

## **A — Proceedings of the Court of First Instance in 2008**

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Following the numerous changes in 2007 that resulted both from the partial renewal of the membership of the Court of First Instance and from accessions, the Court's composition remained more stable in 2008. The year was, however, marked by the departure of Mr John D. Cooke, a Judge at the Court for nearly 13 years, and his replacement by Mr Kevin O'Higgins.

By contrast, there were significant changes in the Court's methods and the results achieved by it.

Faced with a constant increase in its caseload and, as a corollary, in the backlog of cases, the Court reformed its working methods, its organisation and its operation. The various stages in the handling of cases, together with the process of preparing and drafting decisions, were the subject of detailed analysis, with a view to improving the Court's efficiency while ensuring that the quality of its decisions would not be adversely affected. A set of statistical and management tools was also developed. Additionally, the Rules of Procedure were amended in order to enable the Court to rule on actions concerning intellectual property without an oral procedure unless one of the parties submits an application setting out the reasons for which he wishes to be heard.

The body of measures adopted, and the permanent quest for efficiency generally, made it possible to reap in full the rewards of the considerable volume of work carried out by the Court's Members and staff. Thus, 605 cases were decided in the past year, a 52 % increase compared with the year before, while the number of hearings held in 2008 doubled (341 as against 172 in 2007). The average duration of proceedings decreased appreciably (24.5 months compared with 27.7 months in 2007), although progress still remains to be made.

The Court will have to continue its efforts in this regard during 2009 and intends to derive greater benefit from the full deployment of the reforms that have been introduced. While 2008 was exceptional in terms of cases decided, it was in terms of new cases too (432 in 2006, 522 in 2007 and 629 in 2008). The number of cases pending rose slightly (1 178 compared with 1 154 in 2007). There is thus a risk that the duration of proceedings will increase. It will be necessary, in light of the trend in the number of cases, to give further consideration to the ways and means, in particular of a structural nature, that will enable the Court, in the interests of litigants, to continue to deal with cases to a high standard, while reducing the duration of proceedings.

The cases brought before the Court demonstrate, in 2008 once more, the ever increasing variety of both the legal questions raised and the subjects dealt with (competition, State aid, the environment, regional policy, commercial policy, common foreign and security policy, law governing the institutions, intellectual property, public procurement and so forth). It is also apparent that the upward trend, already recorded the previous year, in the number of applications for interim measures was very much confirmed, 58 such applications being lodged and 57 being brought to a conclusion. A summary of the main

developments in case-law is set out in the following pages. It covers in turn proceedings concerning the legality of measures (I), actions for damages (II), appeals (III) and applications for interim measures (IV).

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

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

#### **1. Body enacting the measure**

Article 230 EC provides that the Community judicature is to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank (ECB), and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. Thus, Community agencies are not formally included among the bodies against whose measures an action may be brought before the Community judicature.

The important issue of those bodies' capacity to be sued was tackled by the Court of First Instance in Case T-411/06 *Sogelma v EAR* (judgment of 8 October 2008), an action for annulment of decisions of the European Agency for Reconstruction ('EAR') in the realm of public procurement, taken under a Community action programme. The Court of First Instance considered that the fact that the EAR is not one of the institutions listed in Article 230 EC and that the regulation creating that agency does not provide that the Community judicature has jurisdiction to hear actions directed against decisions other than those concerning requests for access to documents does not prevent it from reviewing, by virtue of Article 230 EC, the lawfulness of those measures taken by that agency.

Acting on the basis of the judgment of the Court of Justice of 23 April 1986 in Case 294/83 *Les Verts v Parliament* <sup>(1)</sup>, which affirmed the Parliament's capacity to be sued, the Court of First Instance laid down the general principle that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. Thus, decisions adopted on that basis cannot cease to be acts open to challenge solely because the Commission has delegated decision-making powers to the EAR, for otherwise there would be a legal vacuum. Last, the Court of First Instance emphasised that the EAR is a Community body endowed with legal personality and has the power to implement programmes of Community assistance, and that the Commission played no part in the decision-making process. Proceedings may therefore be instituted before the Court of First Instance against the EAR in person, as the body which enacted the contested measure.

<sup>(1)</sup> Case 294/83 [1986] ECR 1339.

## 2. Measures against which an action may be brought

Measures against which an action may be brought under Article 230 EC are those producing binding legal effects of such a kind as to affect the applicant's interests by significantly altering his legal position <sup>(2)</sup>.

In Case T-185/05 *Italy v Commission* (judgment of 20 November 2008), the Italian Republic sought annulment of the Commission's decision that external publications of the vacancy notices for senior management posts in the *Official Journal of the European Union* were until 1 January 2007 to be made in English, French and German.

The Court of First Instance recalled that a measure adopted by an institution reflecting only its intention to follow a particular line of conduct in a particular field is not an act open to challenge. Nonetheless, given that an institution may not refrain from applying internal rules governing recruitment which it has itself laid down, and which form part of the legal framework which it must strictly observe in the exercise of its discretion, such rules must be regarded as producing binding legal effects. A privileged applicant, such as a Member State, can immediately challenge the legality of those rules by an action for annulment, without having to wait for them to be applied in a particular case. Finding that the decision relating to the languages of publication is drafted in clear and unequivocal terms, and fixes definitively an aspect of recruitment procedures in binding form, the Court held that the action was admissible.

In Case T-141/05 *Internationaler Hilfsfonds v Commission* (judgment of 5 June 2008, not published, under appeal), the Court held that, in an action for annulment directed against a letter informing the applicant that the Commission had no intention of making available to it any documents other than those already sent to it at the time of an earlier decision, in accordance with the case-law <sup>(3)</sup>, the conclusions reached by the European Ombudsman concerning the applicant's complaint made against that decision were not a new factor capable of distinguishing the contested measure from that decision. The fact that the Ombudsman had concluded that the institution concerned had committed an act of maladministration did not permit that conclusion to be challenged. Such an argument would be tantamount to accepting that an applicant who had not brought an action within the period prescribed against the original decision could, just by referring the matter to the Ombudsman, and insofar as the latter found an instance of maladministration, succeed in circumventing the time limits.

<sup>(2)</sup> Judgment in Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9.

<sup>(3)</sup> Order of the Court of First Instance of 15 October 2003 in Case T-372/02 [2003] ECR II-4389, paragraph 40.

### 3. Standing to bring proceedings

#### (a) Individual concern

According to settled case-law, natural or legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed <sup>(4)</sup>.

The Court of First Instance provided some clarification of the *locus standi* of infra-State bodies in Case T-37/04 *Região autónoma dos Açores v Council* (judgment of 1 July 2008, not published, under appeal). The applicant claimed to be individually concerned by Council Regulation No 1054/2003 <sup>(5)</sup>, on the grounds, first, that as an outermost region of the Union, it enjoyed specific protection, especially in the environmental and economic spheres, under Article 299(2) EC, with which the contested regulation was in conflict and, second, that that regulation affected its legislative and executive powers in the sphere of fisheries.

The Court observed, first of all, that the general interest that a region may have in obtaining an outcome conducive to its prosperity cannot, of itself, be sufficient for that region to be regarded as concerned within the meaning of the fourth paragraph of Article 230 EC. It is clear from the case-law that the system established by the Treaties reserves to the Member States, and not to regional authorities, the right to protect the common interest in their territories. Next, the Court considered that, even if Article 299(2) EC could be interpreted not only as permitting the Council to provide for derogations specific to the outermost regions but also as prohibiting it from adopting measures which would exacerbate the disadvantages suffered by those regions, the protection provided by that article was not sufficient to give the applicant standing to bring proceedings, in accordance with the judgment in Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973. In addition, the Court emphasised that, on any view, the applicant had not raised arguments enabling it to be held that the contested provisions would entail harmful effects for the fish stocks and for the marine environment in the Azores and, consequently, for the survival of the fishing sector in the region.

Furthermore, in reply to the applicant's argument relating to the preservation of its powers, the Court noted that, although the Community judicature has indeed accepted the right of regional authorities to challenge Community acts which either prevent them from adopting measures which they may legitimately adopt if there is no Community intervention or require them to withdraw those measures and to take certain action <sup>(6)</sup>, the contested provisions of the regulation under challenge do not concern legislative or regulatory measures adopted by the applicant and their lawfulness is in no way called into question or compromised.

<sup>(4)</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95, p. 107.

<sup>(5)</sup> Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EEC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95 (OJ 2003 L 289, p. 1).

<sup>(6)</sup> Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria v Commission* [2005] ECR II-4005, paragraph 28.

Lastly, examining the argument that the Aarhus Convention provides that the parties thereto are to ensure that members of the public have access to administrative or judicial procedures to challenge acts of public authorities which contravene national law on the environment, the Court stated that the Community legislature had adopted, in order to facilitate access to the Community judicature in environmental matters, Regulation No 1367/2006 <sup>(7)</sup>. Title IV of that regulation lays down a procedure on completion of which certain non-governmental organisations may bring an action for annulment before the Community judicature pursuant to Article 230 EC. However, the conditions laid down in Title IV manifestly not having been satisfied in the circumstances, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC.

In Case T-30/07 *Denka International v Commission* (order of 27 June 2008, not published), the Court of First Instance noted that the fact that a person is involved in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to the measure in question only when the applicable Community legislation grants him certain procedural guarantees. Given that neither the process of enacting acts of general application nor the nature of those acts themselves requires the participation of the persons affected, their interests being supposed to be represented by the political bodies called upon to adopt those measures, it would be contrary to the letter and spirit of Article 230 EC to allow any individual, once he has participated in the preparation of a measure of a legislative nature, then to bring an action challenging that measure. Neither the contested directive nor that on which it is based provides any procedural guarantees for undertakings manufacturing or distributing active substances. Finally, the applicant argued that it was the proprietor of a trade mark registered for the active substance concerned whose use was affected by the contested directive, which distinguished it from any other person, in accordance with *Codorníu v Council* <sup>(8)</sup>. The Court noted, however, that that protection for a trade mark was not such as to distinguish the applicant from all other manufacturers and distributors, who might also rely on the existence of a trade mark in their favour. It is not the object of the directive to reserve a specific intellectual property right to certain traders, so that any effect on the applicant's intellectual property rights is simply the consequence of the fact, not particular to the applicant, that it manufactures active substances.

Case T-82/06 *Apple Computer International v Commission* (order of the Court of First Instance of 19 February 2008, not published) gave rise to clarification of the admissibility of actions directed against tariff classification regulations. According to the case-law, such measures are, in spite of the apparent specificity of the descriptions which they contain, of general application. They concern all products of the type described and take effect in relation to all customs authorities in the Community and all importers <sup>(9)</sup>.

<sup>(7)</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

<sup>(8)</sup> C-309/89 *Codorníu v Council* [1994] ECR I-1853, paragraphs 21 and 22.

<sup>(9)</sup> Case 40/84 *Casteels v Commission* [1985] ECR 667, paragraph 11.

The Court considered that the circumstances that the classification in the Combined Nomenclature was triggered by an application from the applicant for a binding tariff information, that no other similar product was demonstrated to the Nomenclature Committee and that, on the basis of the demonstration of the operation of the product in question, a draft tariff classification regulation referring to the monitors concerned was circulated to the Member States cannot distinguish the applicant individually in such a way as to render the action admissible. The fact that a person is involved in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to that measure only if the applicable Community legislation grants him certain procedural guarantees.

