harrison (HIWATT)*, not yet published in the ECR; and judgment of 12 December 2002 in Case T-110/01 *Vedial* v *OHIM — France Distribution (HUBERT)*, not yet published in the ECR.

to refuse the application for registration without giving the applicant an opportunity to present its observations. In *Glaverbel* v *OHIM (surface of a sheet of glass)*, cited above, the decision of the Board of Appeal was annulled in its entirety for failure to comply with that obligation. The Court also annulled, for infringement of the rights of defence, decisions of Boards of Appeal founded on absolute grounds for refusal of registration which were raised by them of their own motion and upon which the persons concerned had not been invited to comment (*Eurocool Logistik* v *OHIM (EUROCOOL)* and *Rewe Zentral* v *OHIM (LITE)*, both cited above).

In *Chef Revival USA* v *OHIM — Massagué Marín (Chef)*, cited above, the Court clarified the distinction between matters which fall within the conditions of admissibility of the opposition to registration of a Community trade mark and those which fall within the scope of the examination of the opposition. It held that the evidence and supporting documents which the opponent is to produce within the period laid down by the Office, in particular the translation of the registration certificate for the earlier national mark into the language of the opposition proceedings, are among the matters falling within the scope of the examination, so that failure to produce them on time cannot result in inadmissibility of the opposition.

With regard to the power to alter decisions conferred on the Court by Article 63(3) of Regulation No 40/94, the Court stated that the possibility of altering decisions is, in principle, restricted to situations in which the case has reached a stage permitting final judgment (*SAT.1* v *OHIM (SAT.2)*, cited above).

Also, and for the first time, the Court stated that the Boards of Appeal of the Office are not judicial in nature. It pointed out that, although the Boards of Appeal enjoy a wide degree of independence in carrying out their duties, they constitute a department of the Office with the same powers as the examiner and concluded that they cannot be classified as 'tribunals'. Consequently, an argument based on a right to a fair 'hearing' before the Boards of Appeal cannot succeed (*Procter and Gamble* v *OHIM (soap bar shape)*, cited above).

H. Staff cases

Of the approximately 50 judgments pronounced by the Court of First Instance in staff cases, five were delivered by the Court sitting as a single judge (Case T-386/00 *Gonçalves* v *Parliament* [2002] ECR-SC I-A-13 and II-55; Case T-117/01 *Roman Parra* v *Commission* [2002] ECR-SC I-A-27 and II-121; Case T-187/01 *Mellone* v *Commission* [2002] ECR II-389; judgment of 11 July 2002 in Case T-263/01 *Mavromichalis* v *Commission*, not yet published in the ECR; and judgment of 3 October 2002 in Case T-6/02 *Platte* v *Commission*, not yet published in the ECR).

Given that a large number of cases were decided and that this report is necessarily succinct, it may simply be noted that the following were among the matters submitted to the Court: decisions not to admit candidates to tests in competitions (in particular Case T-193/00 *Felix* v *Commission* [2002] ECR-SC I-A-23 and II-101, Case T-139/00 *Bal* v *Commission* [2002] ECR-SC I-A-33 and II-139; Joined Cases T-357/00, T-361/00, T-363/00 and T-364/00 *Martínez Alarcón and Others* v *Commission* [2002] ECR-SC I-A-37 and II-161; and judgment of 28 November 2002 in Case T-332/01 *Pujals Gomis* v *Commission*, not yet published in the ECR); the conduct of disciplinary proceedings and the penalties imposed on their conclusion (Case T-197/00 *Onidi* v *Commission* [2002] ECR-SC II-325; [53] judgment of 9 July 2002 in Case T-21/01 *Zavvos* v *Commission*, not yet published in the ECR; judgment of 11 September 2002 in Case T-89/01 *Willeme* v *Commission*, not yet published in the ECR; and judgment of 5 December 2002 in Case T-277/01 *Stevens* v *Commission*, not yet published in the ECR); refusal of promotion (judgments of 9 July 2002 in Case T-233/01 *Callebaut* v *Commission* and 11 July 2002 in Case T-163/01 *Perez Escanilla* v *Commission*, both not yet published in the ECR); the legality of an appointment (judgment of 9 July 2002 in Case T-158/01 *Tilgenkamp* v *Commission*, not yet published in the ECR); and classification in grade or in step when duties are taken up (Case T-206/00 *Hult* v *Commission* [2002] ECR-SC I-A-19 and II-81 and judgment of 11 July 2002 in Case T-381/00 *Wasmeier* v *Commission*, not yet published in the ECR).

