A Proceedings of the Court of First Instance in 2000

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

I. Activity of the Court of First Instance

1. The number of cases brought before the Court of First Instance in 2000, namely 387, [1] exceeds the total of 356 cases brought in 1999. The figure for the past judicial year includes a set of 59 actions brought by Italian undertakings for the annulment of a Commission decision ordering the recovery of State aid paid to them and 34 actions brought against decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market.

The total number of cases determined, excluding special proceedings, was 327 (or 241 after the joinder of cases). This figure includes the 41 "Cement" cases, the largest competition law matter ever brought before the Court of First Instance.

The number of judgments delivered by Chambers of five Judges (which have jurisdiction to decide actions concerning State aid rules and trade protection measures) was 24 (compared with 39 in 1999), while 82 judgments (74 in 1999) were delivered by Chambers of three Judges. No case was referred to the Court sitting in plenary session, nor was an Advocate General designated in any case.

The number of applications for interim relief lodged in the course of 2000 provides confirmation of the trend noted in 1999 (43 applications in 2000, compared with 38 in 1999, 26 in 1998 and 19 in 1997); 45 sets of proceedings for interim relief were disposed of in the course of the year.

The total number of cases pending at the end of the year, excluding special proceedings, came to 784 (compared with 724 in 1999).

Pursuant to the provisions of the Rules of Procedure enabling the Court to give decisions when constituted by a single Judge, 15 cases were allocated to a single Judge in the course of the year. Eleven judgments and four orders were pronounced by the Court sitting as a single Judge.

2. On 16 November 2000 the Council approved amendments to the Rules of Procedure of the Court of First Instance which had been submitted to it on 21 January 2000 (OJ 2000 L 322, p. 4). These amendments, formally adopted by the Court on 6 December 2000, will enter into force at the beginning of 2001.

The new provisions will henceforth allow the Court to decide certain cases under a simplified procedure or, having regard to the particular urgency and the circumstances, under an expedited procedure. The time-limit for the intervention of third parties and the detailed rules governing their intervention have undergone consequential amendment.

The new provisions also regulate the transmission of documents by fax or other technical means of communication, provide for the possibility for the Court, in exceptional cases, to exclude the communication to the parties of documents the production of which must be ordered, and create a legal basis for the issue of practice directions to parties.

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[1] This figure does not include 11 special proceedings relating to matters such as legal aid and the taxation of costs.

3. The work of the conference of the representatives of the Governments of the Member States, which began in February 2000, was completed in Nice on 11 December 2000. The outcome of that conference, so far as concerns the Court of Justice as an institution, is commented on by the President of the Court of Justice in the foreword to this report.

II. Developments in the case-law

The principal advances in the case-law in 2000 are set out below, the cases grouped into proceedings concerning the legality of measures (A), actions for damages (B) and applications for interim relief (C).

A. Proceedings concerning the legality of measures

A.1. Admissibility of actions for annulment

In the course of the past year, the Court of First Instance dismissed as inadmissible for lack of standing to bring proceedings a number of actions for annulment either of decisions which were not addressed to the applicants or of measures of a legislative nature. The actions were dismissed by way of judgment in seven cases (judgments of 22 February 2000 in Case T-138/98 *ACAV and Others* v *Council*, of 20 June 2000 in Case T-597/97 *Euromin* v *Council*, of 27 June 2000 in Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* (under appeal, Cases C-281/00 P and C-313/00 P) and of 13 December 2000 in Case T-69/99 *Danish Satellite TV* v *Commission*) and by way of order in the remainder.

By a number of decisions, the Court declared inadmissible actions for the annulment of regulations in the fields of agricultural and fisheries policy (in particular, *ACAV and Others* v *Council*, cited above, and order of 11 July 2000 in Case T-268/99 *FNAB and Others* v *Council* (under appeal, Case C-345/00 P)), the common commercial policy (*Euromin* v *Council*, cited above) and competition policy (orders of 12 July 2000 in Case T-45/00 *Conseil National des Professions de l'Automobile and Others* v *Commission* (under appeal, Case C-341/00 P) and of 19 October 2000 in Case T-58/00 *Bond van de Fegarbel-Beroepsverenigingen and Others* v *Commission*). The Court also dismissed as inadmissible actions for the annulment of a directive (*Salamander and Others* v *Parliament and Council*, cited above).

The Court also reiterated that, in the absence of express provisions of Community law, the Community administration and judicature cannot be placed under a general obligation to inform individuals of the remedies available or of the conditions under which they may exercise them (judgment of 24 February 2000 in Case T-145/98 *ADT Projekt* v *Commission*).

The developments in the case-law in 2000 concern the concept of a reviewable act, the point from which time starts to run for bringing an action, possession of a legal interest in bringing proceedings and standing to bring proceedings.

Concept of a reviewable act

It is well-established case-law that any 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 a decision which may be the subject of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) (judgments of 17 February 2000 in Case T-241/97 *Stork Amsterdam* v *Commission*, of 10 May 2000 in Case T-46/97 *SIC* v *Commission*, of 8 June 2000 in Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico*

v *Commission and Council* (under appeal, Case C-312/00 P) and of 29 November 2000 in Case T-213/97 *Eurocoton and Others* v *Council*). Consequently, where a measure against which an action for annulment has been brought comprises essentially distinct parts, only those parts of that measure which produce such effects can be challenged (judgment of 27 September 2000 in Case T-184/97 *BP Chemicals* v *Commission* (under appeal, Case C-448/00 P)).

In order to determine whether a measure produces binding legal effects, it is necessary to look at its substance. That aspect was fully enlarged upon in the judgment of 22 March 2000 in Joined Cases T-125/97 and T-127/97 *Coca-Cola and Coca-Cola Enterprises* v *Commission*. In those cases, the applicants sought the annulment of part of the statement of reasons for Commission Decision 97/540/EC of 22 January 1997 declaring a concentration compatible with the common market and with the functioning of the European Economic Area Agreement (OJ 1997 L 218, p. 15). The Commission raised an objection of inadmissibility in both cases, which the Court upheld.

The Court found first of all that the mere fact that the contested decision declared the notified concentration compatible with the common market and thus, in principle, did not have an adverse effect on the applicants which had notified it to the Commission did not dispense the Court from examining whether the contested findings contained in that decision had binding legal effects such as to affect the applicants' interests.

The Court then considered, first, whether the finding of a dominant position produced binding legal effects. It held that the mere finding of a dominant position in the contested decision, even if likely in practice to influence the policy and future commercial strategy of the undertaking concerned, had no binding legal effects, so that the applicants' challenge to its merits was not admissible. In reaching that conclusion, the Court stated that such a finding is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision. The conduct which the undertaking held to be in a dominant position subsequently comes to adopt in order to prevent a possible infringement of Article 86 of the EC Treaty (now Article 82 EC) is thus shaped by the parameters which reflect the conditions of competition on the market at a given time. Moreover, in the course of any decision applying Article 86 of the Treaty, the Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position. The Court also pointed out that the fact that, in the event of such a decision, the Commission may be influenced by that finding does not mean that, for that reason alone, the finding has binding legal effects. The undertaking concerned is not deprived of its right to bring an action for annulment before the Court of First Instance to challenge any Commission decision finding conduct to be an abuse.

Nor does the possibility that a national court applying Article 86 of the Treaty directly in the light of the decision-making practice of the Commission might reach the same finding that the undertaking concerned holds a dominant position mean that the contested finding has binding legal effects: that court, having to assess action taken after the contested decision in the context of a dispute brought before it, is not prevented from concluding that that undertaking is no longer in a dominant position.

The Court considered, second, whether a commitment to refrain from certain commercial practices which is entered into by an undertaking and contained in the decision in question can be the subject of an action for annulment. The Court held that it can be where it is clear from an analysis of its substance that it seeks to produce binding legal effects. In the case in point, the Court found that the declaration in the decision that the notified concentration was compatible with the common market was not affected by the commitment in the sense that, in

the event of breach of the terms of the commitment, the Commission could not revoke its decision. The Court accordingly concluded that the commitment did not produce binding legal effects and therefore was not a measure open to challenge for the purposes of Article 173 of the Treaty.

In *Eurocoton and Others* v *Council*, cited above, an application for annulment of a Council "decision" not to adopt a definitive anti-dumping duty on imports of certain products was declared inadmissible. The Court found first of all that the applicants could not invoke a right to the adoption by the Council of a proposal for a regulation imposing definitive anti-dumping duties which had been submitted to it by the Commission. The Court then stated that the vote taken in the Council did not result in a simple majority in favour of that proposal for a regulation, so that the Council did not adopt any measure.

Salamander and Others v *Parliament and Council*, cited above, concerned Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [2] which, subject to derogations, prohibited all forms of advertising of tobacco products in the Community. That directive was to be transposed into national law no later than 30 July 2001. [3] Several undertakings marketing products other than tobacco under the brand names of tobacco products or operating in the tobacco-product advertising market sought the annulment of the directive. While the actions were dismissed as inadmissible on the ground that the applicants lacked standing to bring proceedings, the Court did not rule out the possibility that the directive, a legislative measure, could in certain circumstances be of direct and individual concern to certain businesses. However, consideration of this was not automatic, since the fourth paragraph of Article 173 of the Treaty makes no provision, for the benefit of individuals, for a direct action before the Community judicature challenging a directive.

The point from which time starts to run for bringing an action

With regard to decisions adopted following the review procedure provided for by Article 93(2) of the EC Treaty (now Article 88(2) EC), the Court confirmed that, of the criteria referred to in the fifth paragraph of Article 173 of the EC Treaty, that of publication in the *Official Journal of the European Communities* must be applied when determining the point from which time starts to run for the bringing of an action for annulment by any person other than the Member State to which the decision is notified, even where that person had knowledge of the decision before its publication (judgment of 12 December 2000 in Case T-296/97 *Alitalia* v *Commission*).

Legal interest in bringing proceedings

While a legal interest in bringing proceedings is not expressly required by Article 173 of the Treaty, it is none the less a condition which must be satisfied if an action for annulment brought by a natural or legal person is to be admissible (judgments of 27 January 2000 in Case T-256/97 *BEUC* v *Commission*, of 17 February 2000 in Case T-183/97 *Micheli and Others* v *Commission* and of 13 June 2000 in Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission*; order of 10 February 2000 in Case T-5/99 *Andriotis* v *Commission and Cedefop*). The legal interest in bringing proceedings must be assessed as at the day on which the action is brought (judgment of 8 November 2000 in Case T-509/93 *Glencore Grain* v *Commission*) and

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2 Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 (OJ 1998 L 213, p. 9).

3 The Court of Justice annulled the directive by judgment of 5 October 2000 in Case C-376/98 *Germany* v *Parliament and Council*.

must be personal to the natural or legal person who has brought the action (*BEUC* v *Commission*, cited above).

In its judgment of 6 July 2000 in Case T-139/99 *AICS* v *Parliament* (under appeal, Case C-330/00 P), the Court held, in the context of a procedure for the award of a public service contract, that the contracting institution could not maintain that a tenderer whose tender had not been accepted had no interest in bringing an action on the ground that it submitted a tender which could in no event be accepted. Inasmuch as annulment of the decision not to accept its tender, on the ground that the method of the first successful tenderer for performance of the contract at issue was not permitted under the legislation of the Member State concerned, would entail reopening the tender procedure under different conditions, the applicant did indeed have a legal interest in bringing proceedings in order to be able to submit a fresh tender without being faced by competition from the first successful tenderer.