Although similar circumstances were taken into account to declare the action in *Sony Computer Entertainment Europe v Commission* ('Sony') <sup>(10)</sup> admissible, they could not have been the decisive factor. It was only in the light of the exceptional circumstances of that case that the applicant was, in that case, held to be individually concerned. Similarly, the Court stated that, while that judgment makes it clear that the fact that the applicant is the sole authorised importer of the product concerned constitutes a relevant factor, it is not sufficient, in itself, to establish that the applicant is individually concerned. Last, because the rather general description in the contested regulation of the goods concerned as well as the absence of any visual or textual factor clearly referring to a specific economic operator excluded any individual effect, the Court concluded that there were no grounds for considering that the exceptional circumstances, within the meaning of *Sony*, giving rise to *locus standi* for the applicant, existed in the instant case <sup>(11)</sup>.

#### (b) Direct concern

According to settled case-law, in order to be of direct concern to an individual within the meaning of the fourth paragraph of Article 230 EC, the contested Community measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules <sup>(12)</sup>.

The Court of First Instance held in Joined Cases T 383/06 and T 71/07 *Icuna.com v Parliament* (order of 14 May 2008) that a decision of the Parliament annulling a tendering procedure for the award of a public contract directly affects the legal situation of a tendering undertaking where, as regards the annulment of that tendering procedure in its entirety, the decision results in the annulment of an earlier decision rejecting its tender, but also that of a decision annulling a decision awarding that undertaking the contract, and that of a decision awarding it the contract.

<sup>(10)</sup> T-243/01 *Sony Computer Entertainment Europe v Commission* [2003] ECR II-4189.

<sup>(11)</sup> Mention is also to be made of Case T-227/06 *RSA Security Ireland v Commission* (order of 3 December 2008, paragraph 87), in which the Court held that the applicant had not established the existence of exceptional circumstances within the meaning of *Sony*, observing that the existence of a photograph of the product on which the Sony games station logo was clearly visible, had carried significant importance in the assessment of the admissibility of the action.

<sup>(12)</sup> Case C 386/96 P *Dreyfus v Commission* [1998] ECR I 2309, paragraph 43.



## *Competition rules applicable to undertakings*

### 1. General

#### (a) Res judicata

In Case T-276/04 *Compagnie maritime belge v Commission* (judgment of 1 July 2008), the Court held that where, because of a procedural defect, the Community judicature has annulled in part a Commission decision finding an infringement of the competition rules and imposing a fine, the Commission is entitled to adopt a new decision aimed at correcting the procedural defects identified by the Community judicature and to impose a new fine on the basis of the parts of the first decision that were not annulled. In addition, after all rights of appeal have been exhausted or expiry of the time limits prescribed in that connection, the parts of the first Commission decision which were not annulled acquire res judicata so that, in an action for annulment of the new decision, the undertaking penalised cannot challenge whether the infringement did in fact take place, since that infringement was definitively established in the first decision.

#### (b) Reasonable time

In that same judgment, the Court, recalling that Regulation No 2988/74 <sup>(13)</sup> established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines, held that there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period. That conclusion cannot be challenged by reliance on an alleged breach of the rights of the defence since, so long as the limitation period laid down in that regulation has not expired, any undertaking which is the subject of an investigation under Regulation No 17 <sup>(14)</sup> remains uncertain as to the outcome of the procedure and as to whether sanctions or fines will be imposed. Thus, the prolongation of that uncertainty is inherent in proceedings implementing Regulation No 17 and does not in itself constitute a breach of the rights of the defence. As regards the application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements where it has been proved that that infringement affected the ability of the undertakings concerned to defend themselves.

<sup>(13)</sup> Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

<sup>(14)</sup> Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959–62, p. 87).

## 2. Points raised on the scope of Article 81 EC

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

In Case T-99/04 *AC-Treuhand v Commission* (judgment of 8 July 2008), the Court held that the fact that an undertaking is not active on the market on which the restriction of competition materialises does not rule out its liability in respect of participation in the implementation of a cartel. In this instance, the applicant, a consultancy firm, had provided various services to three producers of organic peroxides and had played an essential role in the cartel between those producers by organising meetings and covering up evidence of the infringement.

### (b) Rights of the defence and right to a fair hearing

In that same judgment, the Court held that, when the first investigation measure is taken in respect of an undertaking, such as a request for information, the Commission is required to inform that undertaking of the putative infringements concerned by the investigation and of the fact that the Commission might have to impute to that undertaking unlawful conduct. In this instance, however, the Court held that the Commission's omission in this respect could not lead to the annulment of the contested decision, since that irregularity did not adversely affect the efficiency of the applicant's defence.

### (c) Fines

In Case T-410/03 *Hoechst v Commission* (judgment of 18 June 2008), the Court applied its unlimited jurisdiction in two respects. First, it held that the Commission had failed to have regard to the principles of sound administration and equal treatment. Although the Commission had clearly displayed its intention not to disclose to the cooperating undertakings, in particular to Hoechst, the fact that other undertakings had taken steps to obtain immunity from a fine, at the same time it assured another undertaking that 'fair warning' would be given to it if another company looked like overtaking it in relation to cooperation. In this instance, in light of the importance of the observance by the Commission of the principles of sound administration and equal treatment, the Court reduced the amount of the fine imposed on Hoechst by 10 %.

Second, the Court held that the Commission erred in applying the aggravating circumstance of leader of the cartel against Hoechst, without however characterising sufficiently clearly and precisely in the statement of objections the facts alleged against it. Moreover, certain facts identified by the Commission did not make it possible to conclude with sufficient precision that the objection of leader would be found as against Hoechst. The Court concluded from this that Hoechst was not in a position to defend itself properly.

In Case T-53/03 *BPB v Commission* (judgment of 8 July 2008), the Court held that the reduction of the fine granted by the Commission in respect of BPB's cooperation was not sufficient since BPB had been the first participant in the anti-competitive practice to send,



following a request for information, but going beyond what the Commission requested, additional information confirming the existence of the cartel. Consequently, that information was able to strengthen substantially the Commission's arguments concerning the existence of an overall plan and thus made it possible to increase substantially the amount of the fines in respect of the gravity of the infringement. The Court therefore granted BPB an additional reduction of 10 % of the amount of its fine.

In Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission* (judgment of 8 October 2008) and Case T-73/04 *Carbone Lorraine v Commission* (judgment of 8 October 2008, under appeal), the Court recalled that, in the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers' room for negotiation. On the other hand, the Court held that the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. Such proof would require considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved. In order to assess the gravity of the infringement, the decisive point is whether the cartel members did all they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained was liable to be influenced by other factors outside the control of the members of the cartel. They cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine.

In addition, the Court found that, even though, in the application, Schunk disputed for the first time before it facts which had been raised against it in the statement of objections and on which the finding of an infringement of Article 81 EC was based, there were no grounds for cancelling the minimum reduction of 10 % allowed to Schunk on the basis of the leniency notice <sup>(15)</sup>, as the Commission requested. The Court observed that the challenges at issue were rejected pursuant to the case-law under which facts which an undertaking has expressly acknowledged during the administrative procedure are to be regarded as established, that undertaking being barred from putting forward pleas disputing those facts in proceedings before the Court.

#### (d) Concept of group and setting of the 10 % ceiling on the amount of the fine

In Case T-52/03 *Knauf Gips v Commission* (judgment of 8 July 2008, not published), the Court stated that, when calculating the 10 % ceiling on the amount of the fine, referred to in Article 15(2) of Regulation No 17, the Commission may take into account the turnover of all the entities which make up an economic unit within the meaning of competition law. In particular, the Court decided that, although it is true that the mere fact that the share

<sup>(15)</sup> Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).

capital of separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those companies are a single economic unit with the result that the actions of one company can be attributed to the other and that one can be held liable to pay the fine for the other, it is possible to reach the conclusion that an economic unit exists on the basis of a series of elements. The Court also recalled in particular that the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal.

#### (e) Imputability of the unlawful conduct

During 2008, the Court *inter alia* applied its case-law on the imputability of the unlawful conduct in *Knauf Gips v Commission*. It recalled in this respect that it is possible to impute to a company all of the acts of a group if that company has been identified as the legal person at the head of that group with responsibility for its coordination.

### 3. Points raised on the scope of Article 82 EC

In Case T-271/03 *Deutsche Telekom v Commission* (judgment of 10 April 2008, under appeal), the Court ruled on the legality of a Commission decision punishing an abuse by Deutsche Telekom of its dominant position on the basis of its charging competitors prices for access to the network ('wholesale services') that were higher than Deutsche Telekom's prices for retail access to the local network. That pricing, in the form of a 'margin squeeze', forced competitors to charge their end-users prices higher than the prices Deutsche Telekom charged its own end-users. The Commission had therefore imposed a fine of EUR 12.6 million on Deutsche Telekom.

The Court observed that the Commission was correct to find that whilst Deutsche Telekom had observed the price cap imposed by the German regulatory authority for telecommunications and post ('the RegTP') it had sufficient discretion, from the beginning of 1998 to the end of 2001 and from 2002 until the date of adoption of the decision, to end or reduce the margin squeeze. The Court also stated that the fact that Deutsche Telekom's charges had to be approved by the RegTP did not absolve it from responsibility under competition law. As an undertaking in a dominant position, Deutsche Telekom was obliged to submit applications for adjustment of its charges at a time when those charges had the effect of impairing genuine undistorted competition on the common market.

As regards the method used by the Commission to establish the margin squeeze, the Court observed that the abusive nature of Deutsche Telekom's conduct was connected with the spread between its prices for wholesale access and its retail prices. The Commission was not therefore required to demonstrate that the retail prices were, as such, abusive.

The Commission was also correct to analyse the abusive nature of the pricing practices solely on the basis of Deutsche Telekom's charges and costs, disregarding the particular situation of competitors on the market. In that connection, the Court observed that, if the

lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, and particularly their cost structure — information which is generally not known to the dominant undertaking — the latter would not be in a position to assess the lawfulness of its own activities.

Lastly, the Court recalled that the prerogatives of the national authorities under Community telecommunications law do not affect the Commission's powers to find infringements of competition law. The Commission's decision cannot therefore be criticised for entailing double regulation of Deutsche Telekom's pricing practices by punishing the company for not using its discretion to end the margin squeeze.

## State aid

### 1. Admissibility

The case-law this year has further clarified in particular the concepts of, first, a person individually concerned by a Commission decision relating to an aid scheme, second, an act producing binding legal effects and, third, a legal interest in bringing proceedings.

In Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Others v Commission* (judgment of 28 November 2008), the Court declared admissible the actions brought by certain beneficiaries of reductions of, and/or exemptions from, social security contributions granted to firms established on the island territory of Venice and Chioggia against a Commission decision which considered those measures to be an aid scheme which was incompatible with the common market and required that the Italian Republic recover from the beneficiaries the aid paid. Although a decision concerning an aid scheme is of general application, the fact of belonging to a closed class of actual beneficiaries of that aid scheme, who are fully identifiable and particularly affected by the obligation to pay back the State aid, is sufficient to differentiate each of them from all other persons. If, as the Commission submitted, the *locus standi* of an actual beneficiary of an aid scheme were conditional upon an examination of its individual situation in the Commission decision declaring the scheme at issue incompatible, *locus standi* would depend on whether or not that institution chose to carry out such an individual examination in the light of the information communicated to it during the administrative procedure. That approach would be a source of legal uncertainty inasmuch as the Commission's knowledge of specific individual situations is frequently a matter of chance.