With regard to an aspect concerning the Community civil service in a more general way, namely rules of professional conduct, the judgments in *Zavvos* v *Commission* and *Willeme* v *Commission*, both cited above, clarified the scope of the first paragraph of Article 11 [54] and Article 14 of the Staff Regulations. [55]

According to the judgments, the first of those provisions requires an official to conduct himself, in all circumstances, in a manner guided exclusively by the interests of the Communities and therefore prohibits generally any action, whether or not linked to breach of a particular rule, which, in the light of the circumstances of the case, shows that the official concerned intended to favour a particular interest to the detriment of the Community interest.

53 In its judgment in this case, the Court recalled the fundamental rule that the time-limits laid down in relation to disciplinary proceedings by the Staff Regulations of Officials of the European Communities (the first paragraph of Article 7 of Annex IX to the Staff Regulations) constitute rules of sound administration, failure to comply with which may render the institution concerned liable for any harm caused to those concerned but does not in itself affect the validity of a disciplinary measure imposed after they have expired.

54 'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.'

55 'Any official who in the performance of his duties is called upon to decide on a matter in the handling or outcome of which he has a personal interest such as to impair his independence shall inform the appointing authority.'

The second provision, designed to ensure the independence and integrity of officials, covers any circumstance which an official must reasonably understand, having regard to the duties performed by him and the circumstances of the case, as being such as to appear to third parties to be a possible source of prejudice to his independence.

II. Actions for damages [56]

On two occasions the Court, in cases following on from Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, declared the Community liable for the damage caused to certain producers who had been prevented from delivering milk owing to Community legislation (Case T-187/94 *Rudolph* v *Council and Commission* [2002] ECR II-367 and Case T-201/94 *Kustermann* v *Council and Commission* [2002] ECR II-415). None of the other actions for damages disposed of in 2002 was successful.

1. Admissibility

An action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution. As was held in Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203 (under appeal, Case C-234/02 P), an action for damages may also relate to conduct attributable to a *Community body* established by the Treaty and intended to contribute to achievement of the Community's objectives, such as the *European Ombudsman*.

Such an action may also seek compensation for damage ensuing from the implementation of Community legislation by national authorities where they have no discretion in that regard. In those circumstances, such damage is attributable to the Community (Case T-174/00 *Biret International* v *Council* [2002] ECR II-17 (under appeal, Case C-93/02 P) and Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47 (under appeal, Case C-94/02 P).

Finally, proceedings in matters arising from non-contractual liability are time-barred after a period of five years, as provided by Article 43 of the EC Statute of the Court. In cases where liability stems from a legislative measure, that period cannot begin before the injurious effects of the measure have been produced. Where those effects continue as a result of an unlawful measure remaining in force, the time bar applies to the period preceding by more than five years the date of the event which interrupted the limitation period and does not affect rights which have arisen during subsequent periods (*Biret International* v *Council*, cited above; see also *Rudolph* v *Council and Commission*, cited above, *Kustermann* v *Council and Commission*, cited above, and Case T-261/94

[56] Excluding staff cases.

Schulte v *Council and Commission* [2002] ECR II-441 (under appeal, Case C-128/02 P).

2. Conditions for incurrence of liability for an unlawful act

It is settled case-law, which has been reiterated once again, that in order for the Community to incur non-contractual liability a number of conditions must be met: the conduct alleged against the institutions must be unlawful, the existence of the damage pleaded must be shown, and there must be a causal link between that conduct and that damage. With regard to the first of these conditions, case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals.

Where the Court dismissed actions, it did so because the conduct complained of was not unlawful (*Biret International* v *Council*, cited above; *Biret et Cie* v *Council*, cited above; Case T-199/94 *Gosch* v *Commission* [2002] ECR II-391; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515; and *Lamberts* v *Ombudsman*, cited above) or because there was no causal link (judgment of 28 November 2002 in Case T-40/01 *Scan Office Design* v *Commission*, not yet published in the ECR).

With regard to the requirement for a causal link, the Court held in Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265 that the applicant company had not established that there was a direct link between the adoption of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait [57] and the harm, consisting in the applicant's inability to recover a debt owed to it by the Iraqi Government, since, first, the non-payment of the sum owed was not the consequence of the adoption by Iraq of a measure of retaliation against that regulation and the maintenance of the Community embargo, and second, the transaction giving rise to the debt did not come within the scope of the regulation.