Also, in its judgment of 10 February 2000 in Joined Cases T-32/98 and T-41/98 *Netherlands Antilles* v *Commission* (under appeal, Case C-142/00 P), the Court confirmed that an infra-State entity cannot be regarded as having no interest in bringing proceedings for annulment of regulations merely because the Member State has an independent right of action under the second paragraph of Article 173 of the Treaty.

The applicant was found to have no interest in bringing proceedings in Case T-49/97 *TAT European Airlines* v *Commission* (order of 27 January 2000). The Court stated that, where a Commission decision authorising State aid is annulled in its entirety, that annulment has the effect of removing the legal basis of subsequent decisions relating to payment of the different tranches of aid. Accordingly, the decision adopted by the Commission after the annulling judgment, reaffirming that the aid was compatible with the common market and authorising afresh the payment of tranches of aid, had to be regarded as an independent decision replacing the previous decisions of authorisation, and not as a measure purely confirming them. The adoption of the new decision, which created, and therefore replaced, rights as regards the authorisations to pay the tranches of aid, resulted in the loss of all legitimate interest in continuing an action for the annulment of one of the previous decisions authorising payment of a tranche of the aid.

Standing to bring proceedings

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

The condition that a person must be directly concerned by the contested Community measure means that the measure must directly affect his legal situation and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules alone without the application of other intermediate rules.

In *Salamander and Others* v *Parliament and Council*, cited above, the Court found that the legal situation of businesses was not directly affected. It held that Directive 98/43, whose legality the applicants contested, could not of itself impose obligations on an individual and could therefore not be relied on as such against an individual. Accordingly, a directive which, as in the case in point, required the Member States to impose obligations on businesses was not of itself, before the adoption of the national transposition measures and independently of them, such as to affect directly the legal situation of those businesses. The Court also held that

the directive left the Member States a power of assessment, such that the applicants could not be directly concerned by it.

On the other hand, in *ACAV and Others* v *Council*, cited above, it was on the ground of lack of individual concern that the Court dismissed as inadmissible an action brought by albacore tuna fishermen established on Ile-d'Yeu (France) for the annulment of Regulation (EC) No 1239/98, [4] inasmuch as it provides that, from 1 January 2002, no vessel may keep on board, or use for fishing, drift-nets intended for the capture of certain species, including albacore.

First, the Court found that the contested regulation had general application since it applied without distinction to any vessel which was flying the flag of a Member State and was using drift-nets in the fishing areas specified, or was likely to do so, and not only to operators who, prior to its adoption, may have obtained authorisations to engage in those activities from the Member State whose flag they flew. The Court then considered whether it could be concluded from certain circumstances that the regulation, despite its general scope, was of individual concern to the applicants. It found that the regulation was of concern to them only in their objective capacity as albacore fishermen using a certain fishing technique in a specific area, in the same way as it was of concern to any other operator in the same situation, and that there was no concrete indication in the regulation that the measures in question were adopted specifically taking account of their situation. In response to arguments going to the serious economic impact which the regulation had on the applicants' business, the Court pointed out that the fact that a legislative measure could have specific effects which differed according to the various persons to whom it applied was not such as to differentiate them in relation to all the other operators concerned where that measure was applied on the basis of an objectively determined situation.

However, several actions for the annulment of measures of general application were declared admissible. In *Netherlands Antilles* v *Commission*, cited above, the Court held that an autonomous authority of a Member State endowed with legal personality under national law and forming part of the overseas countries and territories (OCTs), such as the Government of the Netherlands Antilles, was entitled to challenge Regulation (EC) No 2352/97 introducing specific measures in respect of imports of rice originating in the OCTs [5] and Regulation (EC) No 2494/97 [6] which was adopted within the framework of those measures. First, although the contested regulations were, by their nature, of general application and did not constitute decisions within the meaning of Article 189 of the EC Treaty (now Article 249 EC), the applicant was individually concerned by them inasmuch as the Commission, when envisaging their adoption, was obliged to take account of the applicant's particular situation, by virtue of Article 109(2) of Decision 91/482/EEC. [7] Second, the applicant was directly concerned by the contested regulations. The Court stated with regard to Regulation No 2352/97 that it contained comprehensive rules leaving no latitude to the authorities of the Member States, since it regulated in a binding manner the machinery for the submission and issue of licences for the import of rice from the OCTs and authorised the Commission to suspend their issue if a quota determined by it was exceeded or there were serious disturbances of the market.

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4 Council Regulation (EC) No 1239/98 of 8 June 1998 amending Regulation (EC) No 894/97 laying down certain technical measures for the conservation of fishery resources (OJ 1998 L 171, p. 1).

5 Commission Regulation (EC) No 2352/97 of 27 November 1997 introducing specific measures in respect of imports of rice originating in the overseas countries and territories (OJ 1997 L 326, p. 21).

6 Commission Regulation (EC) No 2494/97 of 12 December 1997 on the issuing of import licences for rice falling within CN code 1006 and originating in the overseas countries and territories under the specific measures introduced by Regulation (EC) No 2352/97 (OJ 1997 L 343, p. 17).

7 Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1).

In one of the cases decided by the judgment in *Camar and Tico* v *Commission and Council*, cited above, the applicants sought the annulment of a Commission decision rejecting a request for adjustment of a tariff quota. A negative decision being at issue, the Court recalled that a refusal constitutes an act in respect of which an action for annulment may be brought provided that the act which the Community institution refuses to adopt could itself have been contested under Article 173 of the Treaty. In the case in point, since the negative decision by the Commission related to the adoption of a regulation, the Court considered whether the applicants would have been directly and individually concerned by the regulation. In declaring the action admissible, the Court stated that the applicants, as the main importers of the product concerned by the tariff quota, were affected by the Commission's refusal by reason of circumstances in which they were differentiated from all other operators trading on the same market.

In the field of State aid, the Court considered of its own motion the admissibility of an application for annulment of a decision declaring State aid illegal and incompatible with the common market and ordering its recovery from the recipients (judgment of 29 September 2000 in Case T-55/99 *CETM* v *Commission*). The Court held that, since the Spanish Confederation for the Transport of Goods (CETM) protected the interests of those of its members which had received the aid in question and were required to make repayment pursuant to the contested decision, it was entitled to apply for annulment of that decision only in so far as it was directed at undertakings which were members of the CETM and whose main business was the transport of goods by road.

In the field of anti-dumping, the Court found it necessary to consider pleas of inadmissibility on the ground of lack of standing in several cases seeking the annulment of regulations. They were, depending on the circumstances, rejected (judgments of 29 June 2000 in Case T-7/99 *Medici Grimm* v *Council* and of 26 September 2000 in Case T-80/97 *Starway* v *Council*) or upheld (judgment of 26 September 2000 in Joined Cases T-74/97 and T-75/97 *Büchel & Co. Fahrzeugteilefabrik* v *Council and Commission*).

A.2. Review of legality

1. Competition rules applicable to undertakings

The *case-law on competition rules applicable to undertakings* was developed exclusively by judgments concerning the rules of the EC Treaty. The judgment of 15 March 2000 in the "Cement" cases ("the *Cement* judgment") [8] by itself disposed of 41 cases. The contribution made by the *Cement* judgment is multifaceted and only a small part of it can be recorded in this report.

The developments in the case-law in the past year cover a wide variety of issues: the scope of the Community competition rules; agreements and concerted practices prohibited by Article 85 of the EC Treaty (now Article 81 EC); abuses of dominant position prohibited by

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[8] Judgment of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95. The names of the parties are set out in a table at the end of this section of the report.

The appeals to the Court of Justice against that judgment have been registered as Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P.

Article 86 of the Treaty; observance of the rights of the defence; examination of complaints relating to Articles 85 and 86; and determining the applicable penalties.

1.1. Scope of the Community competition rules

(a) Concept of an undertaking or association of undertakings

For the purposes of Community competition law, the concept of an undertaking, as defined by the Court of Justice in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. In addition, it is well established that any activity consisting in offering goods and services on a given market is an economic activity.

Relying on that settled-case law, the Court of First Instance found, in its judgment of 30 March 2000 in Case T-513/93 *CNSD* v *Commission*, that the activity of customs agents was an economic activity and that customs agents had to be regarded as undertakings within the meaning of Article 85 of the Treaty. Therefore, the professional body bringing together representatives of that profession (the CNSD) had to be regarded as an association of undertakings within the meaning of Article 85. The public-law status of the CNSD could not preclude the application of that article.

The Court also found that, having regard to the national legislation, the members of the CNSD could not be characterised as independent experts and that they were not required to set tariffs taking into account the general interest and the interests of undertakings in other sectors or users of the services in question, in addition to the interests of the undertakings or associations of undertakings in the sector which appointed them. Consequently, the decisions by which that body established tariffs for professional services had to be regarded not as State decisions by means of which it performed public functions but as decisions of an association of undertakings capable of falling within the scope of Article 85(1) of the Treaty.

The *Cement* judgment upheld the approach taken by the Commission in the contested decision that it was not necessary that trade associations had a commercial or economic activity of their own in order for Article 85(1) of the Treaty to be applicable to them. Article 85(1) applies to associations in so far as their activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress.

Finally, in the judgment of 12 December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission*, the Court pointed out that the provisions of the EC Treaty concerning competition were applicable to the activities of an entity which could be severed from the activities in which it engaged as a public authority. Accordingly, the fact that Aéroports de Paris was a public corporation placed under the authority of the minister responsible for civil aviation and that it managed facilities in public ownership did not in itself mean that it could not be regarded as an undertaking. After drawing a distinction between, on the one hand, purely administrative activities and, on the other, the management and operation of the Paris airports, activities which were remunerated by commercial fees that varied according to turnover, the Court held that the latter were services amounting to a business activity. The activity as manager of the airport infrastructures, which enabled Aéroports de Paris to determine the procedures and conditions under which suppliers of groundhandling services carried out their activities and to levy commercial fees in return, could not be classified as a supervisory activity and had to be considered to be an activity of an economic nature.

(b) State measures and conduct of undertakings

In 1993 the CNSD brought an action before the Court of First Instance for annulment of a Commission decision finding that the tariff for services provided by customs agents which had been adopted by the CNSD constituted an infringement of Article 85(1) of the Treaty. Before the Court gave judgment, the Commission brought an action before the Court of Justice under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that the Italian Republic had failed to fulfil its obligations under Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of the EC Treaty. The Court of First Instance thus stayed the proceedings before it pending the judgment of the Court of Justice, which was delivered on 18 June 1998. In its judgment (Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851), the Court of Justice held that, "by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the [CNSD] to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty, consisting of setting a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty". The judgment of 30 March 2000 in *CNSD* v *Commission*, cited above, brought the proceedings before the Court of First Instance to a close.

The fundamental issue, which had not been analysed in detail by the Court of Justice in its judgment, was whether Article 85(1) of the Treaty was incorrectly applied in the Commission decision, in that, in the absence of autonomous conduct on the part of the CNSD and its members, adoption of the tariff at issue did not constitute a decision by an association of undertakings within the meaning of Article 85. Recalling first of all that Article 85 may apply if it is found that national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition, the Court found that national legislation requiring the CNSD to adopt a uniform and mandatory tariff imposed major limitations on competition and made it difficult in practice for there to be real competition in terms of prices between customs agents. However, it did not as such preclude the continued existence of a certain amount of competition capable of being prevented, restricted or distorted by the autonomous activity of customs agents, inasmuch as it did not lay down specific price levels or ceilings that were necessarily to be taken into account in establishing the tariff and did not define the criteria on the basis of which the CNSD was to draw up that tariff. Since such a body had room for manoeuvre in performing the obligations imposed on it by the national legislation, within which it could and ought to have acted in such a way as not to restrict the existing level of competition, the restrictive effects on competition of a tariff set by it could arise from its conduct.