Concerning the concept of an act producing binding legal effects, the Court, in Case T-233/04 *Netherlands v Commission* (judgment of 10 April 2008, under appeal), relating to a Commission decision which classified the emission trading scheme for nitrogen oxides notified by the Kingdom of the Netherlands as State aid compatible with the common market, ruled that that Member State, which had asked the Commission to declare that that scheme did not constitute aid, had standing to challenge the decision in question. As a privileged applicant, it did not have to establish a legal interest in bringing proceedings, but only that the contested decision produced legal effects. That was the case here, since the classification of that scheme as State aid, first, had the effect of enabling the

Commission to examine the compatibility of the measure in question with the common market and also triggered the application of the procedure for existing State aid schemes and, second, was able to have an impact on the grant of new aid as a result of the rules on overlapping aid from different sources laid down *inter alia* in the Community guidelines on State aid for environmental protection <sup>(16)</sup>.

As regards a legal interest in bringing proceedings, the Court stated, in Case T-301/01 *Alitalia v Commission* (judgment of 9 July 2008), that Alitalia, an undertaking which had received a capital injection classified by the Commission as State aid compatible with the common market subject to compliance with certain conditions, retained a personal interest in the annulment of that decision, even after it had received all of that aid following another Commission decision. Since the contested decision formed the legal basis of the decision authorising the payment of the final instalment of the aid, the second decision would have had no legal basis if the Court had annulled the contested decision on the ground that it classified the measure at issue as State aid. Further, in that same judgment, the Court held that, although the contested decision had been taken subject to compliance with certain conditions that the Italian authorities had undertaken to comply with, Alitalia had standing to raise a plea against those conditions since they were attributable to the Commission, which has exclusive power to find that aid is incompatible with the common market.

Concerning the legal interest in bringing proceedings of a beneficiary of aid declared by the Commission to be partially compatible with the common market, the Court held, in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others v Commission* (judgment of 22 October 2008), that the way in which the Commission examined the compatibility of the aid at issue precluded examining the admissibility of the action by dividing the contested decision into two parts, the first classifying the contested measures as State aid which was partly incompatible with the common market and the second classifying those measures as State aid which was partly compatible. The Commission examined whether, taken as a whole, the State funding measures at issue represented a sum exceeding the net cost of a service of general economic interest.

The Court further observed that the interest in bringing proceedings can result from a genuine 'risk' that the applicants' legal position will be affected by legal proceedings or where the 'risk' of legal proceedings was vested and present at the date on which the action was brought before the Court. TV 2 is the subject of legal proceedings at the national level brought by a competitor seeking compensation for the damage that it had suffered because the State aid received by TV 2 enabled that company to apply a low-price strategy to sales of its advertising space. The Court, whilst noting that TV 2 brought its action before it before the competitor commenced those proceedings, found that the vested and present nature of the risk of legal proceedings at the date on which TV2 initiated proceedings is demonstrated by the fact that it materialised in the form of the legal proceedings pending before the national court.

<sup>(16)</sup> OJ 2001 C 37, p. 3.

## 2. Substantive rules

### (a) Granting of an economic advantage

In Case T-442/03 *SIC v Commission* (judgment of 26 June 2008), concerning an application for the annulment of a Commission decision declaring inter alia that certain measures adopted by the Portuguese Republic with regard to Radiotelevisão Portuguesa ('the RTP'), a company entrusted with providing the Portuguese public television service, did not constitute State aid and that the other measures were compatible with the common market, the applicant claimed inter alia that, at the time of a bond issue, the RTP had received an implicit State guarantee, which explained how it was able to place that issue on the market despite its poor financial position. Having established, first, that the RTP was a limited liability company whose debts the Portuguese Republic, which held a 100 % stake, was not subject to an unlimited obligation to repay and, second, that the prospectus for the bond issue in question provided for no guarantee on the part of the State, the Court held that the fact that the market agreed to subscribe to the 1994 bond issue because it considered that the State would guarantee de facto its repayment did not permit a finding that there was State aid. Only objective findings leading to the conclusion that the State legally had to repay that issue in the event of default by the RTP would permit a finding of the existence of a State guarantee.

In *Hotel Cipriani and Others v Commission*, the undertakings which were beneficiaries of social security exemptions submitted that those exemptions did not confer on them any economic advantage because they compensated the additional costs created by the structural disadvantages in the lagoon area in which they were established. The Court held that the undertakings had failed to demonstrate that there was a direct connection between the additional costs actually incurred and the amount of the aid received. The mere fact that undertakings located in the lagoon area incur costs higher than on the mainland does not permit the inference to be drawn that the scheme does not confer any advantage on them and does not introduce any discrimination against their competitors in Italy or in other Member States.

### (b) Selective nature of aid

In *Netherlands v Commission*, the Court established that the emission trading scheme for nitrogen oxides (NO<sub>x</sub>) adopted by the Kingdom of the Netherlands does not constitute State aid. First, all industrial facilities in the Netherlands with an installed total thermal capacity exceeding a given threshold, without any geographic or sectoral connotation, are subject to the NO<sub>x</sub> emission ceiling laid down by the measure in question and can benefit from the advantage offered by the tradability of emission allowances for which it provides. Aimed at the undertakings which are the biggest polluters, the system at issue uses an objective criterion which is in conformity with the objective of the protection of the environment. Second, only the undertakings covered by that scheme must comply, on pain of fine, with an emission standard or strict 'performance standard rate'. Therefore, the legal and factual situation of the undertakings subject to that NO<sub>x</sub> emission ceiling cannot be regarded as comparable to that of undertakings to which that ceiling does not apply.

In any case, even if the measure in question differentiates between undertakings and is, therefore, in principle selective, that differentiation would arise from the nature or overall structure of the scheme of which it is part and would not therefore fulfil the condition of selectivity. Indeed, ecological considerations justify distinguishing undertakings which emit large quantities of NO<sub>x</sub> from other undertakings.

On the other hand, in *SIC v Commission*, the Court held that the Commission had not established to the requisite legal standard that certain advantages from which the RTP benefited (exemption from notarial charges, registration charges and the costs of publication relating to that undertaking's transformation into a public limited company by way of legislation) did not fulfil the condition of selectivity on the ground that they were justified by the nature or the general logic of the system of which they were a part. First, the Commission did not examine whether the recourse to a legislative instrument which entailed the exemption from notarial charges had not been chosen with the aim of enabling public undertakings to escape those charges, but was merely part of the logic of the Portuguese legal system. Second, the Commission ought to have established whether it was consistent with the logic of the Portuguese legal system for the RTP's transformation into a public limited company to occur not in the normal way laid down for private companies, in other words, by a notarial deed (with all the consequences that entails under the general law concerning registration requirements and publication), but by legislation.

Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom v Commission* (judgment of 18 December 2008) enabled the Court to clarify further the condition of selectivity.

In August 2002, the United Kingdom notified the Commission of the Government of Gibraltar's envisaged reform of corporate tax, which included the establishment of three taxes: a registration fee, a payroll tax and a business property occupation tax ('the BPOT'), on the basis that liability to the latter two taxes would be capped at 15 % of profits. The Commission considered that that reform was regionally selective since it provided that companies located in Gibraltar would be taxed at a lower rate than those located in the United Kingdom. It also found that three aspects of the tax reform were materially selective: first, the requirement that a company must make a profit before it becomes liable to payroll tax and BPOT, since that requirement favours companies which make no profit; second, the cap limiting liability to payroll tax and BPOT to 15 % of profits, since that cap favours companies which, for the tax year in question, have profits that are low in relation to their number of employees and occupation of business property; and, third, the payroll tax and BPOT, since those two taxes inherently favour companies which have no real physical presence in Gibraltar.

Applying the conditions set out in the case-law relating to aid granted by infra-State bodies <sup>(17)</sup>, the Court held that the reference framework for assessing whether the tax reform at issue was regionally selective corresponded exclusively to the territory of Gibraltar and that, consequently, no comparison could be made with the system applicable to the United Kingdom.

<sup>(17)</sup> Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 67.



With regard to material selectivity, the Court noted that classification of a tax measure as selective requires a three-stage analysis. The Commission must begin by identifying and examining the 'normal' regime under the tax system applicable in the geographical area constituting the relevant reference framework. It is in relation to this 'normal' tax regime that the Commission must, secondly, determine whether any advantage granted by the tax measure at issue may be selective. If the Commission demonstrates the existence of derogations from the 'normal' tax regime resulting in a differentiation between undertakings, the Member State concerned may adduce evidence that that differentiation is justified by the nature and general scheme of its tax system. In that eventuality, the Commission must determine, in a third stage, that that is indeed the case. In that connection, the Court added that, if the Commission fails to carry out the first two abovementioned stages, it cannot embark upon the third stage, as otherwise it will go beyond the limits of its review. Such an approach would be liable, first, to enable the Commission to assume the role of the Member State with regard to determination of that State's tax system and of the 'normal' regime under it and, second, thus to make it impossible for the Member State to justify the differentiations in question on the basis of the nature and of the general scheme of the tax system notified.

Noting that the Commission neither began by identifying the 'normal' regime under the notified tax system nor challenged the Gibraltar authorities' description of that regime, the Court held that that institution was unable to establish that certain of the elements of the notified tax system constituted derogations, and were therefore *prima facie* selective, vis-à-vis the 'normal' regime. The Court held that it was likewise impossible for the Commission to assess correctly whether any differentiations between undertakings were capable of being justified by the nature or the general scheme of the tax system notified.

### (c) Private investor in a market economy test

In Case T-196/04 *Ryanair v Commission* (judgment of 17 December 2008), the Court annulled the decision by which the Commission examined separately two agreements concluded by the airline Ryanair with, respectively, the Walloon Region, the owner of Charleroi Airport, and Brussels South Charleroi Airport ('the BSCA'), a public sector company controlled by the Walloon Region which manages and operates that airport. According to the contested decision, those two agreements included State aid which was incompatible with the common market. The Commission found *inter alia* that the Walloon Region had concluded the first agreement with Ryanair as a public authority and that, consequently, its role in that agreement could not be examined pursuant to the principle of the private investor in a market economy. The Court noted, first, that since BSCA is an entity economically dependent on the Walloon Region, the Commission ought to have regarded them as one single entity. It then found that, by concluding its agreement with Ryanair, the Walloon Region carried out an economic activity. The mere fact that that activity was carried out in the public sector did not mean that it was categorised as the exercise of public authority powers. Furthermore, the mere fact that the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle.

#### (d) Application *ratione temporis* of the derogations to the prohibition of State aid

In Case T-348/04 *SIDE v Commission* (judgment of 15 April 2008), the Commission had applied the derogation relating to measures to promote culture and heritage conservation, provided for in Article 87(3)(d) EC, a provision which entered into force on 1 November 1993, to aid granted by France before that date. Having recalled that the substantive rules of Community law do not, in principle, apply to situations existing before their entry into force, and made clear that that conclusion applies irrespective of whether those rules might produce favourable or unfavourable effects for the persons concerned, the Court held, first, that all new State aid is necessarily incompatible with the common market if it was capable of distorting competition during the period in which it was paid and if it was not covered by any derogation and, second, that once it has produced its effect, the aid in question becomes definitively compatible or incompatible with the common market. Accordingly, since the analysis as to whether aid is compatible with the common market does not only require an assessment of whether, at the time when the relevant decision was adopted, the Community interest demanded that the aid be repaid, the Commission must also ascertain whether the aid in question was likely to distort competition during the period in which it was paid. On the basis of those considerations, the Court concluded that the Commission had erred in law by applying the abovementioned derogation to the period before 1 November 1993.

