

## **A — Proceedings of the Court of First Instance in 2004**

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

The Court of First Instance of the European Communities experienced significant changes in 2004 which will leave their mark on the European judicial institution's history.

First of all, the accession to the European Union of 10 new States enabled the Court of First Instance to welcome 10 new Judges: Mrs E. Cremona, Mr O. Czúcz, Ms I. Wiszniewska-Białecka, Ms I. Pelikánová, Mr D. Šváby, Mr V. Vadapalas, Ms K. Jürimäe, Ms I. Labucka and Mr S.S. Papasavvas took the oath on 12 May 2004, while Ms V. Trstenjak entered into the same commitment on 7 July 2004.

For the second time in the Court of First Instance's history, the number of Judges, initially set at 12, was increased. The Court is now composed of 25 Judges, one from each Member State.

The term of office of a number of members of the Court of First Instance, some of whom had just been appointed, came to an end on 31 August 2004. By decision of 14 July 2004, the representatives of the governments of the Member States of the European Union renewed the term of office of the following members for the period from 1 September 2004 to 31 August 2010: Mr B. Vesterdorf, Ms V. Tiili, Mr J. Azizi, Mr M. Jaeger, Mr A.W.H. Meij, Mr M. Vilaras, Ms M.E. Martins de Nazaré Ribeiro, Mr F. Dehousse, Mr O. Czúcz, Ms I. Wiszniewska-Białecka, Mr D. Šváby, Ms K. Jürimäe and Mr S.S. Papasavvas.

In light of the enlargement of the European Union, the Rules of Procedure of the Court of First Instance were amended to increase the number of Judges comprising the Grand Chamber from 11 to 13 (OJ 2004 L 127, p. 108). The provisions relating to the language of a case were also amended: since 1 May 2004 actions may be brought in 21 languages – the 20 official languages and Irish (OJ 2004 L 132, p. 3).

The organisation and operation of the Court of First Instance were adapted to respond to the needs resulting from the increased number of Judges. Initially, for the period from 1 May to 31 August 2004, the new Judges joined the five existing Chambers of three Judges. Each of the Chambers of three Judges was therefore supplemented by two Judges, and formed in that way the Chamber in its extended composition. Subsequently, the Court decided to retain for the 2004/05 judicial year the structure entailing five Chambers composed of five Judges. It follows that, during this judicial year, each of the five Chambers sits with three Judges in two distinct and predetermined trial formations that are presided over by the President of the Chamber.

Four of the five Chambers composed of five Judges are presided over by Presidents who were elected by their fellow Judges in September 2004 for a period of three years, namely Mr Jaeger, Mr Pirrung, Mr Vilaras and Mr Legal. This election of Presidents of Chambers which on 10 September 2004 took place for the first time, pursuant to Article 15 of the Rules of Procedure of the Court of First Instance, is a consequence of the entry into force on 1 February 2003 of the new Protocol on the Statute of the Court of Justice (Article 50).

The other Chamber of five Judges is presided over by the President of the Court, who on 8 September 2004 was elected for three years (that is to say until 31 August 2007). Since the President of the Court does not sit in a Chamber composed of three Judges, the Chamber is presided over by one of the Chamber's other Judges, Mr Cooke, when it sits with three Judges.

Also, implementation of the reforms made possible by the Treaty of Nice has begun. The EC Treaty, as amended by the Treaty of Nice which entered into force on 1 February 2003, provides in Article 225 that the Court of First Instance is to have jurisdiction to hear and determine at first instance all direct actions with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice.

The Council has (i) amended the Protocol on the Statute of the Court of Justice and (ii) adopted provisions for the establishment of a 'judicial panel'.

First, on 26 April 2004 the Council adopted Decision 2004/407/EC, Euratom amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5; corrigendum at OJ 2004 L 194, p. 3). As a result of the new division of direct actions between the Court of Justice and the Court of First Instance, which came into effect on 1 June 2004, actions for annulment and for failure to act brought by a Member State against an act of, or failure to act by, the Commission<sup>1</sup> fall within the jurisdiction of the Court of First Instance. The same is true of actions brought by the Member States against:

- decisions of the Council concerning State aid;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade;
- acts of the Council by which it exercises implementing powers;
- acts of the European Central Bank.

On account of this new division of jurisdiction for direct actions, cases initially brought before the Court of Justice but in which the written procedure had not yet been brought to a close were transferred to the Court of First Instance; these cases related mostly to State aid and to the European Agriculture Guidance and Guarantee Fund.

Second, on 2 November 2004 the Council adopted Decision 2004/752/EC, Euratom establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7). This reform, likewise made possible by the Treaty of Nice (Articles 220 EC and 225a EC; Articles 136 EA and 140b EA; see also Declaration No 16 annexed to the Treaty of Nice), was keenly desired by the Court of First Instance because of the special nature of this field of litigation and the workload which is anticipated as a result of application of the provisions of the new Staff Regulations. This new specialised tribunal, consisting of seven judges, will be called on to hear disputes involving the European Union civil

<sup>1</sup> With the exception of acts of the Commission that concern enhanced cooperation under the EC Treaty.

service, in respect of which jurisdiction is currently exercised by the Court of First Instance. Its decisions will be open to an appeal, limited to points of law, before the Court of First Instance and, exceptionally, subject to review by the Court of Justice in the circumstances prescribed by the Protocol on the Statute. It should begin to operate in the course of 2005.

Finally, the statistics relating to 2004 call for some comments. The number of cases brought continued to increase – a constant feature for a number of years – rising to 536 (compared with 466 in 2003). This increase is partly due to the fact that since 1 June 2004 the Court of First Instance has had jurisdiction to decide direct actions brought by the Member States (see the explanation above). On this basis 48 additional cases were received, namely 21 cases whose referral was ordered by the Court of Justice and 27 new cases lodged by Member States. Community trade-mark litigation continues to grow in absolute terms (110 cases were brought, 10 more than in 2003) and accounts in relative terms for 21% of the total number of cases brought. Staff cases still form the most significant category of cases in terms of numbers, as they have since 2000: 146 new cases were lodged (that is to say 27% of the total number of cases brought).

The number of cases decided, which comes to 361, is close to that of 2003 (339). Of these cases, 76% were decided by Chambers composed of three Judges, 18% by Chambers composed of five Judges and 4% by the Court sitting as a single Judge. It can be seen that the increase in the number of Judges has not yet enabled the number of cases decided each year to be increased significantly.

The number of cases pending crossed the critical threshold of 1 000 cases, there being 1 174 such cases as at 31 December 2004. This number of cases corresponds, as things stand, to more than three years of the Court's work.

The average duration of proceedings increased slightly compared with the preceding three years: in 2004 the average duration was 22.6 months for cases other than those falling within the special areas constituted by intellectual property cases and staff cases.

A very small number of cases have been dealt with under the expedited procedure: 13 such applications were made in the course of the year and two of the cases were accorded expedited treatment.

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

## **I. *Proceedings concerning the legality of measures***

Consideration of the substance of an action presupposes that the action is admissible. Cases which broached the question of the admissibility of actions for annulment (B) will therefore be covered before the essential aspects of substantive law (C to H). The latter are

grouped according to subject matter. Not every field falling within the jurisdiction of the Court of First Instance is included in the following account, which is therefore not exhaustive.<sup>2</sup>

Some issues of a procedural nature will be set out under a specific heading (A), since the clarification of the law provided by certain decisions is worthy of emphasis.

## A. Procedural aspects

### 1. Default proceedings

The delivery of judgments by default is extremely rare. In order for such a judgment to be delivered, a defendant on whom an application initiating proceedings has been duly served must fail to lodge a defence to the application in the proper form within the time prescribed and the applicant must apply to the Court of First Instance for judgment by default.

It was in accordance with those provisions that the Court of First Instance, following the Commission's failure to lodge a defence within the prescribed period, delivered judgments by default in favour of five banks which had been fined for their participation in an agreement relating to commission charged on exchange transactions in respect of euro-zone banknotes. By its judgments of 14 October 2004 in Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission*, not yet published in the ECR, Case T-44/02 *Dresdner Bank v Commission*, not published in the ECR, Case T-54/02 *Vereins- und Westbank v Commission*, not published in the ECR, Case T-60/02 *Deutsche Verkehrsbank v Commission*, not published in the ECR, and Case T-61/02 *Commerzbank v Commission*, not published in the ECR, the Court annulled the Commission decision<sup>3</sup> after finding that the applicants' submissions appeared to be well founded. The Court held that the matters put forward by the applicants in their applications enabled it to conclude that the existence of the agreement was not sufficiently proven, as regards both the fixing of the prices for currency exchange services in the euro-zone currencies and also the ways of charging those prices. The aggregate amount of the fines imposed

<sup>2</sup> In particular, this account does not deal with decisions in customs cases since they very largely involve the application to particular cases of solutions that are already well established (inter alia judgments of 12 February 2004 in Case T-282/01 *Aslantrans v Commission*, of 21 September 2004 in Case T-104/02 *Société française de transports Gondrand Frères v Commission*, and of 14 December 2004 in Case T-332/02 *Nordspedizionieri di Danielis Livio & C. and Others v Commission*, none yet published in the ECR). Nor, for identical reasons, does this account include judgments concerning the annulment of decisions reducing or cancelling Community financial assistance, whether granted under the European Regional Development Fund (ERDF) (judgment of 14 September 2004 in Case T-290/02 *Ascontex v Commission*, not yet published in the ECR) or under the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section (judgment of 28 January 2004 in Case T-180/01 *Euroagri v Commission*, not yet published in the ECR; under appeal, Case C-153/04 P).

<sup>3</sup> Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/E – 1/37.919 (ex 37.391) – Bank charges for exchanging euro-zone currencies – Germany) (OJ 2003 L 15, p. 1).

on the five banks by the Commission in the annulled decision amounted to more than EUR 100 000 000.

The Commission has applied for the setting aside of those judgments, as the relevant provisions allow.

## **2. Raising of an absolute bar to proceedings by the Court of its own motion**

An absolute bar to proceedings may, and even must, be considered by the Community judicature of its own motion. Such a bar may therefore be pleaded by the parties at any stage in the proceedings, whether it relates to the admissibility of the action or to the legality of the contested measure.

The Court of First Instance has thus considered of its own motion absolute bars to proceedings, which include bars relating to the time-limit for bringing an action (judgment of 28 January 2004 in Joined Cases T-142/01 and T-283/01 *OPTUC v Commission*, not yet published in the ECR), to whether the contested measure is of a challengeable nature (orders of 29 April 2004 in Case T-308/02 *SGL Carbon v Commission* and of 13 July 2004 in Case T-29/03 *Comunidad Autónoma de Andalucía v Commission*, neither yet published in the ECR), to the interest of the applicant in obtaining the annulment of the contested measure (judgment of 28 September 2004 in Case T-310/00 *MCI v Commission*, not yet published in the ECR) and to standing to bring proceedings (judgments of 7 July 2004 in Joined Cases T-107/01 and T-175/01 *Sacilor-Lormines v Commission* and of 1 December 2004 in Case T-27/02 *Kronofrance v Commission*, neither yet published in the ECR).

It has also considered, in so far as it constitutes an absolute bar to proceedings, the bar arising from infringement of essential procedural requirements, which encompasses the lack of a statement of reasons for the contested measure or an inadequate statement of reasons (judgment of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke v Commission*, not yet published in the ECR, paragraphs 126 and 210; under appeal, Case C-411/04 P). On the other hand, the Court held that a breach of the rights of the defence, which by its nature is subjective, does not fall within the scope of an infringement of essential procedural requirements and, therefore, is not to be raised by the Court of its own motion (judgment of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, not yet published in the ECR, paragraph 425; under appeal, Cases C-403/04 P and C-405/04 P).

## **3. Costs**

Where a party is unsuccessful before the Court of First Instance, he must in principle bear, in addition to his own costs, those of the opposing party. In accordance with the Rules of Procedure of the Court of First Instance, recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court of First Instance and, second, to those necessarily incurred for that purpose.

The amount of the costs to be recovered is frequently a ground for dispute. The Commission thus regarded as excessive the amounts claimed by the representatives of the companies Airtours and Schneider Electric after the Court of First Instance had

annulled the decisions respectively prohibiting Airtours from acquiring First Choice (Case T-342/99 *Airtours v Commission* [2002] ECR II-2585) and Schneider Electric from acquiring Legrand (Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071) as well as a decision ordering a separation of the undertakings (Case T-77/02 *Schneider Electric v Commission* [2002] ECR II-4201).

In an order of 28 June 2004 in Case T-342/99 DEP *Airtours v Commission*, not yet published in the ECR, the Court observed that the sum which Airtours sought to recover from the Commission amounted to more than GBP 1 700 000. The Commission, for its part, had assessed initially at GBP 130 000, and then at GBP 170 000, the costs incurred by Airtours.

For the purpose of fixing the amount recoverable, the Court held, in particular, that where a client decides to be represented by both a solicitor and counsel, it is possible for the fees due to each of them to be regarded as costs necessarily incurred for the purpose of the proceedings. The Court stated that in those circumstances, however, it must examine the extent to which the services supplied by all the advisers concerned were necessary for the conduct of the legal proceedings and satisfy itself that the fact that both categories of lawyers were instructed did not entail any unnecessary duplication of costs. That was partially the case in this instance.

It also held that the essentially economic nature of the findings made by the Commission in the context of merger control may justify the involvement of economic advisers or experts specialising in that field to supplement the legal advisers' work, thus resulting in costs that are recoverable. The costs of that nature were, however, considered excessive by the Court.

Finally, where an applicant is subject to value added tax, as Airtours was, it is entitled to recover from the tax authorities value added tax paid on goods and services purchased by it. Since this tax does not represent an expense for it, it cannot claim reimbursement of the tax on costs which are recoverable.

In the light of those considerations, and of the importance of the case from the point of view of Community competition law, the numerous and complex economic and legal questions which were examined by the advisers, the financial interest that Airtours had in the case and the amount of work generated by the court proceedings for the legal and economic advisers, the Court set the total amount of costs that Airtours could recover at slightly less than GBP 490 000.

By order of 29 October 2004 in Case T-310/01 DEP *Schneider Electric v Commission*, not published in the ECR, the Court set the amount to be recovered by Schneider Electric, the Commission having refused to pay the sum of roughly EUR 830 000. This sum was claimed in respect, essentially, of the fees and disbursements of Schneider Electric's advisers incurred for the purpose of the procedure before the Court that resulted in annulment of the decision prohibiting the merger between Schneider Electric and Legrand.