(c) Sectoral arrangements

In *Aéroports de Paris* v *Commission*, cited above, the Court considered whether the Commission had been entitled to apply Regulation No 17 [9] to the activities of Aéroports de Paris. The applicant contended that the Commission should have applied Regulation (EEC) No 3975/87 [10] which, with two other regulations, replaced Regulation No 141. [11] According to the Court, the intention expressed by the legislature in Regulation No 141 to exempt from the application of Regulation No 17 only activities directly relating to the provision of transport

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9 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).

10 Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1).

11 Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-62, p. 241).

services in the strict sense was continued in Regulation No 3975/87, so that that regulation, which is specific in nature, applies only to activities directly relating to the supply of air transport services. Since the applicant was not an "undertaking in the air transport sector" and did not provide air transport services, the Commission was entitled to apply Regulation No 17.

1.2. Agreements and concerted practices prohibited by Article 85(1) of the EC Treaty

The *Cement* judgment

On 30 November 1994 the Commission adopted a decision, addressed to 42 undertakings and associations of undertakings, in which it found that there had been a series of agreements and concerted practices aimed at sharing the European markets in white cement and in grey cement. According to the Commission, those agreements and practices constituted a single infringement in which the 42 addressees of the decision had participated and whose starting point was January 1983: then, the representatives of the European cement producers, members of Cembureau (the professional association of European cement manufacturers), met and entered into an agreement which was designed to ensure non-transhipment to home markets and prohibited any export of cement within Europe likely to destabilise the neighbouring markets. It was found in Article 1 of the contested decision that that agreement, called "the Cembureau agreement", existed and that all the undertakings and associations of undertakings to which the decision was addressed participated in it, in breach of the prohibition laid down in Article 85(1) of the Treaty. The Cembureau agreement was described in the contested decision as a single and continuous agreement, in that it was implemented in the framework of bilateral or multilateral agreements and concerted practices. It was found in Articles 2 to 6 of the contested decision that those agreements and concerted practices existed and that the various undertakings and associations of undertakings participated in them. [12] However, the date on which the infringement ceased was uncertain. Fines amounting overall to approximately EUR 250 000 000 were imposed on the addressees of the decision.

Before the Court, all the applicants denied that they had participated in the agreement referred to in Article 1 of the contested decision. The Court found, after consideration of the documents mentioned in the decision, that the Commission had proved the existence of the Cembureau agreement and that there had in fact been an agreement between all the applicant undertakings on non-transhipment to home markets.

In that context, the Court provided some clarification on the standard of proof required in order to establish that an undertaking has participated in an agreement or concerted practice. It indicated that where an undertaking or an association of undertakings has, even without playing an active role, participated in one or more meetings at which a concurrence of wills emerged or was confirmed on the principle of anti-competitive conduct and it has, by virtue of its presence, subscribed to or at least given the impression to the other participants that it subscribed to the subject-matter of the anti-competitive agreement which was concluded and

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12 The contested decision found that there were agreements and concerted practices between Cembureau and its members concerning the exchange of information designed to facilitate the implementation of the Cembureau agreement. It also found that there were specific cross-border agreements, relating to Franco-Italian relations, Hispano-Portuguese relations and Franco-German relations. It set out the collusion which allegedly took place between several European producers as a reaction to imports of Greek cement and clinker into Member States of the Community in the mid-1980s, which gave rise to the setting up of a group known as the European Task Force, the setting up of a joint trading company, the adoption of measures to defend the Italian market and the adoption of measures for the purchase of quantities of cement or clinker likely to destabilise the market. Finally, it alleged that a number of undertakings and associations of undertakings participated in concerted practices contrary to Article 85(1) of the Treaty in the framework of two committees set up by the trade in order to discuss export problems: the European Cement Export Committee and the European Export Policy Committee.

subsequently confirmed at those meetings, it must, unless it proves that it openly distanced itself from the unlawful concerted action or informed the other participants that it intended to take part in those meetings with different objects in mind, be considered to have participated in that agreement. In the absence of such proof that it distanced itself, the fact that that undertaking or association of undertakings does not abide by the outcome of the meetings is not such as to relieve it of full responsibility for the fact that it participated in the agreement or concerted practice.

The Court also held that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 85(1) of the Treaty has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question. In this connection, in order to assess the evidential value of a document, regard should be had first to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, it appears sound and reliable.

In its consideration of whether the existence of the agreements and concerted practices referred to in Article 4 of the contested decision was established, the Court stated that the mere fact that a producer from a Member State knew that the purchases from it by other European producers had the object of halting, or at least reducing, its direct sales in the European markets does not allow the conclusion that it was party to an agreement or concerted practice contrary to Article 85(1) of the Treaty. Such knowledge can be deemed to reveal unlawful conduct only if it is established that it was accompanied by the adherence of that producer to the object pursued by the other European producers through the purchases concerned. In so far as that object is against the interests of the producer in question, only evidence of an undertaking by it that, in return for the purchases, it would halt or reduce its direct sales on the European markets could be deemed to constitute adherence by it to that object.

According to the contested decision, the Cembureau agreement was constituted by "the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts". In ruling on the applicants' claims, the Court considered whether the infringement found could be categorised as a single and continuous agreement. Before concluding that it could, the Court stated that some of the conduct referred to in the operative part of the contested decision pursued the same anti-competitive objective as the Cembureau agreement and could therefore be regarded as elements of the infringement referred to in Article 1 of the decision. In that context, it stated that bilateral or multilateral agreements or concerted practices can be regarded as constituent elements of a single anti-competitive agreement only if it is established that they form part of an overall plan pursuing a common objective. Finding, however, that identity of object between such agreements or concerted practices and such an anti-competitive agreement is not sufficient for an undertaking party to the former to be held to be party to the latter, the Court then considered whether the applicants had been aware of the existence of the Cembureau agreement. According to the Court, it is only if the undertaking knew, or ought to have known, when it participated in those agreements or concerted practices that it was taking part in the single agreement that its participation in the agreements or concerted practices concerned may constitute the expression of its accession to the single agreement.

After completing its analysis of the evidence referred to in the contested decision, the Court held that the participation of certain undertakings in the single agreement had not been proved by the Commission to the requisite standard (namely Buzzi, Castle, Cedest, ENCI, Titan, Heracles, Nordcement, Alsen-Breitenburg and Rugby). As regards the other addressees of the decision, the Court held that the duration of their participation in the infringement was less than that found by the Commission. In this connection, it took due account of the system for

establishing the infringement adopted in the contested decision under which, first, participation by an undertaking or association in a measure implementing the agreement constituted proof of its accession to that agreement and, second, the Commission had chosen to rely solely on specific documentary evidence to establish the agreement and the measures implementing it and the participation of each party in them. Thus, the Commission could not, without such direct documentary evidence, presume that a party continued to adhere to the agreement beyond the point at which it was last shown to have participated in a measure implementing the agreement.

The findings of the Court relating to the concept of a concerted practice are to be noted. It pointed out that a concerted practice implies the existence of reciprocal contacts. That condition of reciprocity is met where one competitor discloses its intentions or future conduct on the market to another when the latter requests it or, at the very least, accepts it. That is the case where the meeting at which a party was informed by its competitor of the latter's intentions or future conduct was held at the former's behest and it is apparent from the minutes of the meeting drawn up by it that it expressed no reservations or objections at all when its competitor informed it of its intentions. The attitude of that party during the meeting cannot, in those circumstances, be reduced to the purely passive role of a recipient of the information which its competitor unilaterally decided to pass on to it, without any request on its part.

Other judgments

The distinction between, on the one hand, genuinely unilateral conduct of a manufacturer in the context of the contractual relations maintained by it with its dealers and, on the other, conduct which is only ostensibly unilateral was clarified in the judgments of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* (under appeal, Case C-338/00 P) and of 26 October 2000 in Case T-41/96 *Bayer* v *Commission* (under appeal, Cases C-2/01 P and C-3/01 P).

In *Volkswagen* v *Commission*, the Court partly upheld an application for annulment of a Commission decision imposing a fine of EUR 102 000 000 on the Volkswagen group for infringement of Article 85(1) of the Treaty. It confirmed the decision to a very large extent, but reduced the fine to EUR 90 000 000, in particular because the Commission failed to establish that the infringement had been committed throughout the period found in the decision. The Commission complained in its decision that Volkswagen had entered into agreements with the Italian dealers in its distribution network in order to prohibit or restrict sales in Italy of Volkswagen and Audi vehicles to final consumers from other Member States and to dealers in its distribution network in other Member States. Amongst the means employed by Volkswagen to prevent or restrict those parallel imports from Italy were a system of supply quotas for Italian dealers and a bonus system discouraging them from selling to non-Italian customers. The Court essentially found that the Commission had proved the existence of those measures, which it held capable of partitioning the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.

The Court, relying on existing case-law, held that a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the Treaty but is an agreement within the meaning of that provision if, as in the case in point, it forms part of a set of continuous business relations governed by a general agreement drawn up in advance. The Court added that Article 85(1) may not in any event be declared inapplicable where the parties to a selective distribution contract conduct themselves in such a way as to

restrict parallel imports. The very spirit of Regulation (EEC) No 123/85 [13] is to make the exemption available under it subject to the condition that users will, through the possibility of parallel imports, be allowed a fair share of the benefits resulting from the exclusive distribution.

By contrast, in *Bayer* v *Commission* the Court annulled a Commission decision of 10 January 1996 finding that there was an agreement between Bayer and its French and Spanish wholesalers intended to prevent the export of the medicinal product "Adalat" (or "Adalate") to the United Kingdom and imposing a fine of EUR 3 000 000 on Bayer.

The case arose from the fact that the price of Adalat in the United Kingdom was much higher than the price set by the French and Spanish health authorities. That caused wholesalers established in France and Spain to export Adalat to the United Kingdom. The effects of the parallel imports on sales of Adalat by the United Kingdom subsidiary of the Bayer group led the latter to fulfil orders placed by French and Spanish wholesalers only to the extent of their normal needs. The Commission, with which those wholesalers lodged a complaint, found that the Bayer group had infringed Article 85(1) of the Treaty and fined it on that basis.

The Court held that the Commission had failed to prove the existence of an agreement between Bayer and its French and Spanish wholesalers. After noting that there was no direct documentary evidence of the conclusion of an agreement between the parties, the Court found that the Commission had not established the existence of an acquiescence by the other parties, express or implied, in the attitude adopted by the manufacturer, the actual conduct of the former being clearly contrary to the new policy of the latter. The Commission therefore could not find that Bayer's conduct, adopted in the context of the contractual relations maintained by it with its dealers, in reality formed the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty.

1.3. Abuse of dominant position

By decision of 11 June 1998, the Commission found that Aéroports de Paris had infringed Article 86 of the Treaty by using its dominant position to impose discriminatory commercial fees at the Paris airports of Orly and Roissy-Charles de Gaulle on suppliers of certain kinds of groundhandling services. In *Aéroports de Paris* v *Commission*, cited above, the Court dismissed the application for annulment of that decision, after finding that the definition of the product market and of the geographical market adopted by the Commission was correct, that Aéroports de Paris did occupy a dominant position within the meaning of Article 86 and that that position had been abused.

1.4. Rights of the defence

(a) Access to the file

Access of undertakings under investigation to the Commission file

The rules governing access to the Commission's investigation file were confirmed and explained in the *Cement* judgment. Practically all the undertakings to which the decision was

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[13] Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

addressed complained that the Commission had allowed them insufficient access to the file during the administrative procedure.