#### (e) Services of general economic interest

Case T-289/03 *BUPA and Others v Commission* (judgment of 12 February 2008) afforded the Court the opportunity to develop its case-law relating to the question whether or not the compensation received by an undertaking in return for a service of general economic interest ('SGEI') that it carries out constitutes State aid. The dispute concerned the organisation of the private medical insurance ('PMI') system in Ireland, which had undergone a process of liberalisation between 1994 and 1996, in the context of which the Voluntary Health Insurance Board (VHI) had been placed in competition with other operators, including the applicant. In the framework of that liberalisation, the establishment of a 'Risk Equalisation Scheme' ('RES') managed by the Health Insurance Authority ('the HIA') had been provided for. The RES is essentially a mechanism which provides for payment of a charge to the HIA by PMI insurers with a lower risk profile than the average market risk profile and for a corresponding payment by the HIA to PMI insurers whose risk profile is higher than the average profile. The mechanism specifies the various thresholds for triggering RES payments. The Commission, which received a complaint from BUPA and notification of the RES from Ireland, had decided that the payments under the RES constituted compensation for the SGEI obligations, namely obligations designed to ensure that all persons living in Ireland would receive a minimum level of PMI services at the same price, independently of their health status, age or sex ('the PMI obligations') <sup>(18)</sup>.

<sup>(18)</sup> Decision C(2003) 1322 final of 13 May 2003 (State Aid N 46/2003 — Ireland).

The Court held that, even though, at the time of the Commission's analysis, the Court of Justice's judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg* <sup>(19)</sup> ('*Altmark*') had not yet been delivered, it was in the light of the four conditions set out in that judgment ('the *Altmark* conditions') that it was appropriate to assess the legality of the contested decision. First, the Court of Justice did not place any temporal limitation on the scope of its findings in *Altmark*, and, second, the Court of Justice's interpretation of a provision of Community law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied, including by the Community institutions, from the time of its entry into force. The Court stated that, in this instance, the *Altmark* conditions, which moreover have a scope which to a large extent overlaps with that of the criteria of Article 86(2) EC, must be applied in accordance with the spirit and the purpose which prevailed when they were laid down, but in a manner adapted to the particular facts of this case.

In the context of the first *Altmark* condition, according to which the undertaking receiving the compensation must actually have clearly-defined public service obligations to discharge, the Court observed that Community law offers neither a clear and precise regulatory definition of the concept of an SGEI mission nor an established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission. Thus, Member States have a wide discretion to define what they regard as SGEIs and that definition can be questioned by the Commission only in the event of manifest error. That wide discretion does not, however, mean that a Member State is relieved of the obligation to ensure that the SGEI mission which it invokes satisfies certain minimum criteria (notably, the presence of an act of the public authority entrusting the operators in question with the mission and the universal and compulsory nature of that mission) common to any SGEI mission within the meaning of the EC Treaty, and to demonstrate that those criteria are indeed satisfied in the particular case. The lack of proof by the Member State that those criteria are satisfied may constitute a manifest error of assessment, in which case the Commission is required to make a finding to that effect. Furthermore, the Member State must indicate the reasons why it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI. In the absence of such reasons, even a marginal review by the Community institutions would not be possible. The Court stated, moreover, that the attribution of an SGEI mission does not necessarily presuppose that the operator entrusted with that mission will be given an exclusive or special right to carry it out, and that that attribution may also consist in an obligation imposed on a large number of, or indeed on all, the operators active on the same market. On the other hand, the essential conditions for establishing the existence of an SGEI mission are its universal and compulsory nature: whilst the first implies that the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party, the second does not mean that the service in question must necessarily be supplied to the whole population of a Member State, provided that it is offered at uniform and non-discriminatory rates and on similar quality conditions for all customers. By applying those criteria in this case, the Court held that the RES satisfies the first *Altmark* condition.

<sup>(19)</sup> C-280/00 ECR I-7747.

As regards the second *Altmark* condition, providing that the parameters on the basis of which the compensation for carrying out the SGEI mission is calculated must be established in advance in an objective and transparent manner, the Court found that it was also satisfied in this instance. Any power that the Irish authorities may have in calculating the RES payments would not in itself be incompatible with the existence of objective and transparent parameters. Furthermore, the complexity of the economic and mathematical formulae which govern the calculations to be carried out does not by itself affect the precise and clearly-determined nature of the relevant parameters.

In the context of the examination of the third *Altmark* condition, according to which the compensation must be necessary and proportionate by reference to the costs incurred in discharging the SGEI mission, the Court observed that the RES payments do not aim to compensate any costs or additional costs associated with a specific supply of certain PMI services, but only to equalise the additional burdens which are supposed to result where a PMI insurer has a negative risk profile differential by comparison with the average market risk profile. That does not, however, entail infringement of the condition at issue. Since the compensation system referred to in this instance is radically different, in particular, from that examined in *Altmark*, it cannot strictly fulfil the third *Altmark* condition, which requires that it be possible to determine the costs occasioned by the performance of an SGEI obligation. However, the quantification of the additional costs by means of a comparison between the actual risk profile of a PMI insurer and an average market risk profile in light of the amounts paid by all PMI insurers subject to the RES is consistent with the purpose and the spirit of that condition, since the compensation is calculated on the basis of objective elements which are specific, clearly identifiable and capable of being controlled.

As regards the fourth *Altmark* condition, requiring that the costs borne in respect of the performance of the SGEI mission correspond to those of an efficient undertaking, the Court held that the Commission was entitled in this case to consider that there was no need to draw a comparison between the potential recipients of the RES payments and an efficient operator. Account must be taken of the fact that that condition is not applicable strictly to the RES system on account of the two following specificities: the neutrality of the compensation system constituted by the RES by reference to the receipts and profits of the PMI insurers, and the particular nature of the additional costs linked with a negative risk profile on the part of those insurers <sup>(20)</sup>.

Other judgments have afforded the Court the opportunity in 2008 to supplement the analysis applicable to the compensation relating to the carrying out of an SGEI mission.

In Case T-266/02 *Deutsche Post v Commission* (judgment of 1 July 2008, under appeal), the Court stated, first, that where State resources were granted as compensation for additional costs associated with the provision of an SGEI in compliance with the *Altmark* conditions, the Commission, if it is not to render Article 86(2) EC entirely ineffective, cannot classify as State aid the public resources granted, as long as their total amount remains below the additional costs generated by carrying out the SGEI mission. Thus, if the Commission fails

<sup>(20)</sup> In *Hotel Cipriani and Others v Commission*, the Court confirmed that, as regards decisions taken by the Commission prior to *Altmark*, it is appropriate to determine whether the overall approach followed is compatible with the substance of the *Altmark* conditions.

to check whether the amount of the compensation exceeds the additional costs associated with an SGEI, it does not show to the requisite legal standard that that compensation confers an advantage for the purposes of Article 87(1) EC and is therefore capable of constituting State aid. Moreover, where the Commission carried out no examination or assessment in this respect, it is not for the Community judicature to carry out in the stead of that institution an examination it never carried out, by substituting the conclusions at which it then arrives.

In *SIC v Commission*, the Court declared that the Portuguese Republic was not required to organise competitive tendering prior to the award of the television SGEI to the RTP. The specific nature of public service broadcasting, in particular its connection with the democratic, social and cultural needs of each society, explains and justifies the fact that a Member State is not required to have recourse to competitive tendering for the award of broadcasting SGEIs, at least where it decides to ensure that public service itself through a public company, as in this case.

The Court observed that the Member States have the power to define broadcasting SGEIs in such a way as to include broadcasting a wide range of programmes, whilst authorising the operator in charge of the SGEI to carry on commercial activities, such as the sale of advertising space. If that were not the case, the very definition of the broadcasting SGEI would be dependent on its method of financing, whilst an SGEI, *ex hypothesi*, is defined in relation to the general interest which it is designed to satisfy and not in relation to the means which will ensure its provision.

As regards the monitoring of the RTP's compliance with its public service remit, the Court stated that only the Member State was able to assess the public service broadcaster's compliance with the quality standards defined in its remit. The Commission must confine itself to finding that there is an independent monitoring mechanism at the national level, which was the case in this instance. So far as concerns whether the funding was proportionate to the public service costs, the Court held that, by not asking the Portuguese Republic to send certain RTP audit reports, the Commission infringed its obligation to investigate. The Commission cannot omit to require the disclosure of information which appears likely to confirm or to refute other information which is relevant for the examination of the measure at issue, but whose reliability cannot be considered to be sufficiently established.

The Court also stated, in *TV 2/Danmark and Others v Commission*, that the broadcasting SGEI does not necessarily have to be limited to the broadcasting of non-profitable programming. The claim that TV 2, which has been entrusted with the (TV 2) SGEI, would inevitably be led to subsidise its commercial activity through the State funds received for the public service, was considered by the Court to refer at the very most to a risk which it was for the Member States to prevent and, where necessary, for the Commission to penalise. Further, regarding the latitude left to TV 2 by the Danish authorities as regards its actual programming choices, the Court held that it is not unusual for a public service broadcaster to enjoy editorial independence from political authority in the choice of its programmes, provided that it satisfies the qualitative requirements.

#### (f) Aid designed to make good damage caused by exceptional occurrences

According to Article 87(2)(b) EC, aid granted to make good the damage caused by exceptional occurrences must be declared compatible with the common market.

Following the terrorist attacks of 11 September 2001, the Commission adopted, on 10 October 2001, a communication <sup>(21)</sup> in which it considered that that provision could authorise compensation, inter alia, for the costs caused by the closure of American airspace from 11 to 14 September 2001. In Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* (judgment of 25 June 2008), the Court annulled in part the Commission's decision declaring incompatible with the common market the part of the aid granted by the Hellenic Republic to make good the losses due to the cancellation of flights scheduled outside the period referred to by that communication. The Court held that, although Article 87(2)(b) EC makes it possible to compensate only for damage caused directly by exceptional occurrences, the existence of a direct connection can be recognised even where the loss arises, as in this instance, shortly after the abovementioned period.

### 3. Procedural rules

Lastly, the 2008 case-law afforded the opportunity to clarify the obligations incumbent on the Commission when it adopts a second decision relating to State aid which has been the subject of a decision annulled by the Court. In *Alitalia v Commission*, the Court held that there was no obligation on the Commission to reopen in such a case the formal investigation procedure, since the illegalities censured by the Court did not go back as far as the opening of the procedure. In addition, the Commission was not required to make available again to the third parties concerned, whose right to submit their comments had been ensured, in the first decision, by the publication of a notice in the Official Journal of its decision to open a formal investigation procedure, that same possibility when adopting the second decision.

#### *Community trade mark*

Decisions relating to the application of Regulation No 40/94 <sup>(22)</sup> continued to represent in 2008 a significant number (171) of the cases disposed of by the Court of First Instance, although they accounted for a lower percentage of the total number of cases in comparison with 2007.

<sup>(21)</sup> COM(2001) 574 final.

<sup>(22)</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).



## 1. Absolute grounds for refusal of registration

For the first time, in Case T-270/06 *Lego Juris v OHIM — Mega Brands (Lego brick)* (judgment of 12 November 2008), concerning invalidity proceedings, the Court ruled on the scope of the absolute ground for refusal provided for in Article 7(1)(e)(ii) of Regulation No 40/94, according to which signs which consist exclusively of the shape of goods which is necessary to obtain a technical result are not to be registered. The Court held that that provision precludes registration of any shape consisting exclusively, in its essential characteristics, of the shape of the goods which is technically causal of, and sufficient to obtain, the intended technical result, even if that result can be achieved by other shapes using the same or another technical solution. Those characteristics are to be determined objectively, on the basis of the graphic representation of the shape concerned and any descriptions filed at the time of the trade mark application, and not on the basis of the perception of the target consumer.