While acknowledging the great complexity of the case, its financial importance to the applicant, its interest from the point of view of Community law and the complexity of the economic and legal questions raised by it, the Court held that the number of chargeable

hours put forward by the lawyers in support of their claim was excessive. In the light of all those factors, the total amount of costs was reduced to almost EUR 420 000.

For reasons of the same nature, the amount of the costs relating to the proceedings for interim relief and to the proceedings that resulted in annulment of the decision ordering Schneider to sell as a whole the assets held in Legrand, which had been assessed at EUR 830 000, was set at almost EUR 427 000 (order of 29 October 2004 in Case T-77/02 DEP *Schneider Electric v Commission*, not published in the ECR).

## **B. Admissibility of actions brought under Article 230 EC**

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

The fifth paragraph of Article 230 EC provides that an action for annulment is to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

### **1. Measures against which an action may be brought**

It is settled case-law that only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC.

By contrast, as recalled in the order in *SGL Carbon v Commission*, cited above, a measure which merely confirms a previous decision not contested within the time-limit for initiating proceedings is not a reviewable act. That is so in the case of a measure which contains no new factor as compared with the previous decision and was not preceded by a re-examination of the circumstances of the person to whom that decision was addressed. The Court points out, however, that the question whether a measure is confirmatory cannot be determined solely with reference to its content as compared with that of the previous decision which it confirms. The nature of the contested measure must also be appraised in the light of the nature of the request to which it constitutes a reply. In particular, if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the administration is requested to reconsider its previous decision, that measure cannot be regarded as merely confirmatory in nature, since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision. The Court held that the Commission was fully entitled to maintain that the letter which it had sent to the applicant was not in the nature of a decision because, even if the financial information supplied by the applicant was new, that information was not capable of substantially altering the applicant's legal

situation as at the date of the previous decision, which was not contested within the time-limit for initiating proceedings.

Also, the Court has held that where, in the context of an action for annulment, the contested measure is negative, it must be appraised in the light of the nature of the request to which it constitutes a reply. In particular, the refusal by a Community institution to withdraw or amend a measure may constitute a measure whose legality may be reviewed under Article 230 EC only if the measure which the Community institution refuses to withdraw or amend could itself have been contested under that provision (order of 15 March 2004 in Case T-139/02 *Institouto N. Avgerinopoulou and Others v Commission*, not yet published in the ECR, and *Comunidad Autónoma de Andalucía v Commission*, cited above). In this regard, the Court held in *Comunidad Autónoma de Andalucía v Commission* that a letter from the Director-General of the European Anti-Fraud Office (OLAF) informing the applicant that it was not possible to investigate its complaint directed against the final report which was drawn up by OLAF following an external investigation and forwarded to the competent Spanish authorities in accordance with Article 9 of Regulation No 1073/1999<sup>4</sup> could not be regarded as a decision against which proceedings could be brought, since that report did not constitute a measure producing binding legal effects such as to affect the applicant's interests, but a recommendation or an opinion lacking binding legal effects.

## 2. Time-limit for bringing an action

While the Court was called on in a number of decisions to verify whether the time-limit for bringing an action was complied with (judgment of 28 January 2004 in Joined Cases T-142/01 and T-238/01 *OPTUC v Commission*, not yet published in the ECR, and order of 25 May 2004 in Case T-264/03 *Schmoltdt and Others v Commission*, not yet published in the ECR (under appeal, Case C-342/04 P), it is the order of 9 November 2004 in Case T-252/03 *FNICG v Commission*, not yet published in the ECR, that is to be focused upon.

In an action brought by the Fédération nationale de l'industrie et des commerces en gros des viandes (French National Federation for the Meat Industry and Meat Wholesalers (FNICGV)) for annulment, on the basis of Article 229 EC, of the fine which the Commission had imposed on it for breach of the competition rules,<sup>5</sup> the Court observed that this article of the Treaty does not enshrine the 'action under the Court's unlimited jurisdiction' as an autonomous remedy. Indeed, this provision, which states that 'regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of [the EC] Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations', is not mentioned in Article 225(1) EC, as amended by the Treaty of Nice, among the types of action falling within the jurisdiction of the Court of First Instance.

<sup>4</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

<sup>5</sup> Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 – French beef) (OJ 2003 L 209, p. 12).

Since that unlimited jurisdiction can be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment, an action in which the Community judicature is asked to exercise its unlimited jurisdiction must be brought within the time-limit laid down by the fifth paragraph of Article 230 EC, which was not the case in this instance.<sup>6</sup>

### 3. Legal interest in bringing proceedings

In the case between MCI, formerly called WorldCom, and the Commission, the Court found that MCI had an interest in obtaining the annulment of the Commission decision prohibiting it from merging with Sprint even though that decision was adopted after withdrawal of the notification.

The Court held in its judgment in *MCI v Commission*, cited above, that the applicant had an interest in obtaining the annulment of a decision by which the Commission refused to regard the parties' statement as amounting to a formal withdrawal of the notified agreement, when the applicant had vainly sought to prevent adoption of the decision by formally stating that it was abandoning the notified merger transaction with which the decision deals. The Court added that, as long as the Commission decision continues to stand, the undertaking is prevented by law from merging with the other party to the notified transaction, at least in the configuration and under the conditions put forward in the notification, should it again have the intention to do so. The fact that the undertaking does not necessarily have that intention, or that it will perhaps not carry it out, is, in this respect, a purely subjective circumstance that cannot be taken into account when assessing its interest in bringing proceedings for the annulment of a measure which, unquestionably, produces binding legal effects such as to affect its interests by bringing about a distinct change in its legal position.

### 4. Standing to bring proceedings

So far as concerns the circumstances in which an applicant is regarded as directly concerned by the measure whose annulment he seeks, the Court recalled that a Community measure is of direct concern to an individual if it directly produces effects on his legal position and its implementation leaves no discretion to the addressees of the measure, implementation being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules. The order in *Institouto N. Avgerinopoulou and Others v Commission*, cited above, and the order of 8 July 2004 in Case T-341/02 *Regione Siciliana v Commission*, not yet published in the ECR (under appeal, Case C-417/04 P), dismiss for lack of direct interest (i) an action, brought by private parties not appearing among the final beneficiaries of the measures envisaged, for annulment of a Commission decision addressed to the Hellenic Republic approving a draft operational programme for the purposes of the regulation on structural funds<sup>7</sup> and (ii) an action for annulment of a Commission decision addressed to the Italian Republic terminating financial assistance from the European

<sup>6</sup> The other actions brought against the decision mentioned in the preceding footnote are still pending before the Court (Case T-217/03 *Fédération nationale de la coopération bétail et viande v Commission* and Case T-245/03 *FNSEA and Others v Commission*).

<sup>7</sup> Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

Regional Development Fund (ERDF) in relation to a motorway project between Messina and Palermo, which had been brought by the authority responsible for carrying out the project, namely the Region of Sicily. In both orders the Court found that the national authorities had a discretion in implementing the contested measures.

So far as concerns the circumstances in which an applicant is regarded as individually concerned by a measure which is not addressed to him, it should be noted that the new interpretation of the criterion for determining whether applicants are individually concerned, which was adopted in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, now clearly belongs to the past. After the Court of Justice had decided to confirm its interpretation of the concept of individual concern in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 (see also the judgment of the Court of Justice of 1 April 2004 in Case C-236/02 P *Commission v Jégo-Quéré*, not yet published in the ECR, setting aside the judgment of the Court of First Instance in Case T-177/01), the Court of First Instance examined the concept of individual concern in the cases before it by reference to the formula laid down in Case 25/62 *Plaumann v Commission* [1963] ECR 95. Thus, in order for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

Where a legal person bringing an action for annulment is an association of undertakings, it may, when it has taken part in the procedure leading to the adoption of the contested measure, be granted standing in at least three kinds of circumstances: where a legal provision expressly grants it a series of procedural powers; where the association itself is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the measure whose annulment is being sought; and where it represents the interests of undertakings which would themselves be entitled to bring proceedings. In its order of 10 May 2004 in Case T-391/02 *Bundesverband der Nahrungsmittel- und Speiseresteverwertung and Kloh v Parliament and Council*, not yet published in the ECR, and in *Schmoldt and Others v Commission*, cited above, the Court, in particular, refused to accept that the applicant associations had occupied a clearly circumscribed position as negotiator which was intimately linked to the subject-matter of the contested measure.

#### a) *Decisions*

In the field of State aid, actions mainly seek the annulment either of a decision taken without opening the formal investigation procedure referred to in Article 88(2) EC or of a decision taken at the end of that procedure. Since those decisions are addressed to the Member State concerned, it is for the undertaking, which is not the addressee, to show that that measure is of direct and individual concern to it.

Where the Commission, without opening the formal investigation procedure, finds in the course of a preliminary investigation that State aid is compatible with the common

market, the parties concerned within the meaning of Article 88(2) EC, who are entitled to the guarantees of the formal investigation procedure when it is implemented, must be regarded as individually concerned by the decision making that finding.

In the judgment of 16 March 2004 in Case T-157/01 *Danske Busvognmaend v Commission*, not yet published in the ECR, a trade association representing the interests of the majority of Danish bus companies was recognised as having the status of a 'party concerned', on the ground that it made a complaint to the Commission, that its interventions influenced the course of the administrative procedure and that at least some of its members were in competition with the undertaking which benefited from the disputed aid.

In the judgment of 1 December 2004 in Case T-27/02 *Kronofrance v Commission*, not yet published in the ECR, the Court held that the applicant, who had pleaded the failure to open the formal investigation procedure, was indeed a 'party concerned' in light of its status as a competitor, a status established by having regard to the identity of the products manufactured by it with those of the undertaking benefiting from the aid and to the fact that their sales areas overlapped.

In the judgment of 13 January 2004 in Case T-158/99 *Thermenhotel Stoiser Franz and Others v Commission*, not yet published in the ECR, hotel operators in a tourist resort in the Province of Styria (Austria) were entitled to challenge the legality of a Commission decision declaring the public financing of the construction of a luxury hotel in the same resort to be compatible with the common market. The Court observed that the applicants were direct competitors of the hotel receiving the aid in question and that they were recognised as having this status in the contested decision.

In the above three cases it was held that the applicant undertakings were, in their capacity as parties concerned within the meaning of Article 88(2) EC, individually concerned by the decisions declaring at the end of the preliminary investigation procedure that aid was compatible with the common market. It should nevertheless be noted, with regard to the extent of the review of the pleas, that in one instance the Court regarded the pleas for annulment in their entirety as seeking to establish that the Commission had unlawfully failed to open the formal investigation procedure (*Thermenhotel Stoiser Franz and Others v Commission*), whereas in another instance it annulled on the merits the decision approving the grant of aid (*Danske Busvognmaend v Commission*).

Where the contested decision has been adopted at the end of the formal investigation procedure provided for by Article 88(2) EC, it is not sufficient, in order for an undertaking to be distinguished individually in the same way as the addressee of the decision, that it has the status of a 'party concerned'. According to the case-law, such a decision is of individual concern to the undertakings which were at the origin of the complaint which led to that procedure and whose views were heard and determined the conduct of the procedure, provided, however, that their position on the market is substantially affected by the aid which is the subject of that decision.

Applying those criteria identified for the first time by the Court of Justice in Case 169/84 *COFAZ and Others v Commission* [1986] ECR 391, the Court of First Instance held that

the Austrian company Lenzing was individually concerned by a Commission decision concerning the State aid granted by the Kingdom of Spain to the company Sniace, since Lenzing, a competitor of the recipient company, first, was at the origin of the complaint that led to the opening of the procedure and participated actively in the procedure and, second, provided information such as would show that its position on the market was substantially affected by the contested decision, for instance information concerning the characteristics of the market in question, namely a very limited number of producers, fierce competition and significant production surpluses (judgment of 21 October 2004 in Case T-36/99 *Lenzing v Commission*, not yet published in the ECR; under appeal, Case C-525/04 P).

On the other hand, by order of 27 May 2004 in Case T-358/02 *Deutsche Post and DHL v Commission*, not yet published in the ECR (under appeal, Case C-367/04 P), the Court found that Deutsche Post and DHL International, two companies operating on the Italian market in postal services open to competition, had not played an active role during the administrative procedure which preceded the adoption of the decision relating to State aid granted by the Italian Republic in favour of Poste Italiane. It therefore examined whether the measure authorised by that decision was nevertheless liable to affect significantly their position on the market in question and concluded, in the absence of sufficient proof of the magnitude of the prejudice to their position on the market, that that was not the case.

b) *Measures of general application*

The Court did not fail to recall that although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for annulment of measures of general application, the mere fact that the contested measure is of general application is not sufficient to render such an action inadmissible.

None the less, after analysing whether the private persons were individually concerned by the measures of general application whose legality they put in issue, the Court concluded that they were not and dismissed actions for the annulment of regulations (order of 6 July 2004 in Case T-370/02 *Alpenhain-Camembert-Werk and Others v Commission*, not yet published in the ECR),<sup>8</sup> directives (order of 6 September 2004 in Case T-213/02 *SNF v Commission*, not yet published in the ECR (under appeal, Case C-482/04 P)),<sup>9</sup> and decisions of general application (*Schmoldt and Others v Commission*, cited above).

<sup>8</sup> By this order the Court dismissed an action for annulment of Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name 'Feta' (OJ 2002 L 277, p. 10), by which 'Feta' was added as a protected designation of origin.

<sup>9</sup> By this order the Court dismissed an action for partial annulment of the Twenty-sixth Commission Directive (2002/34/EC) of 15 April 2002 adapting to technical progress Annexes II, III and VII to Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (OJ 2002 L 102, p. 19) in so far as it restricts the use of polyacrylamides in the composition of cosmetic products.

## C. Competition rules applicable to undertakings

The points raised in this area in 2004 are primarily concerned with questions relating to the procedure before the Commission and the determination of the amounts of fines. The decisions of the Court of First Instance in the 'graphite electrodes'<sup>10</sup> and 'seamless steel tubes and pipes'<sup>11</sup> cases are the main cases dealt with below.