The Court thus recalled the rule, flowing in particular from the general principle of equality of arms, that, in order to allow the parties to defend themselves effectively, the Commission has an obligation 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. In accordance with its judgments in the *Soda ash* cases, [14] the Court held that if the Commission takes the view that certain documents contain business secrets or other confidential information, it must prepare non-confidential versions of the documents in question or have them prepared by the parties from which the documents come. If preparation of non-confidential versions of all the documents proves difficult, it must send to the parties concerned a sufficiently precise list of the documents posing problems so as to enable them to ascertain, with knowledge of the facts, whether the documents described are likely to be relevant for their defence. In the case in point, the Court found that a list of documents which did not describe the content of the documents was not sufficiently precise.

The Court explained the consequences for the legality of the final decision of a lack of proper access to the file during the administrative procedure in competition matters, stating that such a *finding cannot in itself lead to annulment of the contested decision*. Access to the file is not an end in itself, but is intended to protect the rights of the defence. Thus, the right of access to the file is inseparable from and dependent on the principle of the rights of the defence. The contested decision therefore cannot be annulled unless it is found that lack of proper access to the file prevented the parties from perusing documents which were likely to be of use in their defence and thus infringed their rights of defence.

When, in the context of an action seeking annulment of the Commission's final decision, an applicant challenges the Commission's refusal to disclose a document or documents in the file, it is for the Court to require production of the documents and to examine them, action which the Court took in the *Cement* cases since it requested the Commission to forward the file to it so that it could be inspected in its entirety by the parties. The Court cannot act as a substitute for the Commission; its examination must first of all be directed at the question whether there is an objective link between the documents which could not be inspected during the administrative procedure and an objection adopted against the applicant concerned in the contested decision. If there is no such link, the documents in question are of no use in the defence of the applicant invoking them. If the opposite is true, it must be examined whether the failure to disclose them could have impaired the defence of that applicant during the administrative procedure. It is therefore necessary to examine the evidence adduced by the Commission in support of the objection and to assess whether the documents not disclosed might, in the light of that evidence, have had a significance which ought not to have been disregarded. The Court found that the rights of several applicants had been infringed because there was a chance, even if only small, that the outcome of the administrative procedure might have been different if those undertakings could have relied on the document during that procedure.

The Court also defined an "incriminating document" *vis-à-vis* an undertaking which is party to a competition proceeding as a document used by the Commission to support a finding of an infringement in which that undertaking is alleged to have participated. The rights of the defence are therefore not infringed merely because the undertaking was unable to express its views during the administrative procedure on a document used in the contested decision. It is

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[14] Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847.

necessary for the undertaking to prove that in the decision the Commission used a new item of evidence in order to sustain an infringement in which it is alleged to have participated.

Finally, the Court confirmed that the Commission is under no obligation to grant access to internal documents during the administrative procedure in competition matters. Furthermore, in proceedings before the Community judicature such documents are not to be communicated to the applicants, unless the circumstances of the case are exceptional and the applicants make out a plausible case for the need to do so. That restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution when it deals with infringements of the Treaty competition rules.

Access of third parties to the Commission file

In judgments of 30 March 2000 in Case T-65/96 *Kish Glass* v *Commission* (under appeal, Case C-241/00 P) and of 30 November 2000 in Case T-5/97 *Industrie des Poudres Sphériques* v *Commission*, the Court had the opportunity to reiterate that an undertaking which has lodged a complaint with the Commission cannot claim to have a right of access to the file held by the Commission on the same basis as the undertaking under investigation.

(b) Statement of objections

In the *Cement* cases, the applicants alleged various infringements of their rights of defence during the administrative procedure. Several of them, who were not present at the meeting of 14 January 1983 (see above), contended that in the decision the Commission had considered that they were represented at that meeting and had thereby participated in the agreement from the date on which the meeting was held, when that was not included in the statement of objections. The Court held that the Commission should have announced its intention to take the meeting of 14 January 1983 as the starting date of the infringement for all the undertakings to which its future decision would be addressed. The Court thus determined, for each undertaking, the starting date of its participation in the infringement without having regard to the criterion concerning representation adopted by the Commission.

Also, various associations of undertakings contended that the Commission had not announced its intention to impose fines on them in the statement of objections. The Court held that the Commission was not entitled to impose a fine on an undertaking or an association of undertakings where it had not previously informed the party concerned of its intention to do so in the statement of objections, which must make it possible for that party to defend itself not only against a finding of an infringement but also against the imposition of a fine. Since the argument of the various associations was well founded, the fines imposed on associations of undertakings were annulled.

1.5. Examination of complaints by the Commission

The obligations owed by the Commission when dealing with complaints submitted under Article 3 of Regulation No 17 are defined by settled case-law of the Court of Justice and the Court of First Instance. Several judgments helped to refine the obligations on the Commission and attest to the review of its assessments which is carried out (judgments in *Stork Amsterdam* v *Commission*, cited above, in *Kish Glass* v *Commission*, cited above, of 25 May 2000 in Case T-77/95 RV *Ufex and Others* v *Commission*, of 26 October 2000 in Case T-154/98 *Asia Motor and Others* v *Commission* (under appeal, Case C-1/01 P) and in *Industrie des Poudres Sphériques* v *Commission*, cited above).

In *Stork Amsterdam* v *Commission*, the Court held that, when the Commission reopens an administrative procedure for examination of a complaint on which it has been decided to take no action, it must properly state the reasons for its change of position in a decision rejecting the complaint, in particular where the decision to reopen the administrative procedure was not based on the presence or awareness of new points of fact or law warranting re-examination of the matter. Since the requirement as to reasoning was not met, the contested decision was annulled.

In its judgment in *Ufex and Others* v *Commission*, cited above, delivered after the Court of Justice had referred the case back to it by judgment of 4 March 1999 in Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, [15] the Court of First Instance found that the Commission had not complied with its obligations in the context of its examination of the complaint made to it by the applicant. Here, the complaint was rejected on the basis of lack of Community interest, as the unlawful practices complained of had ceased. While the Court confirmed that the Commission may reject a complaint on the ground of lack of a sufficient Community interest in further investigation of the case, it held, in accordance with the judgment of the Court of Justice, that the Commission is obliged to assess, on the basis of all the elements of fact and law obtained, the seriousness and duration of the alleged infringements and whether they continue to have effects, even if the allegedly abusive practices have ceased since the complaint was made. After examining the contested decision, the Court found that the Commission had failed to comply with its obligations. It therefore annulled the contested decision.

1.6. Determining the amount of fines

In the *Cement* judgment, the Court found it necessary to reduce appreciably the amount of the fines imposed on the undertakings whose participation in the agreement was established, the fines having been set by reference to the gravity and the duration of the infringement. [16]

In particular, the Court explained the extent of the obligation to provide a statement of reasons for a decision imposing fines on a number of undertakings or associations for infringement of the Community competition rules. It recalled that this obligation must be assessed *inter alia* in the light of the fact that the gravity of the infringement depends on a large number of factors, without there being a binding or exhaustive list of the criteria to be applied, and that the Commission has a discretion when determining the amount of each fine. It then reiterated that it is desirable that, in order to enable undertakings to define their position in full knowledge of the facts, they should be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method of calculating the fine imposed upon them, without their being obliged, in order to do so, to bring court proceedings against the decision. That is so especially where the Commission uses detailed arithmetical formulas to calculate the fines. Such explanations, which it is for the Court to seek if necessary from the Commission, do not, however, constitute an additional *a posteriori* statement of reasons for

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15 In its judgment the Court of Justice set aside the judgment of the Court of First Instance in Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1.

16 This, in conjunction with other factors, resulted in the overall amount of the fines being reduced from approximately EUR 250 000 000 to approximately EUR 110 000 000 (see p. 146 of this report).

the contested decision, but translate into figures the criteria set out in it that are capable of being quantified. [17]

[17] See, in this regard, the reference to the judgments delivered on appeal in the "cartonboard" cases in the section of this report devoted to the proceedings of the Court of Justice in 2000 (paragraph 16.1., p. 47 et seq.)

2. State aid

In the field of State aid, the Court decided actions brought under the fourth paragraph of Article 173 of the EC Treaty [18] and Article 33 of the ECSC Treaty. [19] Its decisions explain various aspects of the substantive law on aid.

2.1. Concept of State aid

The Court was required in a number of cases to rule, first, on the constituents of the *concept of State aid* and, second, on the distinction between new and existing aid.

(a) Constituents of the concept of State aid

For the purposes of Community law, aid is an advantage, granted by the State or by means of State resources, in favour of certain undertakings or certain products. In the past year the Court considered both the notion of an advantage conferred by a State measure and the need for the measure to be specific in nature.

In *EPAC* v *Commission*, cited above, the Court recalled that the concept of State aid embraces not only positive benefits, such as subsidies themselves, 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. In determining whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions.

In its action for annulment of a Commission decision declaring aid granted to it by the Portuguese Government illegal and incompatible with the common market, EPAC submitted that the Commission had infringed Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) in taking the view that the guarantee granted to it by the Portuguese authorities constituted State aid. The Court thus examined whether, under normal market conditions, the guarantee granted by the Portuguese State to EPAC for the purpose of enabling it to obtain a loan from banking institutions would also have been given by a private operator in view, above all, of the risk of the guarantee being enforced in the event of non-repayment of the loan. Having regard, in particular, to EPAC's seriously exposed financial position, the Court found that the Commission was justified in taking the view that, in the circumstances of the case, a private operator would not have granted EPAC the guarantee.

In determining whether an undertaking which benefits from a measure adopted by a public authority would have obtained the same economic advantages from a private investor operating under market conditions, the Commission is entitled to use the private-investor test. This test is useful when deciding whether an undertaking has received aid within the meaning of Article 92(1) of the Treaty. It is also useful when deciding whether a measure adopted by a public authority, acting as an economic operator or through the intermediary of an economic operator, in favour of an undertaking constitutes State aid for the purposes of Article 4(c) of

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18 Judgments of 16 March 2000 in Case T-72/98 *Astilleros Zamacona* v *Commission*; in *SIC* v *Commission*, cited above; in *EPAC* v *Commission*, cited above; of 15 June 2000 in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* (under appeal, Case C-298/00 P); in *BP Chemicals* v *Commission*, cited above; in *CETM* v *Commission*, cited above; in *Alitalia* v *Commission*, cited above; and of 14 December 2000 in Case T-613/97 *Ufex and Others* v *Commission*.

19 Order of 25 July 2000 in Case T-110/98 *RJB* v *Commission* (under appeal, Case C-371/00 P) and judgment of 29 June 2000 in Case T-234/95 *DSG* v *Commission* (under appeal, Case C-323/00 P).

the ECSC Treaty, as the Court held in *DSG* v *Commission*, cited above. Clarification by the Community judicature of concepts referred to in the provisions of the EC Treaty relating to State aid is relevant when applying the corresponding provisions of the ECSC Treaty to the extent that the clarification is not incompatible with that Treaty. It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty in order to assess the legality of decisions regarding aid covered by the ECSC Treaty.

In *DSG* v *Commission*, an action for annulment of a Commission decision declaring State aid incompatible with the ECSC Treaty and the Steel Aid Code and ordering its recovery, the Court recalled the case-law of the Court of Justice according to which the conduct of the private investor, with which that of a public investor pursuing public policy objectives is to be compared, is not necessarily that of an ordinary investor laying out capital with a view to realising a profit in the medium to long term, but must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term. Relying on that case-law, the Court of First Instance held that the applicant had not established that the Commission obviously erred in its assessment in taking the view that a private investor would not have granted loans such as those which were in dispute given the financial situation of the recipient undertaking, its need for investment and the situation of the market for the products concerned.