In another case involving invalidity proceedings, the Court, in Case T-405/05 *Powerserv Personalservice v OHIM — Manpower (MANPOWER)* (judgment of 15 October 2008, under appeal), defined the geographical area over which the relevant public might perceive as descriptive the sign constituted by the English word ‘manpower’. In that connection, it held that that may even be the case in non-English-speaking Member States, provided that, first, that English word has been received into the language of the country in question and can be used there to replace whatever word or phrase in that language means ‘workforce’ or ‘labour’, or that, second, in the context of the goods and services protected by the mark MANPOWER, English is used — albeit only as an alternative to the national language — to address the members of the relevant public. In accordance with those criteria, the Court held that the Board of Appeal was right to find that the sign at issue is descriptive in Germany and Austria, whereas it was wrong to find that that is also the case in the Netherlands, Sweden and Denmark. Other developments concerning the role of knowledge of languages by the relevant public appear in Case T-435/07 *New Look v OHIM (NEW LOOK)* (judgment of 26 November 2008, not published), in which the Court held that, since a basic understanding of English on the part of the general public in the Scandinavian countries, the Netherlands and Finland must be regarded as a well-known fact, the Board of Appeal was entitled to take the view that the sign NEW LOOK, a banal expression which is part of everyday English and does not present any linguistic difficulty, is devoid of any distinctive character in those countries.

Another significant contribution made by the case-law in 2008 in this field concerns the scope of the reference that Article 7(1)(h) of Regulation No 40/94 makes to the absolute grounds for refusal referred to in Article 6 *ter* of the Paris Convention <sup>(23)</sup>. In Case T-215/06 *American Clothing Associates v OHIM (Representation of a maple leaf)* (judgment of 28 February 2008, under appeal), which arose from the action brought by an undertaking which had been refused by the Office for Harmonization in the Internal Market (Trade Marks and Designs) (‘OHIM’) registration of a sign consisting, inter alia, of a maple leaf, on the ground that the latter appears on the Canadian flag, the Court held that, because of the distinction

<sup>(23)</sup> Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended (*United Nations Treaty Series*, Vol. 828, No 11847, p. 108).

that that convention establishes between 'trade marks' and 'service marks', its Article 6 *ter* (a), which requires, inter alia, that flags and other State emblems be refused registration, does not apply to 'service marks'. If the Community legislature had intended to extend that prohibition to marks in respect of services, it would not merely have referred to Article 6 *ter* of the Paris Convention, but would have mentioned that prohibition in the wording of Article 7 of Regulation No 40/94. Moreover, the Court established that, unlike what is provided for in respect of the assessment of the distinctive character of a complex mark, when applying Article 6 *ter* of the Paris Convention, regard must be had to each of the elements of that mark and it is sufficient that one of them is a State emblem or an imitation thereof to preclude registration of the mark concerned, irrespective of its overall perception. Lastly, the application of Article 6 *ter*(1)(a) of the Paris Convention is not subject to the condition that there be a possibility of error on the part of the public concerned as regards the origin of the goods designated by the mark applied for or as regards the existence of a connection between the proprietor of that mark and the State whose emblem appears in that mark.

In Case T-302/06 *Hartmann v OHIM (E)* (judgment of 9 July 2008, not published), the Court made a significant clarification to the case-law according to which OHIM may base its analysis on facts arising from practical experience generally acquired from the marketing of general consumer goods, without being obliged to give examples of such practical experience. The Court held that, since the goods covered by the mark applied for had been defined by the departments of OHIM as not being intended for general consumption, but for a specialist public, it was not acceptable that those departments based their analysis on specific facts which might be known by anyone.

A series of judgments has enabled the Court to clarify the connection which must exist between a trade mark and the goods or services covered in order for it to be considered descriptive, in particular Case T-181/07 *Eurocopter v OHIM (STEADYCONTROL)* (judgment of 2 April 2008, not published), Case T-248/05 *HUP Usługi Polska v OHIM — Manpower (I.T.@MANPOWER)* (judgment of 24 September 2008, not published, under appeal), Case T-230/06 *REWE-Zentral v OHIM (Port Louis)* (judgment of 15 October 2008, not published), Case T-325/07 *CFCMCEE v OHIM (SURFCARD)* (judgment of 25 November 2008, not published) and Case T-67/07 *Ford Motor v OHIM (FUN)* (judgment of 2 December 2008). In particular, in that last judgment, the Court held that the connection between the meaning of the word 'fun', on the one hand, and land motor vehicles and parts and fittings thereof, on the other, is not sufficiently direct and specific to make it possible to refuse registration of the mark applied for, contrary to what the Board of Appeal decided.

Lastly, in Case T-341/06 *Compagnie générale de diététique v OHIM (GARUM)* (judgment of 12 March 2008, not published), the Court stated that the analysis of the distinctive character of a sign must refer to a specific and current market experience or, at the very least, to a very probable and sufficiently recent market experience. On the other hand, an alleged or hypothetical evolution, without any connection to specific and verifiable elements, cannot, in principle, suffice.

## 2. Relative grounds for refusal

The dispute between the Czech company Budějovický Budvar and the United States company Anheuser-Busch, as in 2007, led the Court, in Joined Cases T-225/06, T-255/06, T-257/06 and T-309/06 *Budějovický Budvar v OHIM — Anheuser-Busch (BUD)* (judgment of 16 December 2008), to interpret Article 8(4) of Regulation No 40/94, which makes it possible to file a notice of opposition against registration of a Community trade mark by invoking an earlier sign other than a mark. First of all, the Court observed that OHIM must take into account earlier rights which are protected in the Member States, without calling in question their classification. Thus, as long as the protection afforded in Austria and France to the appellation of origin 'bud' is valid under the national law of those States, OHIM must take account of the effects of that protection. The Court then held that OHIM, instead of applying Article 43 of Regulation No 40/94 by analogy and requiring Budějovický Budvar to demonstrate 'genuine' use of the appellations 'bud', ought to have determined whether the signs concerned were used in the context of a commercial activity with a view to economic advantage, and not as a private matter, whatever the territory concerned by that use. The Court considered that the Czech company succeeded in proving that the appellations at issue are used in the course of trade. The Court also held that OHIM erred by not taking into account all the relevant elements of fact and law in determining whether the national laws concerned enable Budějovický Budvar to prohibit use of a subsequent mark.

One of the other main contributions of the case-law in 2008 in this field concerns the question of the similarity of the goods and/or the services covered by the earlier mark and the mark applied for for the purpose of assessing whether there is a likelihood of confusion. In Case T-175/06 *Coca-Cola v OHIM — San Polo (MEZZOPANE)* (judgment of 18 June 2008), first, the Court found that there is little similarity between wine and beer. Although wine and beer may, to a certain extent, satisfy the same need — enjoyment of a drink during a meal or as an aperitif — the relevant consumer perceives them as two distinct products. Moreover, there is nothing to support the conclusion that a purchaser of one of those products would be led to purchase the other and that they would thus be complementary. On the contrary, account being taken of price differences, wine and beer are, to a certain extent, competing goods.

In Case T-161/07 *Group Lottuss v OHIM — Ugly (COYOTE UGLY)* (judgment of 4 November 2008, not published), the Court held that there is considerable complementarity between 'beers', on the one hand, and 'cocktail lounge services' and 'entertainment services, services for discos, night clubs', on the other. Beer is consumed to quench thirst or for enjoyment, whilst those services cover the activity of preparing and serving alcoholic beverages in places where people go to enjoy themselves. The Court held that OHIM was therefore right to find that those goods and services are similar to a low degree. That is not the case in respect of the similarity between beers and 'cultural activities', since those activities display a much lower degree of complementarity with beer than the services referred to above.

Complementarity between goods and services was also the subject of two other judgments, which were delivered in cases involving invalidity proceedings. In Case T-116/06 *Oakley v OHIM — Venticinque (O STORE)* (judgment of 24 September 2008), the Court established that the relationship between the services provided in connection with the retail

trade of certain items of clothing and the items of clothing themselves is close in the sense that the goods are important or even indispensable to the provision of those services. Such services are provided at the time of sale of those goods and retail trade includes all activity carried out by the trader for the purpose of encouraging the conclusion of a sales transaction. By contrast, that relationship does not exist where the sales services covered by a mark concern accessories and the other mark covers items of clothing and leather goods.

In Case T-242/07 *Weiler v OHIM — IQNet Association — The International Certification Network (Q2WEB)* (judgment of 12 November 2008, not published), when stating the reasons for its finding that the goods and services covered by the mark Q2WEB can all be used and/or provided together or consecutively in order to provide consumers with the services in question covered by the mark QWEB Certified Site, the Court pointed out that providers of telecommunication services, in particular telecommunications services through the Internet, such as those covered by the mark QWEB Certified Site, generally supply software to their clients and a maintenance and update service for that software, which is therefore, by definition, important for the use of the telecommunications service provided, and that such software and services form part of the goods and services covered by the mark Q2WEB.

The 2008 case-law has also made a contribution to the conceptual comparison between opposing signs in *inter partes* proceedings. When the Court had to adjudicate on the similarity between the word signs EL TIEMPO and TELETIEMPO, it held, in Case T-233/06 *Casa Editorial el Tiempo v OHIM — Instituto Nacional de Meteorología (EL TIEMPO)* (judgment of 22 April 2008, not published), that nothing in the wording of the description of the goods and services in question permits the inference that the word 'tiempo' will necessarily be interpreted in its chronological sense in respect of the mark applied for and in its meteorological sense in respect of the earlier marks.

Further, it is apparent from Case T-212/07 *Harman International Industries v OHIM — Becker (Barbara Becker)* (judgment of 2 December 2008), in which the Court held that, where a word mark consists of two components, one of which is the single component comprising another word mark, it is not necessary that the common component of the conflicting marks is the dominant component in the overall impression created by the composite mark to find a likelihood of confusion. If such a condition were imposed, even though the common component has an independent distinctive role in the composite mark, the owner of the earlier mark would be deprived of the exclusive right conferred by that mark.

Lastly, the Court clarified what is the average consumer's level of attention when he or she purchases an inexpensive item of furniture. Since that consumer acts on the basis of a number of functional and aesthetic considerations, in order to ensure that that furniture is in keeping with other furniture already in his or her possession, the Court held, in Case T-112/06 *Inter-IKEA/OHIM — Waibel (idea)* (judgment of 16 January 2008, not published), that while the actual act of purchase may be completed quickly in the case of certain items of furniture, the process of comparison and reflection before the choice is made requires, by definition, a high level of attention.

### 3. Formal and procedural issues

#### (a) Evidence of genuine use of the earlier mark

In Case T-325/06 *Boston Scientific v OHIM — Terumo (CAPIO)* (judgment of 10 September 2008, not published), the Court held that the evidential value of the figures contained in the list of sales of the goods covered by the earlier mark, provided to OHIM by the proprietor of that mark, could be determined by means other than an affidavit or statement as referred to in Article 76(1) of Regulation No 40/94 and in Rule 22 of Regulation No 2868/95 <sup>(24)</sup>. The fact that certain elements of the invoices corresponding to those sales appear in the list is testimony to its consistency and veracity. Further, the fact that an invoice was drawn up shows that the earlier mark was used publicly and externally and not solely within the undertaking which owns the earlier trade mark or within a distribution network owned or controlled by that undertaking.

In Case T-100/06 *Rajani v OHIM — Artoz-Papier (ATOZ)* (judgment of 26 November 2008, not published), the Court examined the question of the date to be taken into consideration for calculating the beginning of the five-year period during which an earlier mark cannot be made subject to the requirement of evidence of genuine use, where that mark has been the subject of an application for international registration with the World Intellectual Property Organisation (WIPO) which was filed on a certain date, but the mark was granted protection in a Member State at a later date. Having established that the question is a matter for the national law concerned, the Court held that, if, pursuant to that law, protection for an internationally registered trade mark is provisionally refused but subsequently granted, the registration is regarded as having taken place on the date of receipt by WIPO of the final notification that protection has been granted.