In *Tokai Carbon and Others v Commission*, cited above, the eight United States, German and Japanese undertakings which participated in the cartel – seeking, on a worldwide scale, to fix prices and to share national and regional markets according to the 'home producer' principle in the graphite electrodes sector (graphite electrodes are used mainly in the production of steel in electric arc furnaces) – were fined a total of approximately EUR 220 million by the Commission,<sup>12</sup> the individual fines varying between EUR 10.3 million and 80.2 million.

In the 'seamless steel tubes and pipes' case, the Commission ordered eight producers (four European companies and four Japanese companies) of certain types of seamless steel tubes used in the oil and gas industry to pay fines amounting to EUR 99 million for infringing Article 81 EC.<sup>13</sup> The Commission found that each undertaking had undertaken not to sell standard borehole tubes and certain types of line pipe on the national market of any other undertaking participating in the agreement.

The actions brought in those cases (by seven undertakings in the 'graphite electrodes' and also by seven undertakings in the 'seamless steel tubes and pipes' cases) reveal, thus confirming a tendency already observed, that it is now rare for undertakings which are fined for infringing Article 81 EC to challenge the legal classification of the infringements and the evidence of their participation in the agreement. They now essentially dispute the determination of the amount of the fines, claiming that there has been an incorrect application of the rules which the Commission has imposed upon itself in setting fines, in particular the Guidelines on the method of setting fines imposed under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ('the Guidelines')<sup>14</sup> and the Notice

<sup>10</sup> Judgment of 29 April 2004 in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission*, not yet published in the ECR (under appeal, Cases C-289/04 P, C-301/04 P, C-307/04 P and C-308/04 P).

<sup>11</sup> Judgments of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke v Commission* (under appeal, Case C-411/04 P); Case T-48/00 *Corus UK v Commission*; Case T-50/00 *Dalmine v Commission* (under appeal, Case C-407/04 P); and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* (under appeal, Cases C-403/04 P and C-405/04 P); none yet published in the ECR.

<sup>12</sup> Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement – Case COMP/E-1/36.490 – Graphite electrodes (OJ 2002 L 100, p. 1).

<sup>13</sup> Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003, L 140, p. 1).

<sup>14</sup> OJ 1998 C 9, p. 3.

on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').<sup>15</sup> As explained below, the Court of First Instance recognises that the Commission has a margin of discretion, indeed a very wide margin of discretion, depending on the case, in applying the criteria for determining the amount of fines. However, the Court scrupulously ensures that the undertakings fined for having participated in the same cartel are treated in accordance with the principle of equal treatment.

It will also be recalled that the Court of First Instance may exercise its unlimited jurisdiction not only to reduce fines but also to increase them. The reduction by the Court of the overall amount of the fines imposed on the applicants by the Commission in the 'graphite electrodes' and 'welded steel tubes and pipes' cases (from EUR 207 200 200 to EUR 152 772 400) in the 'graphite electrodes' case and from EUR 90 900 000 to EUR 78 120 000 in the 'seamless steel tubes and pipes' case) is a result which merits some qualification (see below).

As no judgment has entailed an adjudication on the lawfulness of decisions adopted under Article 82 EC (as far as 2004 is concerned, *Microsoft v Commission* was dealt with by the judge responsible for granting interim relief; see below) and the only decision relating to Regulation No 4064/89 concluded that the Commission was not competent to deal with the matter (judgment of 28 September in Case T-310/00 *MC/ v Commission*, not yet published in the ECR), the developments relating to Article 81 EC and the sanctions imposed for infringement of that provision will constitute the essential part of this section on competition law.

## 1. Points raised in the case-law on the scope of Article 81 CE

### a) *Scope ratione materiae*

In Case T-313/02 *Meca-Medina and Majcen v Commission* (judgment of 30 September 2004, not yet published in the ECR; under appeal, Case C-519/04 P), the Court of First Instance had occasion to apply the concept of economic activity to sport. In its judgment, the Court upheld the Commission's decision rejecting the complaint lodged by two professional athletes who compete in long-distance swimming events. Those two athletes, who were suspended under the Olympic Movement's Anti-Doping Code after testing positive for nandrolone, had claimed before the Commission that the International Olympic Committee's anti-doping rules infringed the Community rules on competition and the free movement of services.

The Court recalled that, according to the settled case-law of the Court of Justice, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC. The provisions of the EC Treaty on free movement of workers and services apply to the rules adopted in the field of sport which concern the economic aspect which sporting activity can present. That applies, in particular, to the rules providing for the payment of fees for the transfer of professional players between clubs (transfer clauses) or limiting the number of professional players who are nationals of other Member States which those clubs may field in matches. On the other hand, Community law does not extend to what are purely sporting rules which for that reason have nothing to do with

<sup>15</sup> The 1996 Leniency Notice was replaced in 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

economic activity, like the rules on the composition of national teams or 'the rules of the game' fixing, for example, the length of matches or the number of players on the field.

After noting that the Court of Justice had not, in cases concerning Article 39 EC et seq. and Article 49 EC et seq., had to rule on whether sporting rules are subject to the Treaty provisions on competition, the Court of First Instance considered that the principles identified in respect of free movement of workers and services are equally valid as regards the provisions of the EC Treaty relating to competition and that the opposite is also true. It follows that purely sporting legislation does not come under either the Community provisions on free movement of persons and services or the provisions on competition.

b) *Competition procedure*

– **Access to the file**

The rule that undertakings being investigated under Articles 81 EC and 82 EC must have access to the Commission's file is now clearly recognised in Community law. That rule has its basis in the principle of equality of arms and is therefore essential to the exercise of the rights of the defence. None the less, there are limits to the rule, which seek to protect the Commission's decision-taking process or the legitimate interests of third parties.

In *Tokai Carbon and Others v Commission*, cited above, the Court of First Instance first observed that, in order to allow the undertakings concerned to defend themselves effectively against the objections raised against them in the statement of objections, the Commission is required to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission. As regards those internal documents, the restriction of access to them is justified by the need to ensure the proper functioning of the Commission when it deals with infringements of the Treaty competition rules; internal documents can be made available only if the exceptional circumstances of the case so require, on the basis of serious evidence which it is for the party concerned to provide, both before the Community Court and in the administrative procedure conducted by the Commission.

– **The scope of the Statement of Objections**

The function of the Statement of Objections is well established: it must enable those concerned to be fully aware of the conduct in respect of which the Commission criticises them and to exercise their rights of defence effectively. That requirement is satisfied where the final decision does not impute to the parties concerned infringements different from those referred to in the statement of objections and sets out only facts in respect of which the parties concerned have had the opportunity to provide an explanation.

In its judgment of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke v Commission*, not yet published in the ECR (under appeal, Case C-411/04 P), the Court of First Instance recalled that the rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the decision was not set out in the statement of objections in a manner sufficient to enable

the addressees to defend their interests. The obligation placed on the Commission in connection with a statement of objections is limited to setting out the objections and to specifying clearly the facts upon which it relies and its classification of those facts, so that the addressees of the statement of objections are able to defend their interests. In that regard, the Court held that the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis, specifically in order to respect their rights of defence.

– **Consequences of an express acknowledgement of the facts during the administrative procedure**

Where the undertaking involved in an infringement of the competition rules does not expressly acknowledge the facts, the Commission must prove the facts and the undertaking is free to put forward, in the procedure before the Court, any plea in its defence which it deems appropriate. On the other hand, that is not the case where the undertaking *expressly, clearly and specifically acknowledges the facts*: where the undertaking explicitly admits during the administrative procedure the substantive truth of the facts which the Commission alleges against it in the statement of objections, those facts must thereafter be regarded as established and the undertaking estopped in principle from disputing them during the procedure before the Court (*Tokai Carbon and Others v Commission*, cited above, paragraph 108). In the light of those criteria, the Court considered that an inference made by the Commission on the basis of a range of evidence such as the objective conduct of the undertaking concerned towards the Commission during the administrative procedure and its no-contest statements taken from a wide generality did not constitute such an acknowledgement (*ibid.*, paragraph 109).

In reaching that decision, the Court made specific reference to the finding made in 2003 in the ‘lysine’ cases that the elements of fact on which the Commission relied in determining the amount of the fine could no longer be called in question before the Court if the applicant expressly acknowledged them during the administrative procedure (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597 (under appeal, Case C-397/03 P), commented on in the *Annual Report 2003*).

– **No recognition of an absolute right to silence**

The question has regularly arisen whether the undertakings to which decisions taken under Article 11(5) of Regulation No 17<sup>16</sup> requesting that they communicate certain information are sent have an absolute right to silence. The Court of Justice (Case 374/87

<sup>16</sup> Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

*Orkem v Commission* [1989] ECR 3283 and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375) and the Court of First Instance (Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729) have consistently held that to acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the common market are observed and that a right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove. It has always been inferred that, in order to ensure the effectiveness of Article 11 of Regulation No 17, the Commission is therefore entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct. It follows from those decisions that this power of the Commission to request information does not fall foul of Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

However, the applicants have not been deterred from invoking the judgments of the European Court of Human Rights <sup>17</sup> in an effort to ensure that the Community case-law develops in a way favourable to their case. The Court of First Instance has none the less refused to embark on that road and emphasised in *Tokai Carbon and Others v Commission* that the Commission's power to request information does not fall foul of either Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms or the case-law of the European Court of Human Rights.

In any event, the Court of First Instance observes, the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. There is nothing to prevent the addressee of a request for information from showing, whether later during the administrative procedure or in proceedings before the Community Courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different scope from that ascribed to them by the Commission.

<sup>17</sup> *Funke v France* judgment of 25 February 1993, Series A No 256-A, § 44a; *Saunders v United Kingdom* judgment of 17 December 1996, Reports of judgments and decisions, 1996-VI, p. 2044; and *J.B. v Switzerland* judgment of 3 May 2001, not yet published in the Reports of judgments and decisions.

– **Reasonable time**

The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of Community law whose observance is ensured by the Community judicature (Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739).

In its judgment of 13 January 2004 in Case T-67/01 *JCB Service v Commission*, not yet published in the ECR (under appeal, Case C-167/04 P), the Court of First Instance had occasion to recall that infringement of that principle is capable of vitiating the decision adopted by the Commission at the close of the administrative procedure only if it is shown that it also entails infringement of the rights of defence of the undertaking concerned. In that case, although the Commission flagrantly breached its obligation to comply with such a time-limit when examining an application for exemption under Article 81(3) EC when it rejected an application for exemption 27 years after an agreement was notified to it in 1973, the Court of First Instance held that that breach had not affected the lawfulness of the rejection of the application for exemption.

As regards the period of more than four years taken to investigate the complaint lodged by a competitor of the party which notified the agreements in issue, the Court of First Instance did not find it excessive, given the complexity of the case, which involved several Member States and covered five heads of infringement, and the need to draw up a second statement of objections.

c) *Proof of the infringement of Article 81 EC*

It is for the Commission to demonstrate the circumstances constituting an infringement of Article 81 EC (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). The Commission must, in particular, demonstrate the duration of the infringement in respect of which it is imposing a sanction. The challenges mounted by the applicants in the 'seamless steel tubes and pipes' cases helped to clarify a number of aspects relating to the level of proof required and also to the burden of proof before the Court of First Instance when the evidence adduced by the Commission is disputed by the undertakings concerned.

In those cases, the Commission had not adduced evidence of the entire duration of the infringement. In order to determine the duration of the infringement, the Commission took the view that, although the Europe-Japan club had first met in 1977, 1990 should be taken as the starting date of the infringement because, between 1977 and 1990, agreements on the voluntary restraint of exports had been concluded between the European Community and Japan.

The Court noted that none of the parties had challenged the Commission's position, consisting in not setting the starting date of the infringement as 1977 because of the existence of the voluntary restraint agreements. When the applicants disputed the starting date of the infringement, however, the Court observed that the alleged cessation of the voluntary restraint agreements constituted the decisive criterion for the purpose of

determining whether 1990 should be taken as the starting date for the infringement. In that regard, the Court recalled that, in principle, it is for the applicant to adduce evidence of its claims. None the less, the Court found that, in the specific circumstances of the case, it was incumbent on the Commission to produce evidence of the date of cessation of the international voluntary restraint agreements. It was held that that evidence had not been produced, after the Court considered that '[t]he Commission's inexplicable inability to produce evidence relating to a circumstance which concern[ed] it directly [made] it impossible for the Court to give a ruling in full knowledge of the facts concerning the date of cessation of those agreements'.

In the absence of evidence adduced by the Commission, and faced with evidence adduced by the Japanese undertakings that the international agreements had been extended until 31 December 1990, at least at the Japanese level, the Court considered that those agreements had remained in force until the end of 1990. The contested decision was annulled in part on that point and the amount of the fines reduced accordingly.

The Japanese undertakings also disputed the date on which the infringement in which they were found to have participated came to an end. The Court held that, on the basis of the evidence adduced by the Commission, the existence of the infringement had not been established, so far as the Japanese undertakings were concerned, after 1 July 1994 and that, accordingly, the duration of the infringement must be reduced by six months in addition to the reduction of one year indicated above. Consequently, the Court annulled the contested decision in so far as it established the existence of the infringement before 1 January 1991 and, so far as the Japanese undertakings were concerned, beyond 30 June 1994, and the fines imposed on the undertakings were reduced accordingly (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, not yet published in the ECR; under appeal, Cases C-403/04 P and C-405/04 P).

#### d) *Fines*

Under Article 15 of Regulation No 17,<sup>18</sup> where the Commission finds an infringement of Article 81 EC or Article 82 EC, it may, by decision, not only require the undertakings to bring the infringement to an end, but also impose fines on them. The amount of the fine, which may be up to 10% of the worldwide turnover in the business year preceding the adoption of the decision making a finding of infringement of each of the undertakings participating in the infringement, is determined in the light of the gravity and the duration of the infringement.

<sup>18</sup> Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (OJ 2003 L 1, p. 1) is identical to Article 15 of Regulation No 17.

## – Guidelines

As regards, first, the Guidelines, the Court of First Instance recalled, as it had already held in the judgments in the ‘district heating’,<sup>19</sup> ‘Lysine’<sup>20</sup> and ‘FETTSCA’<sup>21</sup> cases, that the Guidelines are binding on the Commission. The Commission must therefore comply with the rules which it has imposed upon itself (*Mannesmannröhren-Werke v Commission*, cited above, paragraphs 212 and 231), unless it sets out expressly its reasons for departing from them in any particular regard (*Tokai Carbon and Others v Commission*, cited above, paragraph 352). The undertakings may therefore invoke the incorrect application of the Guidelines before the Community Courts.