A decision by the Commission concerning the recapitalisation of the company Alitalia was annulled in *Alitalia* v *Commission*, cited above, for failure to state reasons and manifest errors of assessment. In that case, the Court had to determine whether the Commission was entitled to conclude that the capital injection of ITL 2 750 billion by the Italian State finance company IRI constituted State aid within the meaning of Article 92(1) of the Treaty.

First, the Court rejected the applicant's argument that that investment satisfied the private-investor test because of the participation of private investors in its capital. It held that a capital contribution from public funds satisfies the private-investor test and does not constitute State aid if, *inter alia*, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances, which was not the case here.

Second, the Court found that the Commission had failed to provide sufficient reasoning for applying a rate of return of 30% as the minimum rate that an investor acting in accordance with the laws of the market would have demanded before injecting the capital concerned. That minimum rate for an investment by public authorities in an airline had been applied by the Commission in a decision relating to the company Iberia. The applicant's argument, put forward in the administrative procedure before the Commission, that its situation had to be distinguished from Iberia's formed an essential part of its case that IRI's investment satisfied the private-investor test, and warranted a reply from the Commission in the contested decision. Since the Commission did not explain in the contested decision why it considered it necessary to apply to IRI's investment the same minimum rate of 30% as it had adopted in the Iberia decision, the Court found that it had erred in its reasoning.

Third, the Court found that, in the contested decision, the Commission did not reassess the minimum and internal rates of return on the basis of the final version of the applicant's restructuring plan, a step which it should have taken in order to be able to make an accurate assessment of whether IRI's investment satisfied the private-investor test.

In *CETM* v *Commission*, cited above, the Court recalled that a State aid measure must be specific in nature, that is to say its application must be selective.

In order for the selective nature of a measure to be regarded as established, it is necessary to determine whether the measure entails advantages accruing exclusively to certain undertakings or certain sectors of activity. In *CETM* v *Commission*, an action seeking the annulment of a Commission decision concerning a Spanish system of aid for the purchase of commercial vehicles in so far as it declared certain aid illegal and incompatible with the common market, the Court reviewed whether the measure was specific in nature. It stated that the fact that aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, cannot suffice to call in question the selective nature of a measure and, accordingly, its classification as State aid within the meaning of Article 92(1) of the Treaty. In the case in point, a measure which was intended to, and did in fact, benefit, among users of commercial vehicles, only natural persons, small and medium-sized enterprises, local and regional public bodies and bodies providing local public services (to the exclusion of other users of vehicles of that type, such as large undertakings) was considered to be selective and therefore specific for the purposes of Article 92(1) of the Treaty.

(b) Distinction between new and existing aid

Systems of financial aid to local road haulage contractors were set up by Laws of the Friuli-Venezia Giulia Region of Italy of 1981 and 1985 but were not notified to the Commission. In a decision adopted in 1997, the Commission declared incompatible with the common market the aid granted to companies engaged in transport operations at an international level and the aid granted, from 1 July 1990, to companies engaged exclusively in transport operations at a local, regional or national level, and it ordered recovery of the aid.

In their action for annulment of the decision, the hauliers contended in particular that the aid for local, regional and national transport had to be treated as existing aid because it was provided for by laws preceding the liberalisation of the sector concerned and therefore was not subject to the obligation to notify. The Court therefore had to decide whether aid granted under an aid system established before a market was opened up to competition had to be regarded, with effect from the date of that liberalisation, as new aid or as existing aid.

In *Alzetta and Others* v *Commission*, [20] cited above, the Court held that existing aid is not only aid introduced before the Treaty entered into force or before the accession of the Member State concerned to the European Communities and aid which has been properly put into effect under the conditions laid down in Article 93(3) of the Treaty, but also aid established in a market that was initially closed to competition. At the time of its establishment, such aid did not come within the scope of Article 92(1) of the Treaty, which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition. The liberalisation, which is not attributable to the competent authorities of the Member State concerned, cannot be regarded as a material alteration to the aid system, and therefore subject to the obligation to notify under Article 93(3) of the Treaty. On the contrary, liberalisation is a precondition for the applicability of Treaty provisions on State aid in some specific sectors, such as the transport sector, which was initially closed to competition.

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[20] The Friuli-Venezia Giulia Region also brought an action for annulment of the decision. The objection of inadmissibility raised by the Commission against that action was rejected by judgment of 15 June 1999 in Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871. That case is still in progress.

In the case in point, as the international road haulage sector had been opened up to competition with effect from 1969, the systems of aid established in 1981 and 1985 in that sector had to be regarded as new systems of aid which should thus have been notified to the Commission pursuant to Article 93(3) of the Treaty.

On the other hand, as the cabotage market was liberalised only from 1 July 1990, the systems of aid introduced in 1981 and 1985 had to be regarded as existing systems and not new systems of aid, so that aid to undertakings engaged solely in local, regional or national transport could be the subject, at most, of a decision finding it incompatible as to the future. Pursuant to Article 93(1) and (2) of the Treaty and in accordance with the principle of legal certainty, the Commission is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine. That aid can, therefore, lawfully be implemented as long as the Commission has not found it to be incompatible with the common market.

The contested decision was therefore annulled in so far as it declared that aid granted with effect from 1 July 1990 to undertakings engaged solely in local, regional or national transport was illegal and required recovery of that aid.

2.2. Derogations from the prohibition

As regards derogations from the prohibition of aid which is laid down by Article 92(1) of the Treaty, the judgment in *Astilleros Zamacona* v *Commission*, cited above, is to be mentioned. In that judgment, the Court reviewed the legality of a decision in which the Commission had found that the conditions for application of a derogation from the prohibition of operating aid in the shipbuilding industry — a derogation provided for by Directive 90/684/EEC [21] — were not met. In its review, which led it to dismiss the action, the Court had regard to the objective, context and wording of the second subparagraph of Article 4(3) of that directive, which permits a departure from the principle of progressive reduction in the level of aid where ships are not built within a three-year period, and concluded that that provision must be interpreted restrictively.

Also, in *EPAC* v *Commission*, cited above, the Court found that the Commission had not erred in law in considering that the criteria relating to rescue aid contained in the "Community guidelines on State aid for rescuing and restructuring firms in difficulty" (OJ 1994 C 368, p. 12) were not met and that a State guarantee granted to EPAC therefore could not be considered to be rescue aid compatible with the common market.

In *BP Chemicals* v *Commission*, cited above, the Court partially annulled a Commission decision, adopted without opening the formal examination procedure, authorising an aid scheme of the French authorities for biofuels under which bioethanol in particular was exempted from excise duty. Directive 92/81/EEC [22] allows the Member States to provide for certain exemptions or reduced rates within their territory in respect of pilot projects for the technological development of more environmentally-friendly products. The Court found that it had not been established that the aid scheme at issue actually concerned a pilot project within the meaning of the directive. It accordingly concluded that the Commission had infringed Directive 92/81 and exceeded the powers conferred on it by Article 93(3) of the Treaty.

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21 Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27).

22 Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

This judgment gave the Court the opportunity to explain that the margin of discretion which the Commission lawfully intends leaving to the Member States in applying the concept of "pilot projects for the technological development of more environmentally-friendly products" referred to in Article 8(2) of Directive 92/81 must be distinguished from the margin of discretion conferred on the Commission by Article 93 of the Treaty in order to determine to what extent State aid is compatible with the common market within the meaning of Article 92 of the Treaty. Whereas the power conferred on the Commission by Article 93 of the Treaty presupposes that that institution will undertake discretionary appraisals of complex economic and social situations, judicial review of which must be of a limited nature, any appraisal of an application of the provision of Directive 92/81 at issue must, in contrast, be guided by a plausible interpretation of the legislative concepts of a vague and indeterminate character used in it, an appraisal which, in the last resort, is a matter for the Community judicature. Consequently, it is incumbent both on the Commission, when appraising a notified aid scheme, and on the Community judicature before which an action for annulment has been brought to ensure observance of the limits inherent in any contextual and reasonable interpretation of terms used in Community legislation.

2.3. Examination of complaints by the Commission

In *SIC* v *Commission*, cited above, the Court annulled a Commission decision concerning measures in favour of the operator of the Portuguese public television channels, RTP (Radiotelevisão Portuguesa). RTP was financed not only by advertising revenue from its channels but also by State grants paid annually in connection with its contribution to public service obligations.

The case was brought by a commercial company which, since 1992, has been running one of the main private television channels in Portugal, SIC (Sociedade Independente de Comunicação). SIC, which is financed exclusively by advertising revenue, submitted complaints to the Commission on two occasions (in 1993 and 1996), objecting to the grants paid to RTP and other measures in RTP's favour since it took the view that they were State aid that distorted competition. It contended that those measures should therefore have been notified to the Commission in advance and authorised by it.

In the contested decision, adopted in November 1996, the Commission concluded that the measures criticised by SIC in its first complaint of 1993 did not constitute State aid for the purposes of Community law. It is that classification of the measures and, in particular, the failure to open the formal examination procedure provided for by Article 93(2) of the Treaty that the applicant challenged before the Court. It is to be remembered that it is only within the framework of that procedure, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

After noting that, on completion of the preliminary stage of the procedure, the Commission had adopted a decision in favour of the measures complained of by SIC, the Court examined whether the assessments upon which the Commission had relied presented serious difficulties justifying initiation of the formal examination procedure.

With regard to the grants paid each year to RTP by the Portuguese State, the Court pointed out that, according to the decision itself, they resulted in the recipient being given a financial advantage, a determining criterion of the concept of aid. As to the possible effect of that advantage on the conditions of competition, it was pointed out that RTP was a public operator in the advertising market and therefore in direct competition with other television operators. Consequently, the Court found that the Commission's assessment that State aid was not

involved was, at the least, capable of raising serious difficulties requiring initiation of the formal procedure.

Those measures had been presented as intended to offset the additional cost of the public service obligations assumed by RTP, but the Court pointed out that that circumstance has no bearing on the classification of a measure as State aid. It may be taken into account by the Commission only when authorising aid, under the conditions provided for by specific provisions of the Treaty.

As regards the other measures complained of (tax exemptions, payment facilities, rescheduling of the debt owed by RTP to the Portuguese social security authority and waiver of interest and of corresponding sums for late payment), the Court found that, according to the documents in the file, the Commission was likewise confronted with serious difficulties of assessment at the end of the preliminary examination.

The Court also found that the duration of the preliminary examination, approximately three years, far exceeded the period normally required for a preliminary examination. That, in conjunction with the other findings made, confirmed that there were serious difficulties of assessment requiring the second stage of the examination procedure to be initiated in order to allow interested third parties to submit their observations.

In its decision concerning aid allegedly granted by France to SFMI-Chronopost, which was adopted after a formal examination procedure, the Commission concluded that the logistical and commercial assistance afforded by La Poste (the French Post Office), a legal entity governed by public law, to its subsidiary SFMI-Chronopost did not constitute State aid to the latter. The applicants, companies competing with SFMI-Chronopost in the express courier services market, had drawn attention to that assistance in a complaint made to the Commission. In its judgment in Case T-613/97 *Ufex and Others* v *Commission*, cited above, the Court found in their favour and annulled the Commission decision. It found that the Commission should have examined whether the full costs paid by SFMI-Chronopost to La Poste for the provision of logistical and commercial assistance took account of the factors which an undertaking acting under normal market conditions would have had to take into consideration when fixing the remuneration for the services provided. The Court held that, since the Commission did not carry out that check, it based its decision on a misinterpretation of Article 92 of the Treaty.