#### (b) Continuity in terms of functions

The Court applied the principles laid down in the judgment of the Court of Justice of 13 March 2007 in *OHIM v Kaul* <sup>(25)</sup>, when stating, in Case T-420/03 *El Corte Inglés v OHIM — Abril Sánchez et Ricote Saugar (BOOMERANG<sup>TV</sup>)* (judgment of 17 June 2008), that, although the Board of Appeal is not required to take into consideration the facts and evidence produced for the first time before it, it is, however, necessary to determine whether, by its refusal, it did not infringe Article 74(2) of Regulation No 40/94 by considering itself to have no discretion. The Court held that the nature of the facts and evidence in question is only one of the factors which OHIM may take into account when exercising the discretion which it must exercise. Since the Board of Appeal relied on the fact that the applicant had the opportunity to produce the documents at issue before the Opposition Division, it implicitly took the view that the circumstances of the case precluded their being taken into account. Thus, the Board of Appeal did not hold on principle that the documents produced by the applicant for the first time before it were inadmissible, but gave grounds for its decision on that issue.

<sup>(24)</sup> Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1).

<sup>(25)</sup> Case C-29/05 P [2007] ECR I-2213.



### (c) Interest in bringing proceedings in relation to invalidity proceedings

In Case T-160/07 *Lancôme v OHIM — CMS Hasche Sigle (COLOR EDITION)* (judgment of 8 July 2008, under appeal), the Court held that it is apparent from the scheme of Article 55(1) of Regulation No 40/94 that the legislature intended to permit any natural or legal person and any group or body having the capacity to sue or be sued to bring applications for a declaration of invalidity based on absolute grounds for invalidity, and that it is not necessary to demonstrate the existence of an interest in bringing proceedings, whereas, with regard to applications for a declaration of invalidity based on relative grounds for invalidity, it expressly restricted the group of potential applicants for a declaration of invalidity to proprietors of marks or of earlier rights and to licensees.

### (d) Obligations of the Boards of Appeal

Relying on its settled case-law concerning the obligation to provide a statement of reasons <sup>(26)</sup>, the Court stated, in Case T-304/06 *Reber v OHIM — Chocladefabriken Lindt & Sprüngli (Mozart)* (judgment of 9 July 2008), that the Board of Appeal is not, as a general rule, required to provide in its decision a specific answer to each argument regarding the existence in other similar cases of decisions of its own at various stages in the procedure, or those of national courts which go in a particular direction, if the reasons for the decision which it adopts in a specific case show, at the very least implicitly but clearly and unequivocally, why those other decisions were not relevant or were not taken into consideration in its assessment.

In *COYOTE UGLY*, the Court held that, although the Board of Appeal is entitled, when it identifies a similarity, even if only partial, between the goods and services at issue in opposition proceedings, to separate of its own motion the services covered by the mark applied for by stating precisely the sub-categories compatible with the earlier mark, it is not required to do so.

### *Plant variety rights*

Regulation No 2100/94 <sup>(27)</sup> on Community plant variety rights allows for the grant of industrial property rights which are valid throughout the Community in respect of plant varieties. The implementation and application of this Community regime are carried out by the Community Plant Variety Office ('the CPVO'), a decentralised Community agency which has its headquarters in Angers (France), and which has been operational since 27 April 1995. Within the CPVO, a Board of Appeal responsible for deciding on appeals against certain types of decisions taken by the CPVO has been established. In accordance with Article 73 of that regulation, an appeal to the Community judicature lies from decisions of the Board of Appeal of the CPVO.

<sup>(26)</sup> Joined 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 *Aalborg Portland and Others v Commission* [2004] ECR I-123, and Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331.

<sup>(27)</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).



During 2008, the Court delivered two initial judgments relating to decisions adopted by the Board of Appeal of the CPVO. Having had the opportunity to rule principally on admissibility in Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO — Nador Cott Protection (Nadorcott)* (judgment of 31 January 2008) the Court defined the scope of the review which it exercises in this area in Case T-187/06 *Schröder v CPVO (SUMCOL 01)* (judgment of 19 November 2008). In that connection, it observed that, when the Community judicature rules on decisions taken by a Community administrative authority on the basis of complex technical assessments, it exercises in principle limited review and does not substitute its assessment of the facts for the assessment made by that authority. However, that does not mean it must decline to review the administration's interpretation of technical data. That approach may be transposed to cases in which the administrative decision is the result of complex appraisals in scientific domains, such as botany or genetics. In this instance, the appraisal of the distinctive character of a plant variety in the light of the criteria laid down in Article 7(1) of Regulation No 2100/94 was of a scientific and technical complexity such as to justify a limit to the scope of review by the courts. Those criteria require that it be ascertained whether the candidate variety is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety. On the other hand, appraisal of whether there exists another variety which is a matter of common knowledge in accordance with the criteria laid down in Article 7(2) of that regulation does not require expertise or special technical knowledge and is not of a complexity such as to justify a limit to the scope of review by the courts. Those criteria merely require it to be ascertained, for example, whether, on the date of application for a plant variety right in respect of the candidate variety, another variety had been the object of a right or was entered in an official register of plant varieties.

### [Access to documents](#)

In Case T-403/05 *MyTravel v Commission* (judgment of 9 September 2008, under appeal), the Court of First Instance clarified the extent of the right of access provided for by Regulation No 1048/2001 <sup>(28)</sup> to certain documents appearing in the Commission's file, in connection with the assessment of the compatibility of a concentration with the common market, and to documents drafted by the Commission's staff following the annulment of one of its decisions by the Court.

That judgment relates to the operation concentrating the undertakings Airtours and First Choice, declared incompatible with the common market by the Commission. That decision having been annulled by the Court in Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, the Commission set up a working group comprising officials of its Directorate-General (DG) for Competition and the legal service in order to consider whether it was appropriate to bring an appeal against that judgment and to assess the implications of that judgment on the procedures for the control of concentrations or in other areas. MyTravel, the successor in title to Airtours, made a request to the Commission for access to two kinds

<sup>(28)</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

of documents: on the one hand, the working documents and the report drawn up by the working group and, on the other, the documents in the *Airtours/First Choice* file on which that report was based. The Commission refused access to most of those documents on the basis of the exceptions provided for by Regulation No 1049/2001.

With regard, first, to the exception relating to protection of the decision-making process, the Court observed that the report fell within the purely administrative, and not legislative, functions of the Commission. The interest of the public in obtaining access to a document in accordance with the principle of transparency does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply the rules of competition law as in the case of a document relating to a legislative procedure. Noting that disclosure of the report to the public would carry the risk of revealing possibly critical opinions of Commission officials and of enabling a comparison of the content of the report with the decision ultimately taken by the Commission, the Court concluded that the Commission was fully entitled to refuse access on the ground that disclosure of the report to the public would seriously undermine the right of one of its Members to the frankly expressed and complete views of its own services. Furthermore, the Court considered that, so far as the internal documents relating to the *Airtours–First Choice* concentration were concerned, the Commission had correctly taken the view that disclosure of those documents would reduce the ability of its services to express their points of view and would seriously undermine its decision-making process in the field of the control of concentrations, for those documents might indicate opinions of the Commission services, which would perhaps no longer appear in the final version of the decision. Such disclosure would encourage self-censorship and damage full and free communication between staff. In addition, the risk is reasonably foreseeable, for it is probable that those documents could be used to influence the position of the Commission's staff, which has to be free and independent from all external pressures.

With regard, secondly, to the exception relating to protection of court proceedings and legal advice, which the applicant argued did not apply to the notes in reply drafted by the legal service for the attention of the Competition DG in connection with the preparation of the *Airtours* decision, the Court stated that disclosure of the notes in question could lead the legal service to display reticence and caution in the future in order not to affect the Commission's decision-making capacity in areas in which it was involved in its administrative capacity. It added that disclosure of that advice would risk putting the Commission in the difficult position in which its legal service might find itself required to defend a position before the Court which was not its position during the internal procedure. Such a conflict could have a considerable effect on both the freedom of the legal service to express its views and its ability effectively to defend before the Community judicature, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position.

With regard, thirdly, to the exception relating to protection of inspections, investigations and audits, the Court, having found that, for one of the documents requested, the Commission's decision contained only vague and general considerations that did not make it possible to understand how those inspections, investigations and audits could have been threatened, annulled the decision insofar as it refused access to that document.

In Case T-144/05 *Muñiz v Commission* (judgment of 18 December 2008, not published), the Court of First Instance also tackled the issue of the application of the exception relating to protection of the decision-making process, in connection with a request for access to preparatory documents submitted by a working group to the Nomenclature Committee, which plays a part in the legislative process for the adoption of measures classifying goods, when classification of particular goods is likely to give rise to difficulty. The Court considered that, while the protection of the decision-making process from external pressure may constitute a legitimate ground for restricting access to documents, the reality of such pressure must be established with certainty, and it must be shown that there was a foreseeable risk that the classification decision would be substantially affected. In addition, although account must be taken of the Commission's desire that staff and experts should continue to be able to express their opinions freely, it must nonetheless be determined whether those concerns are objectively justified. The Court found that such was not the case in the circumstances, the Commission not having corroborated its contentions with any evidence, and annulled the contested decision.

The exception relating to protection of commercial interests was the subject of consideration in Case T-380/04 *Terezakis v Commission* (judgment of 30 January 2008, not published). The Commission had, in particular, refused to grant the applicant access to a contract concluded between Athens International Airport and the Hochtief consortium, relating to the construction of the new Athens airport at Spata, on the ground that to disclose the contract would cause serious harm to the commercial interests of the parties to the contract. The Court stated that, by its nature, such a document was likely to contain confidential information concerning both the companies in question and their business relations and that, as a general rule, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests. Although certain passages contained information about the contracting parties and their business relations, the examination carried out by the Commission did not make it possible to determine specifically whether the exception relied on actually applied to all the information contained in the contract. Given that it seemed not to be impossible for the Commission to give reasons justifying the need for confidentiality in respect of the whole of the main contract without disclosing its content and, thereby, depriving the exception of its very purpose, and that it was not for the Court to substitute its assessment for that of the Commission, the court annulled the contested decision insofar as it refused access, even partially, to the contract.

In Case T-42/05 *Williams v Commission* (judgment of 10 September 2008, not published), the question arose whether the decision partially refusing access to certain documents identified therein may be interpreted as entailing an implied refusal of access to certain other kinds of documents, such as memoranda and e-mails exchanged at the time of the preparatory work for Directive 2001/18<sup>(29)</sup> on GMOs, which were not identified, but for which also access was sought. For that purpose, the Court proceeded in three stages. First, it found that the Commission held a significant number of preparatory documents other than those identified in the contested decision and that, in the absence of any statement

<sup>(29)</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

by the Commission to that effect, there was no reason to suppose that the documents in question did not exist. Next, the Court ascertained whether the request for access was sufficiently precise to enable the Commission to understand that it related to such documents. Examining the circumstances of the case, the Court considered that it was, and concluded that the fact that the Commission did not identify in the contested decision all the internal documents relating to the background to the adoption of Directive 2001/18 amounted, in accordance with Article 8 of Regulation No 1049/2001, to an implied refusal of access, actionable before the Court. Lastly, the Court examined whether the fact that the contested decision did not contemplate disclosing those documents could be justified in the particular circumstances of the case, *inter alia* on the basis that the request for access was very wide-ranging and imprecise. Recalling that the possibility, for the institution, of weighing the interest in public access to the documents against the burden of work so caused was applicable only in exceptional cases, limited to situations in which concrete individual examination of the documents would entail an unreasonable amount of administrative work for that institution, and finding that the Commission had not formally relied on that exception, the Court considered that the Commission had not justified its implied refusal to grant access to the documents not identified in the contested decision. The implied refusal of access by definition constituted an absolute failure to state reasons which the Commission could not remedy by means of the arguments put before the Community judicature, and justified the annulment of the contested decision on that head.