As regards, second, certain more particular provisions of the Guidelines, the Court has defined the conditions for the application of the criteria set for determining the amount of the fine in the light of the gravity of the infringement and also of its duration.

## Gravity

In its decision in the ‘graphite electrodes’ case, the Commission had concluded that the infringement was ‘very serious’, regard being had to the nature of the infringement, its actual impact on the graphite electrodes market in the EEA and the size of the relevant geographic market. The Court approved the approach taken by the Commission. It considered, in particular, that since the cartel sought to share the markets at worldwide level, the Commission had not made a manifest error of assessment in choosing the worldwide turnover achieved from sales of the relevant product for the purposes of determining the starting amount, because, in the Court’s view, that turnover allowed the Commission to take account of ‘the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers’, within the meaning of point 1.A, fourth paragraph, of the Guidelines.<sup>22</sup>

<sup>19</sup> Judgments of 20 March 2002 in 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 Technologie 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); these judgments are commented on in the *Annual Report 2002*.

<sup>20</sup> In particular, the judgment of 9 July 2003 in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* (under appeal, Case C-397/03 P); the judgments delivered in the ‘Lysine’ cases were commented on in the *Annual Report 2003*.

<sup>21</sup> Judgment of 19 March 2003 in Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, concerning the FETTSCA agreement; this judgment was commented on in the *Annual Report 2003*.

<sup>22</sup> Point 1 A of the Guidelines states that ‘[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market’. It also follows from point 1 that it is possible to ‘apply weightings to the amounts determined within each of the three categories [of gravity] in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition’.

The Commission had also divided the undertakings concerned into three categories, on the basis of the worldwide turnover of each undertaking in sales of the product concerned, in order to take account of the actual economic capacity of each undertaking to cause significant harm to competition and of the great disparity in size between the undertakings. On that point, the Court observed that the Commission was entitled to divide the members of a cartel into several categories for the purposes of setting the amount of fines. Although that categorisation ignored the differences in size between undertakings in the same category, it could not in principle be condemned. However, the thresholds determined for each of the categories thus identified must be coherent and objectively justified. In the present case, the Court held that the method of differentiation used in the decision, which was based on turnover and market shares, had not been correctly applied by the Commission vis-à-vis Tokai Carbon and the Carbide/Graphite Group, which came in one of the three categories in question. In the exercise of its unlimited jurisdiction, the Court therefore decided to dismantle the category in question and to make its own classification. It also fixed the starting amount of the fines for the undertakings coming within that classification and also for the undertakings in the third category.

Last, in regard to the two undertakings considered the most important, the Commission had applied multipliers for gravity to the starting amount. The Court confirmed that it is in principle possible for the Commission to apply a multiplier for gravity to the starting amounts in order to set the fine at a sufficiently deterrent level (Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, paragraphs 165 to 167; under appeal, Case C-213/02 P). However, the multiplier applied in the present case to SDK (2.5) was held not to comply with the principles of proportionality and equal treatment and the Court, in the exercise of its unlimited jurisdiction, reduced the multiplier applicable to that undertaking to 1.5.

Although, by applying a multiplier, the Commission therefore remains free to increase the level of fines, it also has the option of reducing the starting amount which would result from a strict application of the Guidelines. The Court confirmed that, in the seamless steel tubes and pipes decision, the Commission was entitled, in spite of what was recognised as the 'very serious' nature of the infringement, to take a starting amount (EUR 10 million) corresponding to 50% of the minimum amount mentioned in the Guidelines for infringements in that category (EUR 20 million), in order to take account of the fact that the actual impact of the infringement on the market had been limited.

On the other hand, the Court considered that the Commission had failed to take into consideration the second infringement by the European producers (the contracts relating to the United Kingdom market) when setting the amount of the fine. By that omission, the Commission therefore infringed the principle of equal treatment, since different situations were treated in the same way. In order to remedy that unequal treatment of the European producers and the Japanese producers, the Court reduced the fine imposed on each of the Japanese producers by 10%. As the Commission had not requested it to do so, the Court did not increase the fines imposed on the European producers.

## **Duration**

In its judgment in *Tokai Carbon and Others v Commission*, cited above, the Court of First Instance rejected all the complaints relating to the basic amounts applied in the decision in order to take account of duration.

SGL Carbon maintained that the Guidelines were unlawful in that they envisaged the duration of an infringement in the same way, irrespective of its nature. It maintained that a cartel is by definition long-lasting and that it cannot be treated in the same way for the purpose of duration as other infringements. The Court rejected that argument, observing that certain cartels, being of short duration, are less harmful than they would have been had they been in operation for a long period.

## **Aggravating circumstances**

In *Tokai Carbon and Others v Commission* the Court of First Instance confirmed that the Commission could increase the basic amounts for: (i) continuing the infringement after the Commission had begun its investigations (*ABB Asea Brown Boveri v Commission*, paragraphs 211 to 213); (ii) acting as ringleader (*Archer Daniels Midland and Archer Daniels Midlands Ingredients v Commission*, paragraph 239); and (iii) attempting to impede the procedure by warning other undertakings that dawn raids were imminent (Case T-334/94 *Sarrió v Commission* [1998] ECR II-1439, paragraph 320).

## **Attenuating circumstances**

None of the attenuating circumstances which the Commission was alleged to have failed to take into account was recognised by the Court of First Instance.

### **– The Leniency Notice**

Generally, cooperation which allows the Commission to establish the existence of an infringement with less difficulty and, where appropriate, to put an end to it may be rewarded by a reduction in the fine. The 1996 Leniency Notice defines the conditions in which the benefit of its provisions may be granted.

The findings of the Court of First Instance on the application of that notice by the Commission show that the fact of voluntarily sending the Commission, in answer to a request for information under Regulation No 17, documents and information constituting an admission of having participated in an infringement of the Community competition rules must be regarded as voluntary collaboration on the part of the undertaking of such a kind as to warrant a reduction in the fine. In concluding that that was not the case, the Commission, according to the Court of First Instance, failed to appreciate the importance of the cooperation provided by certain applicants (*Tokai Carbon and Others v Commission*, cited above).

It should also be noted that the Court criticised the Commission for having failed to appreciate the importance of the cooperation of UCAR, which had provided information

such as the names of other undertakings which were members of the cartel, the names of a number of representatives of those members or code names used to conceal contacts, not in documentary form but orally.

Last, while the notice provides, in point A.3, only for a reduction ‘in the fine which would have been imposed upon [the undertakings cooperating with the Commission]’, it does not require that each individual item of information must relate to an infringement of competition law in respect of which a separate sanction may be imposed. In order to be able to benefit from that notice, it is sufficient, therefore, that, by revealing its involvement in an infringement, the undertaking minded to cooperate exposes itself to sanctions, while whether the various items of information may be taken into consideration for the purposes of a possible reduction in the fine depends on how useful they are to the Commission in its task of establishing the existence of the infringement and putting an end to it.

In that last regard, since a disloyal Commission official is in a position to sabotage his institution’s mission by supporting the members of an illegal cartel and may thus considerably complicate the investigation carried out by the Commission, for example by destroying or manipulating evidence, by informing the members of the cartel of a forthcoming unannounced investigation and by revealing the entire investigation strategy drawn up by the Commission, information about the existence of such an official must, in principle, be regarded as being capable of making it easier for the Commission to carry out its task of establishing an infringement and putting an end to it. Such information is particularly useful when it is provided at the beginning of the investigation opened by the Commission into possible anti-competitive conduct.

In *Mannesmannröhren-Werke v Commission*, cited above, the Court of First Instance stated that, in order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with point D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections. In the absence of such an express declaration, mere passivity on the part of an undertaking cannot be considered to facilitate the Commission’s task, since the Commission is required to establish the existence of all the facts in the final decision without being able to rely on a declaration by the undertaking in doing so.

– **The principle *ne bis in idem***

As it has already had occasion to state (*Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, cited above, paragraph 85), the Court of First Instance recalled in *Tokai Carbon and Others v Commission* that the principle *ne bis in idem*, which is also enshrined in Article 4 of Protocol No 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, is a general principle of Community law upheld by the Community judicature. In the field of Community competition law, the principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge.

The question none the less arose as to whether the Commission infringes that principle when it imposes sanctions on undertakings in respect of unlawful conduct which has already been punished by the authorities of non-member States.

On that point, the Court of First Instance considered that the principle *ne bis in idem* does not preclude the possibility of concurrent sanctions, one a Community sanction, the other a national one, resulting from two sets of parallel proceedings which pursue distinct ends. *A fortiori*, that principle cannot apply where procedures are conducted and penalties imposed by the Commission on the one hand and the authorities of non-member States on the other, provided that those procedures do not pursue the same ends.

Furthermore, the Court of First Instance held that the Commission was not required, under a general requirement of natural justice, to take account of penalties imposed by the authorities or the courts of a non-member State which have already been borne by the same undertaking in respect of the same conduct. The conditions on which it may be concluded that there is an obligation to take account of the penalties imposed by an authority of a Member State which have already been borne by the same undertaking in respect of the same conduct are not satisfied where the penalties were imposed by the authorities of non-member States. In those circumstances, given that the applicants pointed to no express provision of a convention requiring the Commission, when determining the amount of a fine, to take account of penalties already imposed on the same undertaking in respect of the same conduct by the authorities or courts of a non-member State, such as the United States or Canada, they could not validly complain that, in the present case, the Commission had failed to satisfy any such alleged obligation.

The principles thus recalled by the Court of First Instance confirm those already identified in the 'Lysine' cases (see, in particular, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, paragraphs 85 to 104).

#### – The exercise of unlimited jurisdiction

Pursuant to Article 17 of Regulation No 17, the Court of First Instance has unlimited jurisdiction within the meaning of Article 229 EC in an action against a decision imposing a fine and may thus cancel, reduce or increase the fine imposed.

The Court has on a number of occasions exercised its unlimited jurisdiction to reduce fines after finding that certain elements of the infringement were not established to the requisite legal standard (*JCB Service v Commission*, paragraph 193) or that the Commission had failed to comply with the Guidelines or the Leniency Notice (*Tokai Carbon and Others v Commission*).

Particular attention should be drawn to the Court's exercise of its unlimited jurisdiction to increase the amount of fines. In *Tokai Carbon and Others v Commission* the Court thus exercised for the first time its unlimited jurisdiction to increase the amount of the fine, at an intermediate stage of the calculation. As the undertaking Nippon had contested before the Court facts which it had previously admitted during the administrative procedure – although without expressly, clearly and specifically acknowledging them – the reduction in the fine initially granted by the Commission was reduced.

The Court further observed that, in the context of its unlimited jurisdiction, its assessment of the appropriateness of the fine could take into account information not mentioned in the Commission decision.

## 2. Regulation No 4064/89

The only decision delivered in the field of concentrations in 2004 was a judgment annulling a Commission decision prohibiting the concentration between the United States telecommunications undertakings WorldCom (now MCI) and Sprint.<sup>23</sup>

However, the judgment of 28 September 2004 in Case T-310/00 *MCI v Commission*, not yet published in the ECR, did not involve a determination of the substance of the case, as the ground of annulment concerned the Commission's lack of power to adopt the decision.

After the parties had jointly notified the merger pursuant to Regulation No 4064/89<sup>24</sup> on 10 January 2000, they formally stated on 27 June 2000 that they were withdrawing their notification and that they no longer intended to implement the proposed merger in the form set out in the notification. On 28 June 2000, the Commission none the less adopted its decision declaring the merger incompatible with the common market and the EEA Agreement.

The Court found that the communication which WorldCom and Sprint sent to the Commission on 27 June 2000 concerned not the abandonment, as a matter of principle, of any idea of, or proposal for, a merger, but only the abandonment of the proposed merger 'in the form presented in the notification', i.e. in the form envisaged by the notified merger agreement. Press releases issued on the same day in the United States by the two undertakings confirmed that at the time WorldCom and Sprint still entertained some hopes of merging their activities in one form or another. In reality, it was only by the press release of 13 July 2000 that the notifying parties announced that they were definitively abandoning their proposed merger. However, the Court of First Instance further stated that a merger agreement capable of forming the subject-matter of a Commission decision does not automatically exist (or continue to exist) between two undertakings simply because they are considering merging (or continue to consider merging). Commission competence cannot rest on the mere subjective intentions of the parties. Just as it does not have the power to prohibit a merger before a merger decision has been concluded, the Commission ceases to have that power as soon as that agreement is abandoned, even if the undertakings concerned continue negotiations with a view to concluding an agreement in a modified form. In that particular case, the Commission should have found that it no longer had the power to adopt the decision.

<sup>23</sup> Commission Decision 2003/790/EC of 28 June 2000 declaring a concentration incompatible with the common market and the EEA Agreement (Case COMP/M.1741 – MCI WorldCom/Sprint) (OJ 2003 L 300, p. 1).

<sup>24</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigendum OJ 1990 L 257, p. 13, since repealed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)).

## **D. State aid**

### **1. The concept of State aid**

#### **a) Constituent elements**

The benefit and the specificity of the State measure are characteristic elements of the concept of State aid within the meaning of Article 87(1) EC.<sup>25</sup> The Commission was condemned on a number of occasions for not having correctly appraised the criteria in question (judgments of 16 March 2004 in Case T-157/01 *Danske Busvognmaend v Commission*, of 16 September 2004 in Case T-274/01 *Valmont Nederland v Commission*, of 21 October 2004 in Case T-36/99 *Lenzing v Commission* and of 1 December 2004 in Case T-27/02 *Kronofrance v Commission*, none yet published in the ECR).

#### **– Advantage**

The concept of State aid covers not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.

Thus, in its judgment of 21 October 2004 in *Lenzing v Commission*, the Court of First Instance held that where public bodies with responsibility for collecting social security contributions tolerate late payment of such contributions, their conduct gives a recipient undertaking in serious financial difficulties, by mitigating, for that undertaking, the burden associated with the normal application of the social security system, a significant commercial advantage which cannot be wholly removed by the interest and default surcharges which it is required to pay. By concluding in that case that those bodies had acted in the same way as a hypothetical private creditor in, so far as possible, the same situation vis-à-vis its debtor as those bodies, the Commission made a manifestly incorrect application of the private creditor test; and, accordingly, the Court annulled the contested decision.