The other pleas put forward by the applicants were rejected, in particular the plea alleging infringement of the rights of the defence. The Court stated that the parties concerned within the meaning of Article 93(2) of the Treaty have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case, so that the Commission is not obliged to forward to them the observations or information which it has received from the Member State concerned by the procedure.

2.4. Obligation to recover aid

In several cases the Court developed the case-law according to which undertakings to which aid has been granted cannot, in principle, entertain legitimate expectations as to its legality unless it has been granted in compliance with the procedure laid down by Article 93 of the Treaty.

With regard to the question whether recipients of unlawful aid are able to plead exceptional circumstances which could have formed the basis of legitimate expectations on their part that the aid was lawful, the Court held in *EPAC* v *Commission*, cited above, that, even if the applicant had pleaded such circumstances in order to oppose recovery of the aid, it would have

been for a national court before which such a case was brought to assess the material circumstances. On the same question, the Court found, however, in subsequent judgments *Alzetta and Others* v *Commission* and *CETM* v *Commission*, both cited above that such circumstances were not present, while pointing out in *CETM* v *Commission* that that assessment was made irrespective of whether or not the recipients of unlawful aid are entitled to plead such circumstances before the Community judicature.

In *CETM* v *Commission*, the Court also held that the total length of the administrative procedure for examination of the State measures, assessed by distinguishing the duration of the preliminary examination procedure (approximately one year) and that of the formal procedure (approximately two years), was not so exceptional as to provide a basis for a legitimate expectation on the part of the undertakings that the aid granted to them was lawful.

3. Trade protection measures

The Court ruled on a number of aspects of the anti-dumping rules (judgments in *BEUC* v *Commission*, cited above; of 30 March 2000 in Case T-51/96 *Miwon* v *Council*; in *Medici Grimm* v *Council*, cited above; in *Starway* v *Council*, cited above; and of 29 September 2000 in Case T-87/98 *International Potash Company* v *Council*).

Two Council regulations were partially annulled (in *Medici Grimm* v *Council* and in *Starway* v *Council*).

By its application, the company Medici Grimm asked the Court to review the legality of a Council regulation adopted on completion of a procedure for the interim review of anti-dumping measures, amending a regulation imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China ("the initial regulation"). It was found in the contested regulation that there had been no dumping as regards transactions between the applicant and Lucci Creation, a company based in Hong Kong, during the investigation period preceding the adoption of the initial regulation. The applicant submitted that the contested regulation was unlawful in that the Council had not granted reimbursement of the anti-dumping duties paid by it before the contested regulation was adopted. The Court found in its favour.

The review procedure initiated by the Commission was intended to enable undertakings which had not participated in the anti-dumping proceeding to obtain individual treatment on the basis of their export prices. To do that, the same investigation period was adopted as for the initial investigation. The Court held that, where the institutions find that one of the factors on the basis of which the definitive anti-dumping duties were imposed is missing, it is not possible to consider that the conditions laid down in Article 1 of Regulation (EC) No 384/96 [23] were satisfied at the time when the original regulation was adopted and that the trade protection measures were therefore necessary. In those circumstances, the institutions are bound to abide by all the consequences flowing from their choice of investigation period for the review in question and, where they find that the person concerned did not engage in dumping during that period, they must give that finding retroactive effect. Failure to follow this approach would result in the unjust enrichment of the Community at the applicant's expense.

The case of *Starway* v *Council* raised, in particular, the question whether, in the context of an investigation concerning the circumvention of anti-dumping measures, the Community

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[23] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

institutions may request importers, in the interests of administrative efficiency, to produce certificates of origin in order to prove the accuracy of the information given in their customs declarations, with a view to ensuring that the objective of Article 13 of Regulation No 384/96, namely to thwart circumvention, is attained. The Court's answer was essentially in the affirmative. However, it held that the Community institutions cannot, without infringing that provision, require certificates of origin to the exclusion of any other means of proof where they are or should be aware that some of the traders concerned are unable to produce such certificates for reasons beyond their control. Such a refusal of other means of proof is tantamount to denying the person concerned the right to produce exculpatory documents. Accordingly, the Community institutions, which did not carefully and impartially examine the documents sent to them, could not validly reject them as being, without further consideration, of no evidential value.

The Court also annulled on the ground of misinterpretation of Regulation No 384/96 a Commission decision refusing to regard an association, the Bureau Européen des Unions de Consommateurs (BEUC), as an interested party within the meaning of that regulation in an anti-dumping proceeding because the latter concerned a product not commonly sold at retail level (*BEUC* v *Commission*, cited above).

The Court found, first of all, that the Commission was right to interpret Regulation No 384/96 in the light of the GATT Antidumping Code of 1994. However, it held that it does not follow from Article 6.11 and 6.12 of the Antidumping Code that the Commission is entitled to interpret Regulation No 384/96 so as to confine the right of a consumer organisation to be considered an interested party solely to antidumping proceedings concerning products commonly sold at the retail level.

It also held that the Commission does not have grounds for automatically excluding consumer organisations from the circle of interested parties within the meaning of Articles 5(10), 6(7) and 21 of Regulation No 384/96 by applying a general criterion such as the distinction between products sold at the retail level and other products, without giving them an opportunity to show their interest in the products in question.

4. Association of the overseas countries and territories

The application of Council Decision 91/482/EEC on the association of the overseas countries and territories (OCTs) with the European Economic Community, amended at mid-term by Decision 97/803, is the source of a significant body of litigation before the Court relating both to the validity of the mid-term amendment decision and to safeguard measures adopted by the Commission under Article 109 of Decision 91/482 in respect of imports of rice and sugar.

In a case concluded in 2000 (*Netherlands Antilles* v *Commission*, cited above), the Court granted an application brought by the Netherlands Antilles for annulment of a Commission regulation introducing specific measures in respect of imports of rice originating in the OCTs and of a second regulation founded on that regulation. It held that the Commission had failed to comply with Article 109 of Decision No 91/482, as interpreted by the Court of Justice in Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, by not establishing the existence of a causal link between application of Decision 91/482 and the emergence of disturbances of the Community market.

5. Agriculture

In the field of agricultural policy in the broad sense, application of the legislation concerning the common organisation of the market in bananas again gave rise to several judgments.

In Case T-251/97 *T. Port* v *Commission* (judgment of 28 March 2000) and Case T-252/97 *Anton Dürbeck* v *Commission* (judgment of 19 September 2000; under appeal, Case C-430/00 P), the applicants, fruit importers, sought the annulment of Commission decisions refusing, in the first case, and agreeing only in part, in the second, to grant them additional import licences within the framework of the transitional measures provided for by Article 30 of Regulation (EEC) No 404/93. [24] That regulation established common arrangements for importing bananas in place of the various national arrangements. Since there was a danger of that changeover resulting in disturbances in the internal market, Article 30 allowed the Commission to take specific transitional measures considered necessary in order to overcome difficulties encountered by traders following the establishment of the common organisation of the market but originating in the state of national markets prior to the entry into force of Regulation No 404/93.

In Case T-251/97, the Commission had considered that the circumstances pleaded by T. Port did not amount to a case of excessive hardship such as to justify a special grant of import licences, in particular because the contracts for the supply of bananas could not be taken into account since they were concluded after Regulation No 404/93 had been published in the *Official Journal of the European Communities*. The Court upheld the Commission's analysis and dismissed the action.

In Case T-252/97, the Commission had adopted a decision granting in part the request for additional import licences made by Anton Dürbeck. In its application for annulment of the decision, that company submitted that the transitional measures adopted by the Commission pursuant to Article 30 of Regulation No 404/93 were insufficient to enable it to overcome the excessive hardship. The Court found that that article, which is to be interpreted restrictively as a derogation from the general provisions of Regulation No 404/93, had been applied reasonably by the Commission when it took the view that it was only required to compensate for the costs which the trader concerned had to incur in order to adapt to the new legal conditions. The application was dismissed.

Finally, in *Camar and Tico* v *Commission and Council*, cited above, where one of the actions was founded on Article 175 of the EC Treaty (now Article 232 EC), the Court found that the Commission had unlawfully failed to adopt, on the basis of Article 30 of Regulation No 404/93, the measures necessary to enable the applicant to overcome its supply difficulties.

6. Trade mark law

The case-law on trade marks was developed by a number of judgments concerning assessment of the conditions for registration of a Community mark laid down by Regulation (EC) No 40/94. [25]

Thus, the Court upheld decisions of Boards of Appeal of the Office for Harmonisation in the Internal Market in which they had refused registration as a Community trade mark, on the basis of the lack of distinctive character referred to in Article 7(1)(b) of Regulation No

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

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

40/94 in relation to the products and services concerned in each of the cases submitted, of the words "Companyline" (judgment of 12 January 2000 in Case T-19/99 *DKV* v *OHIM* ("*Companyline*"); under appeal, Case C-104/00 P), "TRUSTEDLINK" (judgment of 26 October 2000 in Case T-345/99 *Harbinger* v *OHIM* ("*TRUSTEDLINK*"), "Investorworld" (judgment of 26 October 2000 in Case T-360/99 *Community Concepts* v *OHIM* ("*Investorworld*") and "electronica" (judgment of 5 December 2000 in Case T-32/00 *Messe München* v *OHIM* ("*electronica*"). Also, by judgment of 30 March 2000 in Case T-91/99 *Ford Motor* v *OHIM* ("*OPTIONS*"), it held that the Office had correctly refused to register the word "OPTIONS" as a Community trade mark under Article 7(3) of Regulation No 40/94, since distinctive character acquired through the use of the trade mark had not been demonstrated in the substantial part of the Community where it was devoid of any such character under Article 7(1)(b), (c) and (d) of that regulation.

On the other hand, the Court held that a Board of Appeal had erred in law in relying, as an absolute ground for refusal, on the idea that the mark consisted exclusively of a shape which resulted from the nature of the goods themselves, as provided for in Article 7(1)(e)(i) of Regulation No 40/94 (judgment of 16 February 2000 in Case T-122/99 *Procter & Gamble* v *OHIM* ("*soap bar shape*").

The case-law was also developed by useful clarifications regarding the jurisdiction of Boards of Appeal of the Office. It was found in *Procter & Gamble* v *OHIM* ("*soap bar shape*") that an appeal to a Board of Appeal seeking to have the examiner's refusal to register a Community trade mark on an absolute ground overturned places the Board of Appeal, in the examination of the merits of the application for registration, in the position of the examiner. It follows that, under Article 62(1) of Regulation No 40/94, the Board of Appeal is competent to reopen the examination of the application in the light of all the absolute grounds for refusal set out in Article 7 of the regulation, without being limited by the examiner's reasoning. However, by raising of its own motion and *a posteriori* a formal irregularity not raised by the examiner, the Board of Appeal exceeded its powers: if the examiner had initially dismissed the application for registration as inadmissible owing to a formal irregularity, the applicant would have had the choice of either appealing to the Board of Appeal or immediately making a fresh application for registration to the Office.

In addition, the general Community-law principle of the protection of the rights of the defence, enshrined in Article 73 of Regulation No 40/94, requires the Board of Appeal to accord the person concerned an opportunity to express his views on absolute grounds for refusal of registration of a Community trade mark which it applies of its own motion. The Court found that, by failing to accord that opportunity to the applicant, the Board of Appeal had infringed the applicant's rights of defence.

7. Access to Council and Commission documents

The Court was required to rule on the conditions governing public access to documents [26] of the Commission (judgments of 13 September 2000 in Case T-20/99 *Denkavit Nederland* v *Commission* and of 12 October 2000 in Case T-123/99 *JT's Corporation* v *Commission*) and of the Council (judgment of 6 April in Case T-188/98 *Kuijer* v *Council*; under appeal, Case C-239/00 P).