### *Common foreign and security policy — Fight against terrorism*

The year 2008 saw the Court give more rulings in the sphere of the fight against terrorism in two judgments, in Cases T-256/07 *People's Mojahedin Organization of Iran v Council* (judgment of 23 October 2008, under appeal) and T-284/08 *People's Mojahedin Organization of Iran v Council* (judgment of 4 December 2008), the same applicant having been successful in part in 2006<sup>(30)</sup>. In the first judgment, the Court stated that the Council, when required to determine whether freezing of the funds of a person, group or entity is or remains justified, must first of all evaluate the danger that, for want of such a measure, those funds might be used to fund or prepare acts of terrorism. With regard to the part played by the Court, the broad discretion that the Council must be recognised to enjoy does not mean that the Court is not to review the interpretation made by the Council of the relevant facts. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council. Moreover, the Court emphasised that, where a Community institution enjoys broad discretion, the review of observance of certain procedural guarantees is of fundamental importance. The Court held that a review determining whether the Council had reasonable grounds for continuing to freeze the applicant's funds fell beyond all question within the bounds of the judicial review that the Community judicature may carry out inasmuch as it corresponds, in essence, to the review of a manifest error of assessment.

<sup>(30)</sup> Case T-228/02 *Organisation des Mojahedines du peuple d'Iran v Council* [2006] ECR II-4665 (see Annual Report 2006).

Having carried out such a review, the Court annulled one of the contested decisions on the ground that the Council had failed to explain sufficiently the reasons why it had not taken into consideration the decision of a United Kingdom judicial authority, the Proscribed Organisations Appeal Commission ('the POAC'), ordering the removal of the applicant from the list of terrorist organisations in the United Kingdom. The Court recalled that it is imperative, for the purpose of adopting Community measures freezing funds, that the Council should check that there exists a decision taken by a competent national judicial authority and check the action taken at national level in response to that decision. By its decision, the POAC had in particular described as unreasonable the Home Secretary's determination that the applicant was still an organisation involved in terrorism.

In the second of those two judgments, given in an expedited procedure the very day after the hearing, the Court of First Instance, stressing that it is necessary for a fair balance to be struck between the need to combat international terrorism and the protection of fundamental rights, ruled that because the restrictions imposed by the Council on the rights of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial, the Community courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential. The Court annulled the contested decision on the ground, *inter alia*, that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if that Member State is not willing to authorise its communication to the Community judicature.

### *Privileges and immunities*

In Case T-345/05 *Mote v Parliament* (judgment of 15 October 2008), the Court of First Instance ruled on a decision of the Parliament waiving the parliamentary immunity of one of its Members. Criminal proceedings had been brought against Mr Mote, a British citizen, on the ground that he had obtained State benefits on the basis of false declarations. Following his election to the European Parliament, Mr Mote applied for the criminal proceedings pending against him to be stayed, relying on the privileges and immunities he enjoyed in his capacity as a Member of the European Parliament. The prosecution was stayed by the competent national court, which held that the bail condition under which Mr Mote had been placed constituted an obstacle to the free movement of Members of Parliament and thus infringed Article 8 of the Protocol on the Privileges and Immunities of the European Communities <sup>(31)</sup>. The United Kingdom having brought the matter before the Parliament, the latter decided in plenary assembly to waive Mr Mote's immunity, whereupon Mr Mote applied to the Court of First Instance for annulment of that decision.

In its judgment, the Court held that is apparent from the last paragraph of Article 10 of the Protocol on the Privileges and Immunities of the European Communities, according to which immunity cannot prevent the European Parliament from exercising its right to waive the immunity of one of its Members, that the Parliament is competent to decide on an ap-

<sup>(31)</sup> Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 annexed to the Treaty establishing a single Council and a single Commission (OJ 1967 152, p. 13).



plication for waiver of the immunity of a Member. By contrast, there is no rule establishing the Parliament as the competent authority for deciding whether the privilege provided for by Article 8 of the Protocol applies. The field of application of Articles 8 and 10 of the Protocol is not the same, the objective of Article 10 being to safeguard the independence of Members by ensuring that pressure, in the form of threats of arrest or legal proceedings, is not brought to bear on them during the sessions of the Parliament, and the function of Article 8 being to protect Members against restrictions on their freedom of movement, other than judicial restrictions. Observing that Mr Mote had not alleged any restrictions other than judicial, the Court concluded that the Parliament had not erred in law in deciding to waive Mr Mote's immunity without ruling on the privilege granted to him in his capacity as a Member of the Parliament.

## II. Actions for damages

This year the chief contributions to the case-law in this sphere deal with the conditions in which the Community may incur liability by reason, first, of the dissemination by a Community institution or body of information relating to individuals and, second, of errors committed by the Commission in the economic analysis underlying a decision declaring a concentration incompatible with the common market.

### *Relation to national proceedings*

In Case T-48/05 *Franchet and Byk v Commission* (judgment of 8 July 2008), the Court of First Instance interpreted Regulation No 1073/1999<sup>(32)</sup>, which governs the inspections, checks and actions undertaken by agents of the European Anti-Fraud Office (OLAF), a body responsible, in particular, for carrying out internal administrative investigations within the institutions intended to investigate serious facts which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings. That regulation provides that those investigations must be conducted in accordance with the Treaty, in particular with full respect for human rights and fundamental freedoms, and in observance of the right of persons involved to express their views on the facts concerning them. In the case in point, several Eurostat internal audits having revealed possible irregularities in its financial management, OLAF initiated a number of investigations concerning, in particular, the contracts concluded by Eurostat with various companies. In 2002 and 2003 OLAF forwarded to the Luxembourg and French judicial authorities files relating to the investigations of those irregularities and implicating Mr Franchet and Mr Byk, the former Director-General and the former Director, respectively, of Eurostat. They brought an action for damages before the Court, claiming that errors had been made by both OLAF and the Commission in the course of those investigations.

<sup>(32)</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF (OJ 1999 L 136, p. 1).



The Court rejected the Commission's argument that the action for damages was in part premature because national proceedings were still pending. In connection with the proceedings before the Court, the question was not whether or not the facts alleged had been established, but rather to evaluate the way in which OLAF conducted and completed an investigation which referred to Mr Franchet and Mr Byk by name and publicly attributed to them liability for the irregularities established well before a final decision, and also of the way in which the Commission conducted itself in the context of that investigation. Nor, if the applicants were to be found not guilty by the national judicial authorities, would such a finding necessarily make good any damage that they would then have sustained. Accordingly, since the alleged damage relied on before the Court was distinct from the damage that might be confirmed by a finding of not guilty by the national judicial authority, the applicants' claims for compensation could not be rejected as premature.

*Sufficiently serious breach of a rule of law conferring rights on individuals*

As regards the substance, in *Franchet and Byk v Commission* the Court first held that OLAF ought to have informed Mr Franchet and Mr Byk in advance of the forwarding to the Luxembourg and French judicial authorities of the files concerning them and that the rule of law laying down that obligation conferred rights on individuals. Although OLAF had discretion in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation, that was not the case with regard to the procedures for adoption of the decision to defer informing the officials concerned. Thus, failure to observe that obligation to inform in advance amounted to a sufficiently serious breach.

Secondly, the Court found that, in contravention of Regulation No 1073/1999, OLAF's Supervisory Committee had not been consulted before the information concerning the applicants was forwarded to the national authorities. Given that it is the task of that committee to protect the rights of persons who are the subject of OLAF investigations and that the obligation to consult the committee is unconditional, OLAF had, therefore, committed a sufficiently serious breach of a rule of law conferring rights on individuals.

Thirdly, the Court held that the fact that OLAF had publicly named the applicants — including by leaks in the press — as guilty of a number of criminal offences constituted a breach of the principles of the presumption of innocence, of confidentiality and of sound administration. As regards the leaks, it considered that in the absence of any evidence adduced by the Commission seeking to show that they could have had any other origin, OLAF must be held responsible. Those principles confer rights on individuals and their breach by OLAF was sufficiently serious, given that it is for OLAF to ensure that such leaks do not take place and that the administration has no discretion as regards observance of that obligation.

Last, the Court examined whether the Commission acted unlawfully when it disclosed various items of information in the context of the investigations in question, in particular by a press release clearly linking the applicants' names with the allegations concerning the Eurostat case. While bearing in mind that the institutions cannot be prevented from informing the public about investigations in progress, the Court considered that, in the instant case, the Commission could not be regarded as having done so with all necessary

discretion and reserve and striking a proper balance between the interests of Mr Franchet and Mr Byk and those of the institution. The Commission having no latitude with regard to observance of the principle of the presumption of innocence, it had committed sufficiently serious breaches of that principle.

The question of the naming of an official in documents relating to a case of maladministration circulated by a Community institution or body was also examined by the Court of First Instance in Case T-412/05 *M v European Ombudsman* (judgment of 24 September 2008, not published). The applicant, an official of the Commission, sought compensation for the damage he claimed to have suffered by reason of his being named in a decision of the European Ombudsman relating to a complaint of maladministration on the part of the department of the Commission to which he was assigned and concerning, inter alia, the building of a sewage treatment plant with adverse effects on the environment.

The Court held that only Community institutions and bodies, and not individuals, can be the subject of an investigation by the Ombudsman. Applying by analogy the case-law following from Case T-277/97 *Ismeri Europa v Court of Auditors* <sup>(33)</sup>, it noted nevertheless that, prompted by the concern to ensure that his duties are properly carried out, the Ombudsman may exceptionally make a full report on the facts established and give the names of persons involved. Particular circumstances, which may be connected to the seriousness of the facts or the risk of confusion capable of damaging the interests of third parties, may allow the Ombudsman in his decisions to give the names of persons who in principle are not subject to his supervision, subject to the condition that such persons must have the right to be heard. In the case in point, the Court found, first, that naming the applicant was neither essential to the attaining of the objective pursued by complaining of an instance of maladministration nor necessary in order to prevent the risk of confusion with other individual officials who were clear of all liability in the situation complained of and, second, that the Ombudsman had not heard the applicant before taking his decision.

The Court concluded that the breach committed by the Ombudsman was sufficiently serious for the Community to incur non-contractual liability for, even though the Ombudsman enjoys very broad discretion as regards the merits of complaints and the action to be taken in response to them, the same is not true when determining whether there are good grounds for departing, in a particular case, from the rule of confidentiality.

The other especially important problem examined by the Court of First Instance this year in that sphere is whether it is possible for the Community to incur liability by reason of errors committed by the Commission in declaring a concentration notified to it incompatible with the common market. Case T-212/03 *MyTravel v Commission* (judgment of 9 September 2008) originated in the action brought by the British travel agent My Travel, formerly known as Airtours, when the Commission refused to allow it to acquire all the capital in one of its competitors in the United Kingdom. Challenging the Commission's analysis, Airtours had initiated proceedings before the Court, *Airtours v Commission*, in which it obtained annulment of the contested decision on the ground that the Commission had not sufficiently established the adverse effects of the concentration.

<sup>(33)</sup> T-277/97 [1999] ECR p. II-1825. Judgment confirmed on appeal by the Court of Justice in Case C-315/99 P *Ismeri Europa v Court of Auditors* [2001] ECR I-5281.

In response to that judgment, MyTravel brought an action for damages to make good the loss it claimed to have suffered by reason of instances of unlawfulness vitiating the procedure followed by the Commission in deciding whether or not to approve.