It was also by reference to the private creditor test that the Court of First Instance determined whether the Commission had been entitled to conclude that the reduction of some of the debts of the German company Technische Glaswerke Ilmenau to the public-law body responsible for the restructuring of undertakings of the former German Democratic Republic ('the BvS') constituted State aid. The restricted review which the court carries out of the complex economic appraisals of that nature led to the conclusion that, in the light of the circumstances of the case, the Commission had not committed a

<sup>25</sup> As established in Article 87(1) EC, a State aid incompatible with the common market is an advantage, granted by the State or through State resources in any form whatsoever in favour of certain undertakings or the production of certain goods, which affects trade between Member States and which distorts or threatens to distort competition.

manifest error of assessment in finding that the BvS had not behaved like a private creditor operating under normal market conditions. As none of the other pleas was upheld, the action for annulment was dismissed (judgment of 8 July 2004 in Case T-198/01 *Technische Glaswerke Ilmenau v Commission*, not yet published in the ECR; under appeal, Case C-404/04 P).

In its judgment in *Valmont Nederland v Commission*, moreover, the Court of First Instance adopted for the first time the solution arrived at by the Court of Justice in its judgment of 24 July 2003 in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, according to which State intervention in favour of an undertaking in return for discharging public service obligations does not constitute aid, provided that a number of conditions are satisfied.<sup>26</sup>

In that case, the Commission had considered that the financing granted by a Netherlands municipality to an undertaking to construct a car park constituted State aid in part, on the ground that it corresponded to business costs which that undertaking should normally have borne and placed it at an advantage. The Commission none the less considered that the other part of the financing benefited other undertakings and did not benefit the applicant.

The Court of First Instance found, first, that the undertaking bore a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded, in the public interest as much as in that of the third parties concerned, with a territorial authority and, second, that a portion of the financing granted by the territorial authority for the construction of that car park effectively benefited Valmont.

In those circumstances, the Court held that the Commission could not automatically consider that the portion of the financing had necessarily benefited Valmont but should have first examined, in the light of the information available, whether or not that portion of the financing could be regarded as being in fact compensation for the burden borne by Valmont. To that end, the Commission was required to ascertain whether the conditions set out in *Altmark Trans and Regierungspräsidium Magdeburg*, cited above, were

<sup>26</sup> Namely: (i) the recipient undertaking must actually be responsible for carrying out public service obligations and those obligations must be clearly defined; (ii) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; (iv) when the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped to be able to satisfy the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

satisfied. As it was not apparent from the decision that the Commission had done so, the decision was annulled.<sup>27</sup>

Last, by its judgment in *Danske Busvognmaend v Commission*, the Court of First Instance annulled the Commission decision declaring the aid granted by Danish authorities to the bus company Combust to be compatible with the common market.

In particular, the Court held that that company had not been entrusted with the performance of public service obligations within the meaning of Regulation No 1191/69.<sup>28</sup> It considered that an undertaking, such as Combust, whose obligations to operate, to carry and to collect the tariffs were not imposed unilaterally, which was not obliged to operate its transport services in an unprofitable manner, contrary to its commercial interests, but which, on the contrary, had voluntarily assumed those obligations once it had been successful in the tendering procedures, which did not provide for any State subsidies and in which it had been free to participate or not, depending on its economic interests, and whose transport services were paid for by the price it had proposed in its bids in the tendering procedures and which had been included in the contracts subsequently concluded, did not bear public service obligations within the meaning of Article 2(1) of Regulation No 1191/69; such an undertaking did not therefore receive compensation within the meaning of that article, as the Commission had found, but financial remuneration provided for in the transport contracts.

#### – Specific or selective nature of the State measure

In *Lenzing v Commission*, the Court considered that the Commission had been entitled to conclude that the measure granted in favour of Sniace was selective.

The Court recalled, in that regard, that measures of purely general scope do not fall within Article 87(1) EC, but that, however, the case-law has already established that even assistance which at first sight is applicable to undertakings in general may present a certain selectivity and, accordingly, be regarded as a measure intended to favour certain undertakings or certain products. That is the case, in particular, where the administration called upon to apply the general rule has a discretion when applying the measure. In this case, the Court found that the Spanish public bodies responsible for collecting social security contributions had a certain discretion both when concluding restructuring and repayment agreements and when determining certain detailed terms in those agreements, such as the repayment timetable, the amount of the surcharges and the sufficiency of the guarantees offered in return for the settlement of the debts. It was

<sup>27</sup> As well as this ground for annulment of the decision of 18 July 2001, there had been an infringement of Article 87(1) EC – established in the same judgment – by the Commission, which had concluded on the basis of an expert report having no probative value that the price of the land sold to the applicant was below market price and, accordingly, contained an element of State aid.

<sup>28</sup> Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

also within the discretion of those bodies whether or not to allow the company not to comply with those agreements and to tolerate non-payment of the debts for several years.

The condition that a State measure should relate to a specific undertaking or apply selectively is one of the defining features of State aid, not only in the context of the EC Treaty but also in that of the ECSC Treaty, as recalled in the judgment of 1 July 2004 in Case T-308/00 *Salzgitter v Commission*, not yet published in the ECR (under appeal, Case C-408/04 P), which, on that point, confirms that the fact that the advantage conferred by a tax measure provided for by law is made subject to a condition that the investments must be made in a geographically-limited area within a Member State, as was the position in this case, is in principle sufficient for the measure in question to be viewed as relating to a specific category of undertakings. The Court referred in support of its findings – a fact sufficiently rare to deserve mention – to a judgment of the EFTA Court <sup>29</sup> and emphasised that what mattered, for a measure to be found to be State aid, was that the recipient undertakings belonged to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question.

#### b) *Guidelines*

Although the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context, it is none the less bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States. The persons concerned are therefore entitled to rely on them and the Court will ascertain whether the Commission has complied with the rules which it has imposed on itself when adopting the contested decision.

The Court of First Instance has thus adjudicated on a number of applications in which it has been requested to declare that there have been errors of law in the application of the Community guidelines on State aid for environmental protection of 1994 and 2001 (judgment of 18 November 2004 in Case T-176/01 *Ferriere Nord v Commission*, not yet published in the ECR), of the multisectoral framework on regional aid for large investment projects <sup>30</sup> (*Kronofrance v Commission*, cited above), of the notice laying down Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>31</sup> (*Technische Glaswerke Ilmenau v Commission*, cited above), and also of Recommendation 96/280/EC concerning the definition of small and medium-sized enterprises <sup>32</sup> and the notice on the Community guidelines on State aid for small and medium-sized

<sup>29</sup> Judgment of the EFTA Court of 20 May 1999 in Case E-6/98 *Norway v EFTA Surveillance Authority* Reports of EFTA Court, p. 74.

<sup>30</sup> OJ 1998 C 107, p. 7.

<sup>31</sup> OJ 1994 C 368, p. 12.

<sup>32</sup> Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (SMEs) (OJ 1996 L 107, p. 4).

enterprises<sup>33</sup> (judgment of 14 October 2004 in Case T-137/02 *Pollmeier Malchow v Commission*, not yet published in the ECR).

In *Ferriere Nord v Commission* the Court of First Instance confirmed that the Commission was able to declare the project of aid for Ferriere Nord incompatible with the common market in so far as the investment did not satisfy the requirement of environmental performance sought by the 1994 and 2001 Guidelines.

Likewise, in *Pollmeier Malchow v Commission* the Court upheld the Commission's finding that the recipient of the aid was a large enterprise and did not therefore satisfy the criteria of the definition of SMEs. The Court considered, in particular, that, in the light of the general scheme of the texts concerned, the Commission was entitled to ensure that the recipient of the aid in question was not in reality a group whose power exceeded that of an SME.

In *Technische Glaswerke Ilmenau v Commission* the Court of First Instance considered, in the light of the guidance provided by the Guidelines on aid for rescuing and restructuring firms in difficulty, whether the Commission made a manifest error of assessment by refusing to declare the price reduction in question compatible with the common market under Article 87(3)(c) EC without taking into account the monopoly situation that would be created should the applicant disappear. The Court held that that circumstance would suffice to justify the grant of State aid intended to save undertakings and to encourage their restructuring only if the general conditions for the authorisation of rescue or restructuring aid, as laid down in the Guidelines, were satisfied. In this case, the Court held that the Commission had not made a manifest error of assessment in concluding that the restructuring plan was not such as to allow Technische Glaswerke Ilmenau to restore its viability, and, consequently, rejected the plea.

In *Kronofrance v Commission*, on the other hand, the Court of First Instance annulled the Commission's decision not to raise objections to aid granted by the German authorities to Glunz for the construction of an integrated wood processing centre. The Court considered that the Commission had not complied with the rules laid down in the multisectoral framework on regional aid for large investment projects, since it had not ascertained, as provided for in that framework, whether the relevant product market was a 'declining market'. Owing to that error of law on the part of the Commission, there had been no assessment of the compatibility of the notified aid on the basis of all the applicable criteria.

### c) *Recovery*

The judgment of 14 January 2004 in Case T-109/01 *Fleuren Compost v Commission*, not yet published in the ECR, provided the opportunity for the Court of First Instance to recall

<sup>33</sup> Commission notice on the Community guidelines on State aid for SMEs (OJ 1996 C 213, p. 4).

that undertakings in receipt of aid cannot in principle have a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 EC but that, none the less, the case-law does not preclude the possibility that, in order to challenge its repayment, the recipients of unlawful aid may, in the procedure for recovery of the aid, plead exceptional circumstances which may have legitimately given rise to a legitimate expectation that the law was lawful.

However, the Court held that those recipients can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, and that it is for those courts alone to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice. In so holding, the Court of First Instance took a clear position on a question to which hesitant answers had thus far been given (see, in that regard, the *Annual Report 1999*).

Unlike the applicant in *Fleuren Compost v Commission*, Salzgitter maintained, in order to challenge repayment of the aid, not that the Commission had breached the principle of protection of legitimate expectations but that it had failed to observe the principle of legal certainty; and the Court considered that the breach of that principle of legal certainty justified in that case the annulment of the provisions of the Commission decision<sup>34</sup> requiring the Federal Republic of Germany to recover the aid granted to the undertakings forming part of Salzgitter AG.

In *Salzgitter v Commission* the Court of First Instance held, first of all, that the possibility of relying on the principle of legal certainty did not depend on the conditions which must be satisfied where a party relies on a legitimate expectation that State aid was properly granted. It was for that reason that the steel undertaking which had obtained State aid which had not been notified to the Commission could rely, in order to challenge the Commission decision requiring repayment of the aid, on legal certainty, although the recipient of aid is precluded, other than in certain circumstances, from having a legitimate expectation that the aid was properly granted if it was granted in breach of the provisions on prior control of State aid.

The Court of First Instance then held that the steel undertaking which had received unlawful aid was entitled to rely on the principle of legal certainty in order to challenge the lawfulness of a Commission decision ordering repayment of the aid in a case where at the time when it received the aid there was, owing to reasons attributable to the Commission, a situation of uncertainty and lack of clarity as regards the legal rules applicable to the type of aids involved, combined with the prolonged lack of reaction on the part of the Commission, which was none the less aware that the aid was being paid and which thus led to the creation, in disregard of its duty of care, of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the repayment of the aid which had been paid.

<sup>34</sup> Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG – Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5).

## 2. Procedural matters

The question of the scope of the rights recognised to the interested parties in the formal procedure involving examination of State aid has been clarified. The case-law of the Court of First Instance draws a clear distinction between the Member States providing the aid and the parties concerned. Whereas the Member States enjoy the full rights of defence, the parties concerned are only entitled to present observations.

First, in one of the pleas examined in the case which it brought against the Commission, *Ferriere Nord* – an undertaking in the steel, mechanical and metallurgical industrial sector – claimed that the Commission had breached its rights of defence in initiating the formal examination procedure in accordance with the 1994 Community guidelines framework on State aid for environmental protection,<sup>35</sup> although the decision had been adopted on the basis of the 2001 guidelines,<sup>36</sup> without either the Italian Republic or itself having been invited to submit comments on the new guidelines. In its judgment in *Ferriere Nord v Commission*, the Court of First Instance stated, first of all, that that plea must be examined not from the point of view of the rights of the defence, which only the States enjoy in State aid matters, but in consideration of the right which, pursuant to Article 88(2) EC, the ‘parties concerned’ have to submit comments during the review stage referred to in that provision. The Court then observed that the Commission would not have been able, without disregarding the procedural rights of the parties concerned, to have based its decision on new principles introduced by the 2001 Guidelines without inviting the parties concerned to submit their comments in that regard. However, the Court found that the principles laid down by the two sets of guidelines were, in the light of the grounds on which the Commission relied to declare the aid in question incompatible, substantially identical; it concluded that there had been no requirement to consult the parties concerned again.

Second, the question arose whether the undertaking in receipt of the aid must be recognised as having guarantees over and above the right to submit comments after initiation of the procedure recognised to all the parties concerned within the meaning of Article 88(2) EC. The answer given by the Court of First Instance in *Fleuren Compost v Commission* and *Technische Glaswerke Ilmenau v Commission* is unambiguous: ‘the recipient of the aid does not play a special role pursuant to any provision governing the procedure for the review of State aid’, and the Court recalled that the procedure for the review of State aid is not a procedure initiated ‘against’ the recipient of aid by virtue of which it could rely on rights as extensive as the rights of the defence as such.

As the parties concerned other than the Member State in question cannot rely on the right to participate in an adversarial procedure before the Commission, the Court of First Instance rejected the applicants’ complaints, in particular Technische Glaswerke Ilmenau’s complaint that it ought to have been granted access to the non-confidential part of the file in the administrative procedure and to have received the comments or

<sup>35</sup> OJ 1994 C 72, p. 3.

<sup>36</sup> Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3).

replies to the Commission's questions submitted by one of its competitors on the market.