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[26] On 6 December 1993 the Council and the Commission approved a code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41). In order to implement the principles laid down by the code, the Council adopted, on 20 December 1993, Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43). The Commission likewise adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58).

In *Kuijer* v *Council* the Court found fault with the Council's refusal, founded on the exception relating to protection of the public interest (international relations), to provide access to certain documents connected with the activities of the Centre for Information, Discussion and Exchange on Asylum. The Council's decision was annulled on two grounds. First, the decision contained no explanation enabling it to be verified whether the Council had examined whether disclosure of each of the documents at issue was in fact liable to damage the relations of the European Union with the countries to which they referred. When assessing the plea concerning breach of the duty to state reasons, the Court was also given the opportunity to explain the requirements with regard to reasoning placed on the institution when it adopts a decision confirming the rejection of an application for access to documents on the basis of the same grounds. In such a case, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information available to the applicant about the nature and content of the requested documents. In certain circumstances, as in the case in point, the context in which the decision is adopted may make the requirements as to reasoning more stringent. Inasmuch as, during the procedure in which application was made for access to documents, the applicant had put forward factors capable of casting doubt on whether the first refusal was well founded, the Council, when replying to the confirmatory application, had to state why those factors were not such as might warrant a change in its position.

Second, the Court, relying expressly on the judgment in Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489 (under appeal, Case C-353/99 P), [27] held that the Council should have examined the possibility of disclosing certain passages in the documents to which access was sought.

It was also in direct reliance on *Hautala* v *Council*, and on grounds identical to those in *Kuijer* v *Council*, that the Court found in *JT's Corporation* v *Commission* that the Commission's decision had to be annulled in so far as it refused access to certain documents (mission reports and Commission correspondence with the Government of Bangladesh). The refusal had been based on the exception relating to protection of the public interest (inspections and investigations) and on Article 19 of Council Regulation (EEC) No 1468/81, [28] which provides that information obtained in connection with customs investigations is confidential in nature. With regard to a further category of documents, namely correspondence sent by the Government of Bangladesh to the Commission, the Court held that the Commission was entitled to rely on the authorship rule to refuse access.

In *Denkavit Nederland* v *Commission*, the Court upheld the Commission's refusal, founded on the mandatory exceptions relating to protection of the public interest (inspections and investigations) and of commercial and industrial secrecy, to grant access to a Commission inspection report concerning the combating of swine fever in the Netherlands. Since that document in fact related to an inspection and the Commission had not erred in its assessment that its disclosure could undermine the protection of the public interest, the Court dismissed the action for annulment, stating that that exception was sufficient in itself to justify refusal of access to the document.

8. Customs cases

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27 That judgment is mentioned in the Court's Annual Report for 1999.

28 Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1).

The Community legislation laying down the conditions for the repayment or remission of import duties (in particular Article 13 of Regulation (EEC) No 1430/79) [29] was, once again, at the heart of a case. By judgment of 18 January 2000 in Case T-290/97 *Mehibas Dordtselaan* v *Commission*, the Court dismissed an action contesting the legality of a Commission decision refusing a request submitted by the Kingdom of the Netherlands for repayment to the applicant of agricultural levies.

The applicant was a customs agent which, after paying agricultural levies, had to pay the Netherlands customs authorities supplementary levies because the value of the imported goods was actually higher than the value which had been declared. That error in the declarations was caused by the submission of fraudulent invoices by the importer of the goods. Subsequently, the applicant applied to the Netherlands authorities for repayment of the supplementary levies. The application was sent to the Commission, which found in an initial decision that the application was not justified. However, in the light of the Court's judgment in Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, the Commission revoked its initial decision. It was only after ascertaining that the application contained a "statement for the file" made by the person concerned that it then decided that the application for repayment was not justified. In that second decision, the Commission stated in particular that the fact that invoices proved to be inaccurate was a trade risk to be assumed by any person making a customs declaration and could not itself be regarded as a special circumstance.

In its judgment, the Court found that there were irregularities in the procedure whereby the Commission had adopted the second decision. It found in particular that the statement for the file which was required only partly met the principles laid down in *France-Aviation*; it followed from *France-Aviation* that the right to be heard had to be guaranteed not only during the first stage of the administrative procedure, which takes place at national level, but also during the second stage, which takes place before the Commission. [30] However, it had not been established that without the irregularities which occurred in the present case the procedure might have resulted in a different decision.

The Court also held that the Commission had not manifestly erred in its assessment of Article 13 of Regulation No 1430/79 by confirming that the submission of documents subsequently found to be falsified or inaccurate did not in itself constitute a special situation justifying the remission or repayment of import duties, even where such documents had been presented in good faith.

9. Community funding

Of the decisions in this field, mention will be made first of all of the action taken following the three judgments of the Court of Justice of 5 May 1998 (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, Case C-391/96 P *Compagnie Continentale (France)* v *Commission* [1998] ECR I-2377 and Case C-403/96 P *Glencore Grain* v *Commission* [1998] ECR I-2405), in which it set aside the judgments by which the Court of First Instance had declared inadmissible actions brought by international trading companies for the annulment of decisions adopted by the Commission in the exercise of its powers concerning the management of financing intended for the former Soviet Union. The cases were referred back

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29 Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

30 In the judgment, reference is made to Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401 and Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773, which are included in the Court's Annual Report for 1998.

to the Court of First Instance, which dismissed the actions on the merits (judgment of 8 November 2000 in Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission*). It held that the Commission was correct in refusing to approve amendments to contracts for the purchase of wheat concluded between a Russian State-owned company and the applicants contracts which the Commission had approved on the ground that the condition of free competition had not been fulfilled. When the applicants agreed new contractual terms with the Russian State-owned company, they had not been required to compete with at least two independent undertakings, contrary to the relevant legislation.

The European Social Fund (ESF) participates in the financing of operations concerning vocational training and guidance, the successful completion of which is guaranteed by the Member States concerned. The applicable legislation provides that, when the financial assistance is not used in accordance with the conditions set out in the decision of approval of the ESF, the Commission may suspend, reduce or withdraw the assistance. It was decisions by the Commission suspending financial assistance granted by the ESF to a Portuguese company that the Court again had to deal with (judgment of 27 January 2000 in Joined Cases T-194/97 and T-83/98 *Branco* v *Commission*).

In *Branco* v *Commission*, the Court recalled that, when suspending such financial assistance, the Commission assesses complex facts and accounts which are the subject only of restricted review by the Court. In the case in point, it held that the Commission had not manifestly erred in its assessment when it found that there were grounds for suspecting an irregularity which justified suspension. The judgment is noteworthy above all because the Court held in relation to a plea alleging infringement of the principle of legal certainty that the Commission must decide, in the exercise of a power vested in itself alone, on claims for final payment of financial assistance by taking a decision within a reasonable time, either by ordering full payment or by suspending, reducing or withdrawing the aid. However, the fact that there has been unreasonable delay in adopting a decision suspending assistance cannot lead to its annulment. If such decisions were annulled on the sole ground that they were late, the Commission could do no more than adopt, pursuant to Article 176 of the Treaty (now Article 233 EC), fresh decisions to suspend assistance since it would still not have the information it needed to calculate eligible expenditure. In those circumstances, an annulling judgment would be wholly pointless.

In *ADT Projekt* v *Commission*, cited above, the Court dismissed as unfounded an action for annulment of a decision by the Commission not to award the applicant a contract relating to a project under the TACIS programme. The decision to award the contract to a tenderer other than the applicant company had been adopted after a first evaluation of the tenders had been cancelled by the contracting authority. The Court found, in answer to a claim by the applicant, that the procedure which had led to the adoption of the decision by the Commission to carry out a second evaluation of the tenders was not unlawful in any way. After pointing out that the contracting authority is not bound by the evaluation committee's proposal, it held that, in the circumstances of the case, the Commission had good grounds, in order to restore equal treatment and, thereby, equality of opportunity for all the tenderers, which it is bound to ensure at each stage of a tendering procedure, for cancelling the evaluation procedure and organising a fresh one, open to the same tenderers as those who had competed in the first evaluation procedure.

The question of the conditions to which financial assistance under the European Regional Development Fund (ERDF) is subject was raised in a case brought by the Council of European Municipalities and Regions against the Commission. In its judgment of 3 February 2000 in Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission*, the Court held, first, that the contested decision contained in a debit note had to be annulled on the ground of inadequate reasoning in particular because it did not explain why the receipts which the applicant had

supplied to the Commission were not sufficient evidence of the expenditure actually incurred. The Court then recalled that grant of financial assistance is subject not only to compliance with the conditions laid down by the Commission in the decision granting assistance but also to compliance with the terms of the application for assistance in respect of which that decision has been given. In the case in point, since the programme of work together with a planned budget, submitted at the time of the application for financial assistance, had been accepted by the Commission, the latter could not, without infringing the principles of the protection of legitimate expectations and legal certainty, regard an activity envisaged in the initial budget as ineligible and consequently reduce the financial assistance as regards the approved amount. Since the plea was partially upheld, the contested decision was annulled in that respect.

Finally, in the judgment of 14 December 2000 in Case T-105/99 *CEMR* v *Commission* the question was raised as to whether the Commission may effect set-off against entities to which Community funds are owed but which also owe sums of Community origin. In the circumstances of the case, the Court, taking account of the principle of the effectiveness of Community law which implies that the funds of the Community are to be made available and used in accordance with their purpose, held that the Commission was not entitled to adopt a decision effecting set-off between its and the applicant's mutual claims without first ensuring that the decision did not pose a risk for the use of the Community funds for the purposes for which they were intended and for the carrying out of certain activities, when it could have acted otherwise without jeopardising the recovery of the applicant's alleged debt to it and the proper use of the contested sums.

10. Staff cases

A substantial number of judgments were delivered in staff cases. Among the judgments, a circumstance sufficiently rare to be noted is the finding that a Community institution misused its powers (judgments of 16 June 2000 in Case T-84/98 *C* v *Council* and of 12 December 2000 in Case T-223/99 *Dejaiffe* v *OHIM*). The Court also ruled on the freedom of expression of Community officials (judgment of 14 July 2000 in Case T-82/99 *Cwik* v *Commission*; under appeal, Case C-340/00 P) and annulled decisions adopted by the appointing authority within the framework of disciplinary proceedings (judgment of 15 June 2000 in Case T-211/98 *F* v *Commission*) or at the conclusion of such proceedings (judgment of 17 May 2000 in Case T-203/98 *Tzikis* v *Commission*).

B. Actions for damages

In the course of the year, a number of applications for the Community to be held liable were dismissed (in particular, by orders of 15 June 2000 in Case T-614/97 *Aduanas Pujol Rubio and Others* v *Council and Commission*, of 16 June 2000 in Joined Cases T-611/97 and T-619/97 to T-627/97 *Transfluvia and Others* v *Council and Commission*, and of 26 June 2000 in Joined Cases T-12/98 and T-13/98 *Argon and Another* v *Council and Commission*; and judgments of 21 June 2000 in Case T-429/93 *Le Goff and Others* v *Council* and in Case T-537/93 *Tromeur* v *Council and Commission*, of 27 June 2000 in Case T-72/99 *Meyer* v *Commission* (under appeal, Case C-301/00 P), and in *Eurocoton and Others* v *Council*, cited above). By contrast, the Court held in *Camar and Tico* v *Commission and Council*, cited above, and in its judgment of 24 October 2000 in Case T-178/98 *Fresh Marine Company* v *Commission* (under appeal, Case C-472/00 P) that the conditions laid down by the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) were met, namely unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal

link between the unlawful conduct and the alleged damage. The emphasis will be placed on the first of those three conditions for the incurring of Community liability.