3. Conditions for incurrence of liability for a lawful act

While the principle that the Community can be liable for a lawful act has never been established and, *a fortiori*, liability has never been incurred on that basis, the Court, once again (for a previous example, see the *Annual Report 2001*) stated that, in the event of the principle of such liability being recognised in Community law, a precondition for liability would be the existence of 'unusual' and 'special' damage, defined in such a way that special damage is that which affects a particular class of economic operators in a disproportionate manner by comparison with other operators and unusual damage is that which exceeds the limits of the economic risks inherent in

[57] OJ 1990 L 213, p. 1.

operating in the sector concerned, without the legislative measure that gave rise to the damage pleaded being justified by a general economic interest (*Förde-Reederei* v *Council and Commission*, cited above).

III. Applications for interim relief

The number of applications for interim relief lodged in 2002 (25) is appreciably lower than that for the three previous years (37 in 2001, 43 in 2000 and 38 in 1999). This drop is explained, in part, by the considerable number of applications for expedited treatment made in the course of the year (also 25), a substantial proportion of which were undoubtedly made because it is difficult, or impossible, to obtain interim relief in certain circumstances. If the statistics concerning what may be called 'urgent procedures' (interim relief proceedings and the accelerated procedure) are taken as a whole, it is noteworthy that applications to the Court for a rapid decision, whether interim or final, have been made in almost 13% of all actions brought in 2002.

In certain cases, applications for interim relief were made concomitantly with applications for expedition (Case T-155/02 *VVG International Handelsgesellschaft and Others* v *Commission* in the field of commercial policy; Case T-211/02 *Tideland Signal* v *Commission* and Case T-345/02 *European Dynamics* v *Commission* in the field of public procurement) or in connection with the grant of expedition (Cases T-310/01 and T-77/02 *Schneider Electric* v *Commission* and Cases T-5/02 and T-80/02 *Tetra Laval* v *Commission*, in the field of concentrations of undertakings). *Tideland Signal* v *Commission* illustrates the complementary nature of the two procedures. An application for interim relief was made on 15 July 2002. The President of the Court of First Instance, by an order made the next day on the basis of Article 105(2) of the Rules of Procedure, suspended the tender procedure from which the applicant considered itself to have been unlawfully excluded. In parallel the expedited procedure, which was ordered with regard to the substance of the case, enabled the Court ─ the tender procedure having been frozen ─ to put a rapid end to a legal situation prejudicial to the applicant, the Commission and the third parties to which it had been announced that the contract would be awarded. Since the judgment of 27 September 2002 in Case T-211/02 *Tideland Signal* v *Commission* annulled the contested decision, it was found that there was no longer any need to give a further decision on the application for interim relief.

Apart from that particular instance, only one application for interim relief was granted. By order in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 (upheld by order of the President of the Court of Justice in Case C-232/02 P(R) *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977), the President of the Court of First Instance found that it was necessary to suspend the operation of a Commission decision ordering the recovery from the applicant of State aid declared incompatible with the common market. He held in particular that immediate operation of the decision would imperil the applicant's existence soon if not immediately. However, in order to take account of the Community's interest in the

effective recovery of State aid, the suspension of operation of the decision was limited in time and accompanied by conditions designed to ensure recovery of the aid in so far as the applicant's financial situation so allowed.

Several applications were dismissed as inadmissible on the ground that the main proceedings to which they formed an adjunct appeared themselves to be inadmissible. By order of 8 August 2002 in Case T-155/02 R *VVG International Handelsgesellschaft and Others* v *Commission* [2002] ECR II-3239, the President of the Court of First Instance dismissed the application for interim relief because the applicants did not appear to be individually concerned, as interpreted by the Court of Justice in *Unión de Pequeños Agricultores* v *Council*, cited above, by the contested regulation. [58]

The other applications were dismissed for lack of urgency (in particular, orders of the President of the Court of First Instance in Case T-132/01 R *Euroalliages and Others* v *Commission* [2002] ECR II-777, Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387 and Case T-34/02 R *B* v *Commission* [2002] ECR II-2803) or because there was no urgency and the balance of interests did not favour the applicant (in particular, orders of the President of the Court of First Instance of 5 December 2002 in Case T-181/02 R *Neue Erba Lautex* v *Commission* and of 6 December 2002 in Case T-275/02 R *D* v *EIB*, both not yet published in the ECR).

[58] It should be noted, first, that the parties were of course invited to submit their observations on that judgment of the Court of Justice and, second, that this is the first case where the Court of First Instance applied the approach contained in the Court of Justice's judgment following the judgment in *Jégo-Quéré*, cited above.

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