In one of the pleas which it formulated in the action for annulment of the Commission decision declaring incompatible with the common market the aid which the Italian Republic proposed to grant to Ferriere Nord, that undertaking criticised the Commission for not having asked it or the Italian Republic to provide documentation relating to the environmental purpose of the investment, then for having stated in its decision that no evidence on that point had been provided. In that regard, the Court of First Instance (*Ferriere Nord v Commission*) held that the principle of protection of legitimate expectations meant that in carrying out the procedure involving review of State aid, the Commission must take account of the legitimate expectations which the parties concerned might entertain as a result of what had been said in the decision opening the formal examination procedure and, subsequently, that it did not base its final decision on the absence of elements which, in the light of those indications, the parties concerned had been unable to consider that they must provide to it. In that case, the plea was rejected on the ground that the indications in the decision to open the procedure were sufficiently clear and precise.<sup>37</sup>

## E. Trade protection measures

Although mention must be made of the judgment of 28 October 2004 in Case T-35/01 *Shanghai Teraoka Electronic v Council*, not yet published in the ECR, dismissing the action for annulment of a regulation imposing definitive anti-dumping duties on imports of certain electronic weighing scales,<sup>38</sup> in particular because it is the only decision delivered in the anti-dumping sphere, it is to the judgment of 14 December 2004 in Case T-317/02 *Fédération des industries condimentaires de France (FICF) and Others v Commission*, not yet published in the ECR, that the reader's attention is drawn.

In adjudicating for the first time on the lawfulness of a Commission decision rejecting a complaint lodged in accordance with the Council regulation on trade barriers<sup>39</sup>, the Court of First Instance specified the conditions in which those obstacles to trade justify Community intervention.

<sup>37</sup> See also, to that effect, *Pollmeier Malchow v Commission*, cited above, paragraph 76.

<sup>38</sup> Council Regulation (EC) No 2605/2000 of 27 November 2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating in the People's Republic of China, the Republic of Korea and Taiwan (OJ 2000 L 301, p. 42).

<sup>39</sup> Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (OJ 1994 L 349, p. 71).

In this case, the complaint lodged in June 2001 by the FICF, which represents all the principal French producers of prepared mustard, sought to denounce the effects of the measures which the United States of America had been authorised to take by the Dispute Settlement Body of the World Trade Organisation (WTO),<sup>40</sup> which consisted, *inter alia*, in imposing an additional customs duty of 100% on certain products from the Member States of the European Community, including 'prepared mustard'.

In its complaint, the FICF denounced the selective nature of the United States retaliatory measures applied only *vis-à-vis* certain Member States and not *vis-à-vis* the European Community as a whole. The complaint also stated that the trade barrier created by the United States had unfavourable commercial effects on the exports of prepared mustard of the undertakings that were members of the FICF and that it was in the Community interest, under the rules on international trade, to initiate proceedings against the measures adopted by the United States.

In accordance with the trade barriers regulation, the Commission initiated an examination procedure which was subsequently extended to three other trade organisations of producers of foie gras, Roquefort and shallots. That procedure was closed in 2002, the Commission concluding that no specific action was necessary in the interests of the Community, as the selective withdrawal of concessions by the United States did not cause adverse trade effects within the meaning of that regulation.

Upon application by the FICF and the other organisations concerned for annulment of the Commission's decision not to take action against the retaliatory measures taken by the United States, the Court of First Instance upheld that decision.

The Court observed, first of all, that under the Trade Barriers Regulation, the Community may take action pursuant to international rules against an obstacle to trade created by a third country on the basis of three cumulative conditions: there must be an obstacle to trade which produces adverse trade effects and action must be necessary in the interests of the Community.

The Court of First Instance then considered that the Commission had correctly taken into account all the essential and indissociable elements of the concept of an obstacle to trade. As regards adverse trade effects, the Court found that the increase in exports of prepared mustard between 1996-1998 and 2000 from the United Kingdom to the United States, in terms of both value and volume, was extremely small in size and proportion by comparison to exports from other Member States of the Community. Therefore, even on the assumption that exporters from Member States other than the United Kingdom themselves would have benefited from that increase if the retaliatory measures adopted by the United States had been extended to prepared mustard from the United Kingdom

<sup>40</sup> Between 1981 and 1996, the Council of the European Union adopted a number of directives against the use of certain substances having a hormonal action in animal feedstuffs, in order to protect human health. In January 1998, the Appellate Body of the WTO, following a complaint lodged by the United States, declared that legislation contrary to the WTO rules. In July 1999, as the Community legislation had not been adjusted to comply with those rules, the Appellate Body authorised the United States to adopt retaliatory measures and in particular to impose additional customs duties of 100% on a number of products from the European Community.

– which the applicants had failed to show –, those exporters would not have been able to enjoy greater opportunities for export.

Last, the Court observed that an assessment of the interests of the Community required a balancing of the interests of the various parties involved against those of the general interest of the Community. Although the examination procedure had not precluded a general Community interest in taking action in future, the Commission had closed the procedure because there was no specific Community interest in challenging an obstacle to trade which did not produce adverse trade effects within the meaning of the Trade Barriers Regulation. The Court held that a complainant may not urge the Community to take action on principle to protect the general interest without, at the least, having itself suffered adverse trade effects within the meaning of the Trade Barriers Regulation. Contrary to the French producers' contention, therefore, the Commission had not confused the interests of the Community with those of the FICF. Furthermore, although the contested decision did not refer to the interested parties other than the FICF, the Court found that the Commission had considered their interests in the context of its examination.

## **F. Community trade mark**

Given the place which it now occupies in the Court's work, the registration of Community trade marks is a prime source of litigation before the Court: 110 actions were brought in 2004 (compared with 100 in 2003) and 76 cases were disposed of (47 by judgment and 29 by order), which is 29 more than last year.

Under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark,<sup>41</sup> registration as a Community trade mark is to be refused if, inter alia, the mark is devoid of distinctive character (Article 7(1)(b)) or descriptive (Article 7(1)(c)) (absolute grounds for refusal) or in the event of well-founded opposition on the basis of an earlier mark protected in a Member State or as a Community trade mark (Article 8) (relative grounds for refusal).<sup>42</sup>

### **1. Absolute grounds for refusal of registration**

In its 14 judgments ruling on the lawfulness of decisions of the Boards of Appeal relating to absolute grounds for refusal of registration, the Court annulled only one of those

<sup>41</sup> OJ 1994 L 11, p. 1.

<sup>42</sup> A Community trade mark may also be declared invalid by OHIM where an application for such a declaration has been made under Article 51(1) of Regulation No 40/94. No ruling was given by the Court in 2004 on the lawfulness of any decision of the Cancellation Division of OHIM.

decisions (judgment of 24 November 2004 in Case T-393/02 *Henkel v OHIM (shape of a white and transparent bottle)*) and dismissed all the other actions.<sup>43</sup>

First, the marks covered by Article 7(1)(b) of Regulation No 40/94 are those which are incapable of performing the essential function of the trade mark, which is to identify the trade origin of goods or a service. In other words, to be distinctive within the meaning of that provision, a mark must be capable of identifying the goods or service in respect of which registration is applied as originating from a particular undertaking and thus to distinguish those goods or that service from those of other undertakings.

The Court upheld, *inter alia*, the decisions of the Boards of Appeal refusing to register the following as Community trade marks on account of a lack of distinctiveness: representations of stand-up pouches for packaging drinks in respect of fruit juices; the word mark 'LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS' for synthetic surfacing and installation services for that product; a transparent bottle, filled with a yellow liquid, with a long neck in which a slice of lemon with a green skin has been plugged for drinks and certain services; the word mark 'Mehr für Ihr Geld' for cleaning and cosmetic materials and foods for everyday consumption; the representation of a twisted wrapper for sweets; and a three-dimensional shape representing a light-brown sweet for confectionery.

By contrast, the Court annulled the decision of the Board of Appeal which held that a three-dimensional mark consisting of the shape of a white and transparent bottle for cleaning products was devoid of distinctive character. In *Henkel v OHIM (shape of a white and transparent bottle)*, cited above, the Court found that the three-dimensional mark applied for was unusual and capable of enabling the goods in question to be distinguished from those having a different commercial origin.

Second, it may be observed that, in the cases concerning the descriptiveness of the marks applied for within the meaning of Article 7(1)(c) of Regulation No 40/94, the Court upheld all of the findings made by the Boards of Appeal on that point. It thus found lawful the decisions declaring the following to be incapable of fulfilling the trade mark's function of an indication of origin: the word mark TELEPHARMACY SOLUTIONS for equipment which may be used to distribute pharmaceutical products from a distance; the word mark LIMO for certain categories of laser products; the word mark APPLIED MOLECULAR EVOLUTION for services relating to the molecular engineering of compounds; and the word mark NURSERYROOM for goods for young children.

<sup>43</sup> Judgments of 28 January 2004 in Joined Cases T-146/02 to T-153/02 *Deutsche SiSi-Werke v OHIM (stand-up pouch)* (under appeal, Case C-173/04 P); of 31 March 2004 in Case T-216/02 *Fielddturf v OHIM (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS)*; of 21 April 2004 in Case T-127/02 *Concept v OHIM (ECA)*; of 29 April 2004 in Case T-399/02 *Eurocermex v OHIM (shape of a beer bottle)* (under appeal, Case C-286/04 P); of 30 June 2004 in Case T-281/02 *Norma Lebensmittelfilialbetrieb v OHIM (Mehr für Ihr Geld)*; of 8 July 2004 in Case T-289/02 *Telepharmacy Solutions v OHIM – (TELEPHARMACY SOLUTIONS)*; of 8 July 2004 in Case T-270/02 *MLP Finanzdienstleistungen v OHIM (bestpartner)*; of 20 July 2004 in Case T-311/02 *Lissotschenko and Hentze v OHIM (LIMO)*; of 14 September 2004 in Case T-183/03 *Applied Molecular Evolution v OHIM (APPLIED MOLECULAR EVOLUTION)*; of 10 November 2004 in Case T-402/02 *Storck v OHIM (shape of a sweet wrapper)*; of 10 November 2004 in Case T-396/02 *Storck v OHIM (shape of a sweet)*; of 23 November 2004 in Case T-360/03 *Frischpack v OHIM (shape of a cheese box)*; of 30 November 2004 in Case T-173/03 *Geddes v OHIM (NURSERYROOM)*, none yet published in the ECR.

Moreover, for the first time, the Court applied Article 111 of the Rules of Procedure in order to dismiss by order an action brought against a decision of a Board of Appeal, in which it was held that QUICK-GRIP was descriptive of clamps (DIY equipment), on the ground that it was manifestly lacking any foundation in law (order of 27 May 2004 in Case T-61/03 *Irwin Industrial Tool v OHIM (QUICK GRIP)*, not yet published in the ECR).

Third, in *Concept v OHIM (ECA)*, cited above, the Court reviewed whether the Board of Appeal had properly applied the absolute ground for refusal laid down in Article 7(1)(h) of Regulation No 40/94.<sup>44</sup> In that case, the Court confirmed that registration of a figurative mark composed of a circle of stars of the same shape and size with five points one of which points upwards, surrounding, on a square background, the word element 'ECA', without specification of any of the colours, in respect of which registration was sought for, inter alia, record data carriers and the arranging and conducting of seminars, had to be refused. It found that such a mark is an imitation from a heraldic point of view of the European emblem within the meaning of Article 6 ter (1)(b) of the Paris Convention. It held, in addition, that the Board of Appeal had been right to find that registration of the mark sought was likely to give the public the impression that there is a connection between the mark sought and the Council of Europe, the European Union or the European Community.

Fourth, since Article 7(3) of Regulation No 40/94 expressly provides that Article 7(1)(b) to (d) does not apply if the mark has become distinctive in relation to the goods or services for which registration is requested 'in consequence of the use which has been made of it', applicants do not neglect to rely on that provision before OHIM in support of their argument that the mark should be registered. The Court set out the circumstances in which such distinctiveness may be regarded as established, in terms of both the procedural requirements and the necessary proof, in its judgments *Eurocermex v OHIM (shape of a beer bottle)* and Case T-396/02 *Storck v OHIM (shape of a sweet)* and Case T-402/02 *Storck v OHIM (shape a sweet wrapper)*, cited above. In the last of those judgments, the Court stated that the Boards of Appeal do not infringe the first clause of Article 74(1) of Regulation No 40/94 where they refrain from examining, of their own motion, all the facts on the basis of which it may be concluded that a mark has become distinctive as a result of use within the meaning of Article 7(3). Although, in contrast to what is stated at the end of Article 74(1) with regard to the relative grounds for refusal, there is no rule in the first clause of that provision requiring that the examination by OHIM (that is, by the examiner or the Board of Appeal, as the case may be) be limited to the facts pleaded by the parties, the Court found that, if the applicant for a mark does not plead distinctiveness acquired through use, OHIM is, in practical terms, unable to take account of the fact that the mark claimed may have become distinctive. Accordingly, under the principle that 'no one is obliged to do the impossible', OHIM is not bound to examine facts showing that the mark claimed has become distinctive through use within the meaning of Article 7(3) of Regulation No 40/94 unless the applicant has pleaded them.

<sup>44</sup> That provision states that 'trade marks which have not been authorised by the competent authorities and are to be refused pursuant to Article 6 ter of the Paris Convention are not to be registered'.

## 2. Relative grounds for refusal of registration

In addition to the cases which were disposed of by order, including that ordering that there was no need to adjudicate where the opposition to the mark had been withdrawn (order of 9 February 2004 in Case T-120/03 *Synopharm v OHIM – Pentafarma (DERMAZYN)*, not yet published in the ECR), the Court gave 19 rulings by way of judgment. Fourteen of the judgments delivered upheld the decisions of the Boards of Appeal,<sup>45</sup> whilst the others annulled the contested decisions either for reasons of form and procedure<sup>46</sup> or because the Board of Appeal had infringed Article 8(1)(b) of Regulation No 40/94.<sup>47</sup>

That provision states that, upon opposition by the proprietor of an earlier trade mark, the mark applied for is not to be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the two marks, there is a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.