In accordance with long-established case-law, in the field of administrative action any infringement of law constitutes illegality which may give rise to liability on the part of the Community. It is therefore of particular interest whether an act is classified as administrative.

In *Camar and Tico* v *Commission and Council*, the Court held that a decision by which the Commission refused to take provisional measures to allow the annual quantity allocated to the applicant for the purpose of obtaining import licences for traditional ACP bananas to be calculated on the basis of the quantities which it marketed in 1988, 1989 and 1990 even if it was based on Article 30 of Regulation No 404/93 on the common organisation of the market in bananas, a provision which obliges the Commission to take the transitional measures it judges necessary to assist the transition from national arrangements to the common organisation of the market in bananas and which gives the Commission broad discretionary power was nevertheless an individual decision and therefore administrative in nature.

In *Fresh Marine Company* v *Commission*, the Court for the first time awarded damages to an undertaking in an anti-dumping case without the undertaking having to prove that the defendant institution had committed a sufficiently serious breach of a superior rule of law for the protection of individuals. In principle, the measures of the Council and Commission in connection with a proceeding relating to the possible adoption of anti-dumping measures must be regarded as constituting legislative action involving choices of economic policy, so that the Community can incur liability by virtue of such measures only if there has been a sufficiently serious breach. However, where the operation in question, of an administrative nature, does not involve any choices of economic policy and confers on the Commission only very little or no discretion, mere infringement of Community law is sufficient to lead to the non-contractual liability of the Community.

In the case in point, the Commission did not take account of corrections of clerical errors contained in a report drawn up by the applicant, Fresh Marine Company, when checking whether the latter had complied with an undertaking not to sell its products in the Community below an average price in order to avoid the application of anti-dumping duties. The Commission was thereby led to conclude that the undertaking as to price appeared to have been infringed and that it was necessary to adopt provisional measures in relation to the applicant's imports. However, the Commission subsequently reconsidered its position, finding that the undertaking as to price had in fact been complied with.

The Court held that the checking of the report by the Commission constituted an operation of an administrative nature and that, when analysing the report, the Commission committed an error which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence. That finding allowed the Court to conclude that the institution's conduct amounted to an illegality such as to render the Community liable.

C. Applications for interim relief

In addition to applications for interim relief made in the field of competition law (orders of the President of the Court of First Instance of 14 April 2000 in Case T-144/99 R *EPI* v *Commission*, of 28 June 2000 in Case T-191/98 R II *Cho Yang Shipping* v *Commission* and of 14 December 2000 in Case T-5/00 R *FEG* v *Commission* under appeal, Case C-7/01 P(R)) and in staff cases, there were a number of applications for the suspension of operation of decisions authorising the marketing of a medicinal product (order of the President of the Court

of First Instance of 7 April 2000 in Case T-326/99 R *Olivieri* v *Commission*) or, conversely, withdrawing authorisation.

The suspension of operation sought by such applications was ordered a number of times (in particular, by order of the President of the Court of First Instance of 28 June 2000 in Case T-74/00 R *Artegodan* v *Commission*). [31] It may be noted from those orders that a mere reference to the protection of public health cannot be sufficient to justify the withdrawal of an authorisation of that kind. In *Artegodan* v *Commission*, the President held that, notwithstanding the preponderance which unquestionably had to be given to the requirements of the protection of public health as against economic considerations, the balance of interests inclined towards suspension of operation of the Commission decision withdrawing marketing authorisation for a medicinal product inasmuch as the Commission had not succeeded in demonstrating that the protective measures contained in a previous decision, which were based on facts identical to those giving rise to the contested decision, had proved insufficient to protect public health.

In a quite different field, an application for interim relief was granted by order of 2 May 2000 in Case T-17/00 R *Rothley and Others* v *Parliament*, a case brought by 71 Members of the European Parliament (MEPs) against the Parliament concerning the manner in which investigations are conducted by the European Anti-Fraud Office (OLAF). A brief account of the background is helpful for explaining the significance of the decision.

In May 1999 the European Parliament and the Council adopted a regulation concerning investigations conducted by the OLAF. The regulation provides, *inter alia*, that the OLAF may conduct investigations within the institutions, the latter being informed when the OLAF's employees conduct an investigation on their premises or consult a document or request information held by them. Under an agreement subsequently concluded between the Parliament, the Council and the Commission, each institution was to adopt common rules containing the measures required to ensure smooth operation of the investigations carried out by the OLAF within those institutions. In November 1999 the Parliament adopted a decision amending its Rules of Procedure, making it possible to apply the rules provided for by the interinstitutional agreement. The legality of that decision was challenged before the Court by a number of MEPs, who also sought its suspension.

In the order, the President of the Court of First Instance considered whether the conditions for granting interim relief were met, having first found that the application for relief was admissible because the contested decision was capable of producing legal effects going beyond the mere internal organisation of the Parliament's work and of being of direct and individual concern to the applicants.

In his consideration of the requirement for there to be a *prima facie* case, the President found it necessary to carry out a *prima facie* assessment of the extent of the immunity enjoyed by MEPs. After interpreting the provisions of the Protocol on the Privileges and Immunities of

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31 The Court followed the same reasoning in a number of subsequent orders deciding applications for interim relief on facts very much comparable to those in *Artegodan* v *Commission*: orders of 19 October 2000 in Case T-141/00 R *Laboratoires Pharmaceutiques Trenker* v *Commission* (under appeal, Case C-459/00 P(R)) and of 31 October 2000 in Case T-76/00 R *Farmaceutici and Others* v *Commission* (under appeal, Case C-474/00 P(R)), in Case T-83/00 R I *Hänseler* v *Commission* (under appeal, Case C-475/00 P(R)), in Case T-83/00 R II *Schuck* v *Commission* (under appeal, Case C-476/00 P(R)), in Case T-84/00 R *Laboratórios Roussel and Laboratoires Roussel Diamant* v *Commission* (under appeal, Case C-477/00 P(R)), in Case T-85/00 R *Laboratórios Roussel and Roussel Iberica* v *Commission* (under appeal, Case C-478/00 P(R)), in Case T-132/00 R *Gerot Pharmazeutika* v *Commission* (under appeal, Case C-479/00 P(R)) and in Case T-137/00 R *Cambridge Healthcare* v *Commission* (under appeal, Case C-471/00 P(R)).

the European Communities of 8 April 1965 in the light of their context and purpose and with regard to the time at which they were adopted, he did not exclude the possibility that the Protocol protected MEPs against certain actions by the institutions or Community organs, such as the OLAF, since those actions might be preliminary to legal proceedings before a national court and might hinder the internal working of the Parliament.

The President then considered whether the contested decision contained provisions ensuring that the immunity of MEPs would not be compromised; he found that it did not contain any specific guarantee with regard to respect for the rights of MEPS when the OLAF exercised its powers of investigation. In particular, the OLAF employees could have access to MEPs' offices within the Parliament, in their absence or without their consent, in order to obtain certain information. The condition relating to urgency was therefore satisfied since, if interim relief had not been granted, the MEPs would have been at risk of suffering serious and irreparable damage.

Finally, the President weighed the competing interests and considered that, while it was unarguably in the Community's interest to prevent and to combat fraud and any other illegal activity detrimental to the financial interests of the Community, it was equally in the Community's interest that MEPs should be able to carry out their activities with the assurance that their independence would not be compromised.

Consequently, in order to ensure that the applicants' interests were protected in the interim while at the same time preserving as best possible the interests of the Community, the President, first, ordered suspension of the operation of those provisions of the Parliament's decision requiring the applicants to cooperate with the OLAF and to inform the President of the Parliament or the OLAF and, second, ordered the Parliament to notify the Members concerned without delay of any imminent measure of the OLAF to be taken concerning them and to authorise employees of the OLAF to have access to those Members' offices only with their consent.

"Cement" cases: amounts of the fines

Case number	Names of the parties	Amounts of the fines imposed by the Commission (Decision 94/815/EC of 30 November 1994) (Euros)	Amounts of the fines imposed by the Court of First Instance (Euros)
T-25/95	*Cimenteries CBR* v *Commission*	8 032 000	1 711 000
T-26/95	*Cembureau Association Européenne du Ciment* v *Commission*	100 000	
T-30/95	*Fédération de l'Industrie Cimentière Belge* v *Commission*	100 000	
T-31/95	*Eerste Nederlandse Cementindustrie (ENCI)* v *Commission*	7 316 000	
T-32/95	*Vereniging Nederlandse Cementindustrie (VNC)* v *Commission*	100 000	
T-34/95	*Ciments Luxembourgeois* v *Commission*	1 052 000	617 000
T-35/95	*Dyckerhoff* v *Commission*	13 284 000	7 055 000
T-36/95	*Syndicat National de l'Industrie Cimentière (SFIC)* v *Commission*	100 000	
T-37/95	*Vicat* v *Commission*	8 272 000	2 407 000
T-38/95	*Groupe Origny* v *Commission*	2 522 000	
T-39/95	*Ciments Français* v *Commission*	25 768 000	13 570 000
T-42/95	*Heidelberger Zement* v *Commission*	15 652 000	7 056 000
T-43/95	*Lafarge Coppée* v *Commission*	23 900 000	14 248 000
T-44/95	*Aalborg Portland* v *Commission*	4 008 000	2 349 000
T-45/95	*Alsen* v *Commission*	3 841 000	
T-46/95	*Alsen* v *Commission*	1 850 000	
T-48/95	*Bundesverband der Deutschen Zementindustrie* v *Commission*	100 000	
T-50/95	*Unicem* v *Commission*	11 652 000	6 399 000
T-51/95	*Fratelli Buzzi* v *Commission*	3 652 000	
T-52/95	*Compañia Valenciana de Cementos Portland* v *Commission*	1 866 000	638 000
T-53/95	*The Rugby Group* v *Commission*	5 144 000	
T-54/95	*British Cement Association* v *Commission*	100 000	
T-55/95	*Asland* v *Commission*	5 337 000	740 000
T-56/95	*Castle Cement* v *Commission*	7 964 000	

T-57/95	*Heracles General Cement Company* v *Commission*	5 748 000	
T-58/95	*Corporación Uniland* v *Commission*	1 971 000	592 000
T-59/95	*Agrupación de Fabricantes de Cemento de España (Oficemen)* v *Commission*	70 000	
T-60/95	*Irish Cement* v *Commission*	3 524 000	2 065 000
T-61/95	*Cimpor Cimentos de Portugal* v *Commission*	9 324 000	4 312 000
T-62/95	*Secil Companhia Geral de Cal e Cimento* v *Commission*	3 017 000	1 395 000
T-63/95	*Associação Técnica da Indústria de Cimento (ATIC)* v *Commission*	70 000	
T-64/95	*Titan Cement Company* v *Commission*	5 625 000	
T-65/95	*Italcementi Fabbriche Riunite Cemento* v *Commission*	33 580 000	25 701 000
T-68/95	*Holderbank Financière Glarus* v *Commission*	5 331 000	1 918 000
T-69/95	*Hornos Ibéricos Alba (Hisalba)* v *Commission*	1 784 000	836 000
T-70/95	*Aker RGI* v *Commission*	40 000	14 000
T-71/95	*Scancem (publ)* v *Commission*	40 000	14 000
T-87/95	*Cementir Cementerie del Tirreno* v *Commission*	8 248 000	7 471 000
T-88/95	*Blue Circle Industries* v *Commission*	15 824 000	7 717 000
T-103/95	*Enosi Tsimentoviomichanion Ellados* v *Commission*	100 000	
T-104/95	*Tsimenta Chalkidos* v *Commission*	1 856 000	510 000