Having regard to the fact that the likelihood of confusion must be assessed globally, by reference to the perception by the relevant public and taking into account all the factors relevant to each case, in particular the interdependence between the similarity of the marks and the similarity of the goods or services, the Court confirmed, for example, that there was a likelihood of confusion between the word mark CONFORFLEX for bedroom furniture and the figurative marks FLEX previously registered in Spain for categories of goods including

<sup>45</sup> Judgments of 18 February 2004 in Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)*; of 3 March 2004 in Case T-355/02 *Mülhens v OHIM – Zirh International (ZIRH)* (under appeal, Case C-206/04 P); of 31 March 2004 in Case T-20/02 *Interquell v OHIM – SCA Nutrition (HAPPY DOG)*; of 17 March 2004 in Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)*; of 28 April 2004 in Joined Cases T-124/02 and T-156/02 *Sunrider v OHIM – Vitakraft-Werke Wührmann and Friesland Brands (VITATASTE and METABALANCE 44)*; of 22 June 2004 in Case T-66/03 *'Drie Mollen sinds 1818' v OHIM – Nabeiro Silveria (Galáxia)*; of 22 June 2004 in Case T-185/02 *Ruiz-Picasso and Others v OHIM – DaimlerChrysler (PICARO)* (under appeal, Case C-361/04 P); of 30 June 2004 in Case T-186/02 *BMI Bertollo v OHIM – Diesel (DIESELIT)*; of 6 July 2004 in Case T-117/02 *Grupo El Prado Cervera v OHIM – Heirs of Mr Debuschewitz (CHUFAFIT)*; of 8 July 2004 in Case T-203/02 *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* (under appeal, Case C-416/04 P); of 13 July 2004 in Case T-115/02 *AVEX v OHIM – Ahlers (Image 'a')*; of 13 July 2004 in Case T-115/03 *Samar v OHIM – Grotto (GAS STATION)*; of 16 September 2004 in Case T-342/02 *Metro-Goldwyn-Mayer Lion v OHIM – Moser Grupo Media (Moser Grupo Media)*; of 6 October 2004 in Joined Cases T-117/03, T-118/03, T-119/03 and T-171/03 *New Look v OHIM – Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)*, none yet published in the ECR.

<sup>46</sup> Judgments of 30 June 2004 in Case T-107/02 *GE Betz v OHIM – Atofina Chemicals (BIOMATE)*; of 8 July 2004 in Case T-334/01 *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)*; of 6 October 2004 in Case T-356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)* (under appeal, Case C-512/04 P); and of 10 November 2004 in Case T-164/02 *Kaul v OHIM – Bayer (ARCOL)*, none yet published in the ECR.

<sup>47</sup> Judgment of 30 June 2004 in Case T-317/01 *M+M v OHIM – Mediametrie (M+M EUROdATA)*, not yet published in the ECR.

bedroom furniture and, conversely, that there was no such likelihood between the word mark PICARO for vehicles and the earlier Community trade mark PICASSO for the same goods or between the word mark CHUFACIT for processed and fresh nuts and two earlier national trade marks, namely the word mark CHUFI and a figurative mark containing the word CHUFI, for goods including those covered by the application for registration.

Moreover, several judgments help to clarify the rules governing the procedure for examining an opposition laid down in Article 43(2) and (3) of Regulation No 40/94. More specifically, Article 43(2) provides that, if the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition is to furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided that the earlier Community trade mark has at that date been registered for not less than five years. Article 43(3) provides for the application of paragraph 2 to earlier national trade marks by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.

It is apparent from the case-law that proof of genuine use may be requested only if five years have elapsed between the date of registration of the earlier mark and the date of publication of the application for registration of a Community trade mark (*BMI Bertollo v OHIM – Diesel (DIESELIT)*, cited above) and that proof of genuine use need be adduced only in so far as the applicant has ‘expressly and timeously requested such proof before OHIM’ (*El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)*, cited above). In several decisions (*MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)*, *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* and *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)*), the Court also clarified the definition of genuine use and the standard of proof which must be met by the opponent and reviewed the Board of Appeal’s assessment of the genuine nature of the use. With respect to such an assessment, the Court held, in *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)*, that the Board of Appeal was wrong to find that proof of genuine use had been adduced because its reasoning was based on mere presumptions and therefore annulled the contested decision.

### 3. Formal and procedural issues

Although the Court dealt with a relatively large number of formal and procedural issues, the limited nature of this account means that only some of them can be addressed. Four points have thus been chosen.

The first point concerns the admissibility or inadmissibility of certain forms of order. First of all, the question arose as to whether OHIM may seek a form of order other than dismissal of the action, given that OHIM is designated as the defendant before the Court in the Rules of Procedure.<sup>48</sup> According to the judgment in *GE Betz v OHIM – Atofina Chemicals (BIOMATE)*, cited above, the answer is that it may. The Court accepted that OHIM could endorse the applicant’s claim for annulment of the decision of the Board of

<sup>48</sup> Article 133(2) of the Rules of Procedure of the Court of First Instance.

Appeal or simply leave the decision to the discretion of the Court. Referring to the principle of continuity in terms of their functions between the Board of Appeal, the examiner and/or the competent division and of the functional independence of the Boards of Appeal and their members in carrying out their tasks, the Court took the view that it must be recognised that, while the Office does not have the requisite capacity to bring an action against a decision of a Board of Appeal, conversely it cannot be required to defend systematically every contested decision of a Board of Appeal or to claim automatically that every action challenging such a decision should be dismissed.<sup>49</sup>

Moreover, the question also arose as to the admissibility of a claim for annulment of, in addition to the contested decision, the decision of the Opposition Division. It follows from the judgment in *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)*, cited above, that such an application is admissible because it seeks to have the Court take the decision which, according to the applicant, the Board of Appeal should lawfully have taken when hearing the appeal before OHIM. Since the Board of Appeal may annul the decision taken by the section of OHIM, such annulment is likewise one of the measures which may be taken by the Court in the exercise of its power to amend decisions, which is provided for in Article 63(3) of Regulation No 40/94.

The second point is that Article 73 of Regulation No 40/94, which provides that decisions of OHIM are to be based only on reasons on which the parties have had an opportunity to present their comments, is not regarded as having been infringed where the information not communicated served only to confirm the accuracy of a finding based on reasoning independent of that information (*Feldturf v OHIM (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS)*, cited above).

The third point relates to the application of Article 74 of Regulation No 40/94 by the Board of Appeal in proceedings concerning relative grounds for refusal of registration. The scope of that provision, which provides that, in such proceedings, the 'examination [is restricted] to the facts, evidence and arguments provided by the parties and the relief sought', was clarified in the judgment in *Ruiz-Picasso and Others v OHIM – DaimlerChrysler (PICARO)*, cited above.<sup>50</sup>

In that judgment, the Court observed that, as it had already held in Case T-308/01 *Henkel v OHIM – LHS (UK) (KLEENCARE)* [2003] ECR II-3253, under Article 74 of Regulation No 40/94, the Board of Appeal, when hearing an appeal against a decision terminating opposition proceedings, may base its decision only on the relative grounds for refusal which the party concerned has relied on and the related facts and evidence it has presented. However, it stated, for the first time, that the restriction of the factual basis of the examination by the Board of Appeal does not preclude it from taking into consideration, in addition to the facts expressly put forward by the parties to the opposition proceedings, facts which are well

<sup>49</sup> With respect to this issue, see also the judgment of 12 October 2004 in Case C-106/03 P *Vedial v OHIM*, not yet published in the ECR.

<sup>50</sup> With respect to the inadmissibility before the Court of a document which was not produced during a procedure before OHIM relating to the relative grounds for refusal of registration and of which OHIM was therefore not required to take account of its own motion, see *Samar v OHIM – Grotto (GAS STATION)*, cited above.

known, that is, which are likely to be known by anyone or which may be learned from generally accessible sources. In that respect, it explained that the object of Article 74(1) *in fine* is to relieve OHIM of the task of investigating the facts itself in the context of proceedings between parties. That object is not compromised if OHIM takes well-known facts into account.

Finally, as a fourth point, it may be noted that the Court offered some important clarifications with regard to the language requirements of the opposition procedure in *GE Betz v OHIM – Atofina Chemicals (BIOMATE)*.

#### 4. Operational continuity of the departments of OHIM

It is appropriate to apply the case-law established in the *ex parte* cases<sup>51</sup> according to which there is continuity in terms of function between the examiner and the Board of Appeal to the relationship between the Opposition Division of OHIM ruling at first instance and the Boards of Appeal. Relying expressly on the approach adopted in *Henkel v OHIM – LHS (UK) (KLEENCARE)*, cited above (commented on in the *Annual Report 2003*), the Court held in its judgment of 10 November 2004 in *Kaul v OHIM – Bayer (ARCOL)* that the Board of Appeal had erred in refusing to take account of the evidence intended to demonstrate that the earlier mark was highly distinctive, on the ground that that evidence had not been produced before the Opposition Division. In light of the principle of operational continuity of the departments of OHIM, the Board of Appeal is bound to base its decision on all the factual and legal evidence that the party concerned has submitted either during the proceedings before the division ruling at first instance or, subject to compliance with the prescribed time-limits,<sup>52</sup> during the appeal proceedings. In the case at issue, the factual evidence had been produced in good time before the Board of Appeal so that it ought to have taken account of it. The failure to do so was penalised by annulment of the decision of the Board of Appeal.<sup>53</sup>

#### G. Access to documents

Regulation No 1049/2001,<sup>54</sup> adopted pursuant to Article 255 EC, defines the principles, conditions and limits governing the right of access by the public to European Parliament,

<sup>51</sup> Case T-163/98 *Procter & Gamble v OHIM (BABY-DRY)* [1999] ECR II-2383, which was not set aside on that point in Case C-383/99 P *Procter & Gamble v OHIM (BABY-DRY)* [2001] ECR I-6251, and Case T-63/01 *Procter & Gamble v OHIM (soap bar shape)* [2002] ECR II-5255.

<sup>52</sup> That is to say, subject to compliance with Article 74(2) of Regulation No 40/94, which provides: 'The Office may disregard facts or evidence which are not submitted in due time by the parties concerned'.

<sup>53</sup> Although the position taken on the issue was less clear, the operational continuity of the departments of OHIM was referred to in other *inter partes* cases, namely in the judgments of 30 June 2004 in *GE Betz v OHIM – Atofina Chemicals (BIOMATE)* and of 8 July 2004 in *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)*.

<sup>54</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

Council and Commission documents in such a way as to enable citizens to participate more closely in the decision-making process, guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and strengthen the principles of democracy and respect for fundamental rights.

The refusal of access to documents by the Commission and the Council which gave rise to the judgments of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* and of 23 November 2004 in Case T-84/03 *Turco v Council*, neither yet published in the ECR, gave the Court of First Instance an opportunity to define the scope of certain provisions of that regulation more clearly.

The regulation provides, first, that an institution which is asked to disclose a document originating from a third party is to consult the third party with a view to assessing whether one of the exceptions provided for by the regulation is applicable, unless it is clear that the document is or is not to be disclosed (Article 4(4)) and, second, that a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement (Article 4(5)).

As the Federal Republic of Germany had refused to agree to the disclosure to the applicant of certain documents originating from the German authorities, the Commission refused to disclose them to that applicant. On an application for annulment of the decision refusing access, the Court of First Instance upheld that decision in its judgment in *IFAW Internationaler Tierschutz-Fonds v Commission*, cited above. Pointing out that the Member States are in a different position from that of other third parties, the Court of First Instance observed that a Member State has the power to request an institution not to disclose a document originating from it and the institution is obliged not to disclose it without its 'prior agreement'. That obligation imposed on the institution to obtain the Member State's prior agreement, which is clearly laid down in Article 4(5) of the Regulation, would risk becoming a dead letter if the Commission were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned. Thus, contrary to what the applicant argued, with the support of three Member States, where a request is made by a Member State under that provision, the institution is obliged not to disclose the document in question.

In *Turco v Council*, the issue was the Council's refusal to disclose to the applicant an opinion of the Council's legal service on a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council had relied on Article 4(2) of Regulation No 1049/2001, which provides that the institutions are to refuse access to a document where disclosure would undermine the protection of, inter alia, court proceedings and legal advice unless there is an overriding public interest in disclosure.

The Court of First Instance held in favour of the Council, which was supported in those proceedings by the United Kingdom and the Commission. It held that, contrary to the argument of the applicant, the words 'legal advice' must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the Council's legal service in the context of court proceedings

but also for any other purpose. It pointed out, citing the judgment in Case T-92/98 *Interporc v Commission* [1999] ECR II-3521 (see the *Annual Report 1999*), that legal advice drawn up in the context of court proceedings was already covered by the exception relating to the protection of such proceedings.

As exceptions to the right of access to the institutions' documents under Regulation No 1049/2001 must be interpreted and applied strictly, the Court of First Instance held that the fact that the document in question is a legal opinion cannot, of itself, justify application of the exception relied upon. However, since, first, the Council made no error of assessment in considering that the disclosure of such advice could give rise to lingering doubts as to the lawfulness of the legislative act in question and there was, therefore, an interest in the protection of that opinion and, second, the applicant has not cited any matter of public interest liable to justify the disclosure of such a document, the Court of First Instance dismissed the action in its entirety.

## H. Community staff cases

The hundred or so decisions giving rulings in disputes between officials and staff of the institutions of the Community, on the one hand, and those institutions, on the other, tackle many different legal situations, and since this section is necessarily a summary, it can give an account of only some of them. In brief, those actions sought to contest the legality of:

- decisions not to promote (judgments of 21 January 2004 in Case T-97/02 *Mavridis v Commission*, of 2 March 2004 in Case T-197/02 *Caravelis v Parliament*, of 17 March 2004 in Case T-175/02 *Lebedev v Commission* and Case T-4/03 *Lebedev v Commission*, of 10 June 2004 in Case T-330/03 *Liakoura v Council* and of 28 September 2004 in Case T-216/03 *Tenreiro v Commission*, none yet published in the ECR);
- decisions taken in the course of appointment procedures (judgments of 21 January 2004 in Case T-328/01 *Robinson v Parliament*, of 2 March 2004 in Case T-234/02 *Michael v Commission*, of 23 March 2004 in Case T-310/02 *Theodorakis v Conseil* and of 31 March 2004 in Case T-10/02 *Girardot v Commission*, none yet published in the ECR). In this connection it must also be noted that the judgment of 9 November 2004 in Case T-116/03 *Montalto v Council*, not yet published in the ECR, annuls the decision of the Council of 23 May 2002 appointing an additional Chairman of a Board of Appeal, also President of the Appeals Department of the OHIM;
- decisions no longer to engage conference interpreters over the age of 65 (judgments of 10 June 2004 in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* (under appeal, Case C-373/04 P), in Case T-275/01 *Alvarez Moreno v Parliament* and in Case T-276/01 *Garroni v Parliament*, none yet published in the ECR);
- decisions taken by competition selection boards not to admit candidates to tests (judgments of 20 January 2004 in Case T-195/02 *Briganti v Commission*, of 19 February 2004 in Case T-19/03 *Konstantopoulou v Court of Justice*, of 25 March 2004 in Case T-145/02 *Petrich v Commission*, of 21 October 2004 in Case T-49/03 *Schumann v Commission*, of 26 October 2004 in Case T-207/02 *Falcone v Commission* and of 28 October 2004 in Joined Cases T-219/02 and T-337/02 *Lutz Herrera v Commission*, none yet published in the ECR), awarding a number of marks

such that the applicant was excluded (judgment of 9 November 2004 in Joined Cases T-285/02 and T-395/02 *Vega Rodríguez v Commission*, not yet published in the ECR), or refusing to include the applicant on a reserve list (judgments of 28 April 2004 in Case T-277/02 *Pascall v Council* and of 10 November 2004 in Case T-165/03 *Vonier v Commission*, neither yet published in the ECR);

- decisions taken in the course of disciplinary procedures (judgment of 16 December 2004 in Joined Cases T-120/01 and T-300/01 *De Nicola v EIB*, not yet published in the ECR), or imposing disciplinary sanctions (judgments of 16 March 2004 in Case T-11/03 *Afari v European Central Bank*, of 1 April 2004 in Case T-198/02 *N v Commission*, and of 10 June 2004 in Case T-307/01 *Eveillard v Commission* and in Case T-307/01 *François v Commission*, none yet published in the ECR).

Other judgments rule on claims for compensation for the damage suffered as a result of delay in drawing up staff reports (judgments of 6 July 2004 in Case T-281/01 *Huygens v Commission* and of 30 September 2004 in Case T-16/03 *Ferrer de Moncada v Commission*, neither yet published in the ECR), or as a result of an occupational disease of an official (judgments of 3 March 2004 in Case T-48/01 *Vainker and Vainker v Parliament* and of 14 October 2004 in Case T-256/02 *I v Court of Justice* and in Case T-389/02 *Sandini v Court of Justice*, none yet published in the ECR). Also of interest are the judgments of 5 October 2004 in Case T-45/01 *Sanders and Others v Commission* and in Case T-144/02 *Eagle v Commission*, neither yet published in the ECR, which order the defendant institution to pay damages for the loss sustained by the applicants as a result of the fact that they were not recruited as temporary servants of the Communities during the time they worked at the Joint European Tours (JET) Joint Undertaking.

## II. **Actions for damages** <sup>55</sup>

For the Community to incur non-contractual liability for an unlawful act, three conditions must be fulfilled: the conduct alleged against the Community institutions must be unlawful, there must be actual damage and there must be a causal link between that conduct and that damage.

The concurrence of those three conditions allowing the non-contractual liability of the Community to be incurred was regarded as established by the Court in its interlocutory judgment of 23 November 2004 in Case T-166/98 *Cantina sociale di Dolianova and Others v Commission*, not yet published in the ECR. As one or more of those conditions were not met in the other actions for damages, the Court of First Instance dismissed all the other actions brought under Article 288 EC.

As regards the condition that the conduct alleged against the Community institutions should be unlawful, it was recalled in the judgment of 10 February 2004 in Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co. v Commission*, not yet published in the ECR, and in *Cantina sociale di Dolianova and Others v Commission*, cited above, that the case-law requires that a sufficiently serious breach of a rule of law intended to confer rights on individuals

<sup>55</sup> Excluding Community staff cases.

must be established (judgment in Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291). As regards the requirement that the breach must be sufficiently serious, the decisive test for finding that there has been such a breach is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution in question has only considerably reduced discretion, or even no discretion at all, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The expression 'rule of law intended to confer rights on individuals' has been analysed on several occasions by the Court of First Instance. For instance, it has been held that the aim of the rules applicable to the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to confer rights on individuals. Accordingly, any unlawful delegation of the Council's powers to the Commission is not such as to engage the Community's liability (judgment in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co. v Commission*, cited above). It has also been held, by reference to the case-law of the Court of Justice, that infringement of the obligation to state reasons is not such as to give rise to the liability of the Community (judgment in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co. v Commission* and judgment of 25 May 2004 in Case T-154/01 *Distilleria F. Palma v Commission*, not yet published in the ECR).

On the other hand, in its judgment in *Cantina sociale di Dolianova and Others v Commission*, the Court of First Instance held that the prohibition on unjust enrichment and the principle of non-discrimination were intended to confer rights on individuals. The breach by the Commission of those principles was held to be sufficiently serious, a conclusion which the Court of First Instance did not reach with regard to any of the other actions for damages in which it ruled in 2004.

Further, in *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert & Co. v Commission*, the Court of First Instance outlined the conditions which would give rise to the non-contractual liability of the Community in the event of the principle of such liability as a result of a lawful act being recognised in Community law (see, on that subject, the 2001, 2002 and 2003 *Annual Reports*). Citing its previous decisions, it thus considered that those three conditions would have to be met, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage, it being specified that damage is 'special' when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators, and 'unusual' when it exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest. In that case, the Court of First Instance held that damage of that sort was manifestly not established.

Finally, the order of 7 June 2004 in Case T-338/02 *Segi and Others v Council*, not yet published in the ECR (under appeal, Case C-355/04 P) <sup>56</sup> is interesting and important. By their action, the applicants seek compensation for damage suffered as a result of their being included in the list annexed to Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, <sup>57</sup> updated by Common Positions 2002/340 and 2002/462. <sup>58</sup> Common Position 2001/931/CFSP was adopted on the basis of Article 15 of the Treaty on European Union under Title V: 'Provisions on a common foreign and security policy' (CFSP), and Article 34 of the Treaty on European Union under Title VI: 'Provisions on police and judicial cooperation in criminal matters' (together called justice and home affairs (JHA)).

Holding that the provision <sup>59</sup> of the Common Position which affects the applicants entails no measure coming under the CFSP and that, therefore, Article 34 of the Treaty on European Union is the only relevant legal basis as regards the measures which, it is claimed, give rise to the alleged damage, the Court of First Instance declared that it was clear that it had no jurisdiction to take cognisance of the action for damages since the only remedies provided for under Title VI of the Treaty on European Union are a reference for a preliminary ruling, an action for annulment and a ruling in disputes between Member States and, therefore, there is no provision for an action for damages under Title VI. The Court of First Instance points out that the fact that the applicants 'probably have no effective judicial remedy' cannot of itself found a claim to Community jurisdiction proper in a legal system based on the principle of specific jurisdiction.

As regards the applicants' claim for damages, in so far as it seeks a finding that the Council, acting in the area of JHA, has encroached on the jurisdiction of the Community, the Court of First Instance declared that it had jurisdiction but held that the claim manifestly lacked any foundation in law, since the relevant legal basis for the adoption of the provision giving rise to damage was actually Article 34 of the Treaty on European Union.

### III. *Applications for interim relief*

The number of applications for interim relief submitted in 2004 was lower than for the previous year, since 26 were registered, compared with 39 in 2003. Contrary to what had been observed in 2002, the fall in the number of applications for interim relief was not offset by a large number of applications for expedited procedures in the main proceedings, since, as indicated previously, only 13 applications for expedited procedure were lodged.

<sup>56</sup> See also the order of the same date in Case T-333/02 *Gestoras Pro-Amnistia and Others v Council*, not yet published in the ECR; under appeal, Case C-354/04 P.

<sup>57</sup> OJ 2001 L 344, p. 93.

<sup>58</sup> Common Positions 2002/340/CFSP and 2002/462/CFSP adopted by the Council pursuant to Articles 15 and 34 of the Treaty on European Union of 2 May and 17 June 2002 respectively (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32).

<sup>59</sup> Namely, Article 4, according to which the Member States are, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, to afford each other the widest possible assistance in preventing and combating terrorist acts.

The President of the Court of First Instance, in his capacity as judge responsible for granting interim relief, completed 34 interim relief cases. Apart from cases in which provisional measures were ordered for a limited period (orders of 21 January 2004 in Case T-217/03 R *FNCBV v Commission* and Case T-245/03 R *FNSEA and Others v Commission* and of 12 May 2004 in Case T-198/01 R III *Technische Glaswerke Ilmenau v Commission*, none yet published in the ECR) and the cases in which suspension of operation pending final judgment was granted, the applications with which the President dealt in 2004 were dismissed, in particular the application by the Autonomous Region of the Azores for suspension of the new fisheries rules applicable to Azorean waters (order of 8 July 2004 in Case T-37/04 R *Região autónoma dos Açores v Council*, not yet published in the ECR) and the application by Microsoft.

In the latter case, the President of the Court of First Instance, by order of 22 December 2004 in Case T-201/04 R *Microsoft v Commission*, not yet published in the ECR, the President of the Court of First Instance found that the evidence adduced by Microsoft was not sufficient to show that the immediate enforcement of the remedies imposed by the Commission might cause Microsoft serious and irreparable damage.

That case originated in the Commission's decision of 24 March 2004 <sup>60</sup> finding that Microsoft had infringed Article 82 EC by abusing its dominant position by engaging in two distinct types of conduct. The Commission also fined Microsoft more than EUR 497 million.

The first type of conduct concerned Microsoft's refusal to provide its competitors with certain 'interoperability information' and to authorise its use in the development and distribution of products competing with its own products on the work group server operating system market during the period October 1998 to the date of adoption of the decision. By way of remedy, the Commission ordered Microsoft to disclose the 'specifications' for its client-to-server and server-to-server communications protocols to any undertaking wishing to develop and distribute work group server operating systems. The specifications describe certain characteristics of a program and must therefore be distinguished from the program's 'source code', which designates the software code actually run by the computer.

The second type of conduct sanctioned by the Commission was the tying of Windows Media Player with the Windows operating system. The Commission considered that that practice affected competition on the media reader market. By way of remedy, the Commission ordered Microsoft to offer for sale a version of Windows without Windows Media Player. Microsoft none the less retains the possibility to market Windows with Windows Media Player.

On 7 June 2004, Microsoft brought an action before the Court of First Instance for annulment of the Commission's decision (Case T-201/04). On 25 June 2004, Microsoft sought suspension of operation of the remedies imposed by that decision. Following the lodging of that application, the Commission stated that it did not intend to enforce the remedies until a decision had been reached on the application for suspension.

<sup>60</sup> Commission Decision C(2004) 900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-37.792 Microsoft).

In his order of 22 December 2004, the President of the Court of First Instance, after examining the circumstances of the case, held that Microsoft had not shown that it might suffer serious and irreparable damage if the contested decision should be enforced.

As regards the refusal to provide the interoperability information, the President considered that the main action raised a number of questions of principle relating to the conditions in which the Commission is justified in concluding that a refusal to disclose information constitutes an abuse of a dominant position contrary to Article 82 EC. Emphasising that it is solely for the court dealing with the substance of the application to answer those questions, the President of the Court of First Instance concluded that the application for annulment lodged by Microsoft was not at first sight unfounded and that the *prima facie* requirement (which entails an assessment of whether the main action is *prima facie* well founded) was therefore satisfied.

However, the President of the Court of First Instance held that the condition relating to urgency was not satisfied, since Microsoft had not adduced evidence that disclosure of the information thus far kept secret would cause serious and irreparable harm. Following a factual examination of the actual consequences of disclosure as alleged by Microsoft, the President found, in particular, that disclosure of information thus far kept secret does not necessarily entail serious harm and that, regard being had to the circumstances of the case, such damage had not been demonstrated in the present case. Nor had Microsoft demonstrated, first, that the use of the disclosed information by its competitors would have the effect of placing the information in the public domain; second, that the fact that the competing products would remain in distribution channels after annulment of the decision would constitute serious and irreparable damage; third, that Microsoft's competitors would be able to 'clone' its products; fourth, that Microsoft would have to make a fundamental change to its business policy; and, fifth, that the decision would cause an irreversible development on the market.

As regards the tying of Windows and Windows Media Player, the President considered, first of all, that certain of Microsoft's arguments raised complex issues, such as that of the anti-competitive effect of the tying resulting from 'indirect network effects', which it was for the Court of First Instance to resolve in the main action. The President concluded that the *prima facie* requirement was satisfied and then considered whether the requested suspension must be ordered as a matter of urgency. On the basis of a factual analysis of the alleged damage, the President held that Microsoft had not demonstrated in concrete terms that it might suffer serious and irreparable damage owing to interference with its commercial freedom or harm to its reputation.

## Table of Contents for the Proceedings of the Court of First Instance in 2004

	Page
I. PROCEEDINGS CONCERNING THE LEGALITY OF MEASURES .....	79
A. Procedural aspects .....	80
1. Default proceedings.....	80
2. Raising of an absolute bar to proceedings by the Court of its own motion.....	81
3. Costs .....	81
B. Admissibility of actions brought under Article 230 EC.....	83
1. Measures against which an action may be brought .....	83
2. Time-limit for bringing an action.....	84
3. Legal interest in bringing proceedings.....	85
4. Standing to bring proceedings.....	85
a) Decisions .....	86
b) Measures of general application .....	88
C. Competition rules applicable to undertakings .....	89
1. Points raised in the case-law on the scope of Article 81 CE .....	90
a) Scope <i>ratione materiae</i> .....	90
b) Competition procedure.....	91
– Access to the file .....	91
– The scope of the Statement of Objections.....	91
– Consequences of an express acknowledgement of the facts during the administrative procedure.....	92
– No recognition of an absolute right to silence .....	92
– Reasonable time .....	93
c) Proof of the infringement of Article 81 EC.....	94

d) Fines .....	95
– Guidelines .....	96
Gravity.....	96
Duration .....	98
Aggravating circumstances.....	98
Attenuating circumstances .....	98
– The Leniency Notice .....	98
– The principle <i>ne bis in idem</i> .....	99
– The exercise of unlimited jurisdiction .....	100
2. Regulation No 4064/89.....	101
D. State aid.....	102
1. The concept of State aid.....	102
a) Constituent elements .....	102
– Advantage	
– Specific or selective nature of the State measure	
b) Guidelines .....	105
c) Recovery.....	106
2. Procedural matters .....	108
E. Trade protection measures .....	109
F. Community trade mark.....	111
1. Absolute grounds for refusal of registration.....	111
2. Relative grounds for refusal of registration.....	114
3. Formal and procedural issues .....	115
4. Operational continuity of the departments of OHIM .....	117
G. Access to documents .....	117
H. Community staff cases .....	119
II. ACTIONS FOR DAMAGES .....	120
III. APPLICATIONS FOR INTERIM RELIEF .....	122