Adopting an approach similar to that followed in Case T-351/03 *Schneider Electric v Commission* <sup>(34)</sup>, the Court held that the possibility could not be ruled out in principle that manifest and grave defects affecting the Commission's economic analysis underlying a decision declaring a concentration incompatible with the common market could constitute breaches sufficiently serious to give rise to non-contractual liability on the part of the Community. It stated, however, that it must, in its analysis of the action for damages, of necessity take into account the contingencies and the difficulties inherent in the control of concentrations in general and complex oligopolistic structures in particular. Such an exercise is by its nature more demanding than that which is required in examining an action for annulment, where the Court need only, within the limits of the pleas in law put forward by the applicant, examine the lawfulness of the contested decision in order to satisfy itself that the Commission has correctly appraised the different elements which enable it to declare the notified concentration incompatible with the common market. Accordingly, mere errors of assessment and failure to put forward relevant evidence in the context of *Airtours v Commission* could not of themselves be sufficient to give rise to a manifest and grave infringement of the limits imposed on the Commission's discretion in the control of concentrations and in the presence of a complex oligopoly situation. Despite its mistakes, the Commission was in possession of evidence in the administrative file that could reasonably support its findings. The instances of unlawfulness found by the Court in *Airtours v Commission* do not mean that the Commission committed a manifest and grave infringement of its discretion in the control of concentrations, provided that — as in the present case — it was capable of explaining the reasons for which it could reasonably form the view that its assessment was well founded. Furthermore, although the reasoning set out by the Commission in respect of market transparency did not convince the Court, inasmuch as that reasoning was not sufficiently supported by evidence or was badly explained, the fact remained that the Commission made its decision following a careful examination of the information provided in the administrative procedure.

Last, the Court found that the commitments submitted by Airtours in order to correct problems relating to the potential adverse effects of the concentration on competition identified by the Commission had indeed been examined by the latter and did not clearly deal with its objections.

On the basis of those considerations, the Court held that the Commission had not committed a sufficiently serious breach of a rule of law conferring rights on individuals.

<sup>(34)</sup> T-351/03 *Schneider Electric v Commission* ECR II-2237, under appeal.

### III. Appeals

During 2008, 37 appeals were brought before the Court of First Instance against decisions of the Civil Service Tribunal. In total, 21 of those cases were closed by the Appeal Chamber, composed of five judges, that is to say, the President of the Court of First Instance and four Presidents of Chambers in rotation. In six judgments, the Court set aside in part the decisions under appeal, three of those cases being referred back to the Civil Service Tribunal <sup>(35)</sup>.

One of the decisions given in this area in 2008 (in Case T-414/08 *Combescot v Commission*, judgment of 5 March 2008) was the subject of a proposal for review put forward by the First Advocate General on the basis of the second subparagraph of Article 225(2) EC and of Article 62 of the Statute of the Court of Justice. However, the proposal was not followed <sup>(36)</sup>.

As regards organisation, the Court decided that for cases lodged between 1 October 2008 and 30 September 2009 the Appeal Chamber is to be composed of three judges only, that is to say, the President of the Court and, in rotation, two Presidents of Chambers, it being possible to refer the case to an extended formation of five judges (decision of 8 July 2008, OJ 2008 C 197, p. 17).

### IV. Applications for interim relief

This year 58 applications for interim relief were brought before the Court of First Instance, representing a significant increase over the number of applications made in 2007 (34), which itself was much higher than the number in the previous year. In 2008, 57 applications for interim relief were disposed of, as against 41 in 2007. Just one application for a stay of execution was granted in the order of the President of the Court in Case T-257/07 R II *France v Commission* (order of 30 October 2008, not published).

With regard to the case giving rise to the order in *France v Commission*, it is to be borne in mind that the judge hearing the application for interim measures had already, by order of 28 September 2007 in Case T-207/07 R *France v Commission* [2007] ECR II-4153, suspended, in view of the seriousness of the claim alleging breach of the precautionary principle, the operation of the rules relaxing the health measures applicable to transmissible spongiform encephalopathies which the Commission had adopted in 2007 on the basis of evolving scientific knowledge. No appeal was brought before the President of the Court of Justice against the order of 28 September 2007. In contrast, the Commission repealed those relaxation rules and adopted new legislation the enacting terms of which were almost identical to those of the rules repealed. Only the statement of reasons for the new legislation was

<sup>(35)</sup> Case T-262/06 P *Commission v D* (judgment of 1 July 2008), Case T-253/06 P *Chassagne v Commission* (judgment of 19 September 2008) and Case T3/07 P *Neophytou v Commission* (judgment of 13 October 2008). On the other hand, the Court gave final judgment in Case T-250/06 P *Ott and Others v Commission* (judgment of 22 May 2008), Case T-56/07 P *Commission v Economidis* (judgment of 8 July 2008), and Joined Cases T-90/07 P and T-99/07 P *Belgium and Commission v Genette* (judgment of 18 December 2008).

<sup>(36)</sup> Decision of the Court of Justice in Case C-216/08 RX (16 April 2008, not published).

different, in that it supplied scientific and technical explanations intended to supplement those of the old rules. In those circumstances, the French Republic lodged a fresh application seeking suspension of operation of the new legislation <sup>(37)</sup>.

The President of the Court of First Instance considered that, having regard to the fact that the new legislation was almost identical to the old rules, it could, when examining the condition relating to a *prima facie* case, confine itself to ascertaining whether the new statement of reasons contained any matters capable of justifying any assessment other than that made in the order of 28 September 2007 concerning the old rules. That selective examination prompted the President to conclude that there were no such matters as regards risk evaluation and management, as carried out in respect of the new statement of reasons. The President held, therefore, that the French Republic's claims that the new legislation constituted a breach of the precautionary principle did not appear, *prima facie*, to be irrelevant and warranted thorough examination by the court adjudicating on the substance. So far as the condition of urgency was concerned, the President concluded that there existed a grave danger of serious and irreparable harm to the health of persons if the suspension of operation were not to be granted. As regards the weighing of the conflicting interests, he stressed that the requirements involved in the protection of public health must, in the circumstances of the case, be recognised to outweigh the considerations put forward to justify relaxation of the relevant health measures applicable.

The other applications for interim measures were all dismissed, most of them for want of urgency, the applicants having failed to establish the imminence of serious irreparable harm. Attention must be drawn to three groups of cases in particular <sup>(38)</sup>.

The first group concerns eight applications for interim measures made by the Republic of Cyprus, seeking to obtain suspension of operation of notices of calls to tender issued by the Commission and intended to encourage economic development in the northern part of the island of Cyprus. The Republic of Cyprus maintained that, in those notices, the Commission treated the Turkish Cypriot community as though it were an autonomous state entity and as though recognition were given to the 'Turkish Republic of Northern Cyprus'. It considered that the notices constituted a grave danger to its sovereignty, its independence, its territorial integrity and its unity.

<sup>(37)</sup> In the case in the main proceedings (T-257/07), the French Republic was given leave to extend its claims and pleas in law to the new rules.

<sup>(38)</sup> A fourth group concerns 19 applications for interim measures introduced by Italian undertakings established in the Venice region that had received State aid incompatible with the common market. In the order of the President of the Court of First Instance in Joined Cases T-234/00 R, T-235/00 R and T-283/00 R *Fondazione Opera S. Maria della Carità and Others v Commission* (order of 8 July 2008, not published) three of those applications were dismissed as inadmissible, the applicants having done no more than set out their actions in the main proceedings and the amendment to the Italian legislation in the context of the interim application, but yet without explaining the facts and law that might enable the judge hearing the application for interim measures to examine the conditions of *fumus boni juris* and urgency. The 16 other applications were discontinued.

In three orders *Cyprus v Commission* <sup>(39)</sup>, the President of the Court of First Instance, having noted that the Republic of Cyprus is the only State body of that island recognised internationally and that the northern part of the island forms part of its territory and falls within its sovereignty alone, acknowledged that the Republic of Cyprus's arguments might appear relevant enough to constitute a *prima facie* case. He concluded, nevertheless, that there had been no manifest serious infringement of international or Community law, so that the harm alleged could not be regarded as serious. The notices at issue had no intrinsically political purpose and, in particular, were not intended to tackle the problem of the possible reunification of the island of Cyprus. They were texts of a technical nature designed to supply tenderers with useful information enabling them to decide whether to take part in the tendering procedure and to prepare their tender files. According to the President, the harm alleged, exclusively non-pecuniary, appeared not to be irreparable either, given that any annulment of the notices challenged at the end of the main proceedings would constitute sufficient compensation.

The second group of cases concern the fund-freezing measures adopted by the Council in respect of the Iranian bank Bank Melli Iran ('BMI') and its London subsidiary Melli Bank in connection with the regime of sanctions set up in order to put pressure on the Islamic Republic of Iran to end aspects of its nuclear programme.

That application was dismissed by order of the President of the Court of First Instance in Case T-246/08 R *Melli Bank v Council* (order of 27 August 2008, not published). With regard to the alleged financial damage, the President held that, in the absence of specific information in the application for interim measures concerning BMI's financial situation, he was unable to examine whether the inability of the applicant, as a company belonging to the BMI group, to carry out banking operations would cause it, having regard to the total turnover of that group, a loss which could be classified as serious financial damage. He added that it appeared realistic to expect that the applicant had available to it the minimum funds necessary to ensure its survival until judgment should be given in the main action and that the BMI group would be able to bear, during that period, the financial damage caused to its London subsidiary. With regard to the alleged damage to the applicant's reputation, assuming it to be established, the President considered that it would already have been caused by the contested decision. In his view, the purpose of proceedings for interim relief is not to ensure reparation for damage already suffered but rather to ensure the full effectiveness of the ruling to be given in the main case. On any view, annulment of the contested decision when the main action is decided would constitute sufficient reparation for the non-material damage allegedly sustained.

<sup>(39)</sup> Joined Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T-93/08 R *Cyprus v Commission* (order of 8 April 2008, not published), Case T-119/08 R *Cyprus v Commission* (order of 11 April 2008, not published), and Case T-122/08 R *Cyprus v Commission* (order of 11 April 2008, not published). Following the dismissal of the eight applications for interim relief, the Republic of Cyprus discontinued all its actions in the main proceedings.



On 17 September 2008 Melli Bank brought a second action for annulment of the same decision <sup>(40)</sup>. The application for interim measures, coupled to that second action, was dismissed by order of the President of the Court of First Instance in Case T-332/08 R *Melli Bank v Council* (order of 17 September 2008, not published) for the same reasons as those explaining the rejection of the first application. Finally, the order of 15 October 2008 in Case T-390/08 R *Melli Bank v Council* (not published) dismissed on the same grounds the application for interim measures coupled with the action brought by BMI, the applicant's parent company, seeking annulment of the same decision.

The third group of cases is linked to the decision by which the Commission, without imposing any fines, ordered 24 copyright management companies established in the European Economic Area ('the EEA') and members of CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs — International Confederation of Societies of Authors and Composers) to, inter alia, review the reciprocal representation agreements that they had all concluded bilaterally with a view to the management of public performance rights held by the authors (composers and writers) in their musical works <sup>(41)</sup>. According to the Commission, this network of bilateral agreements was based on a concerted practice contrary to Article 81 of the EC Treaty and Article 53 of the EEA Agreement. The CISAC and 20 management companies brought actions for annulment of that decision. Nine management companies — the German, Italian, French, Polish, Finnish, Hungarian, Danish, Greek and Norwegian — coupled to their actions applications for suspension of operation of the contested decision.

The President of the Court of First Instance, by orders of 14 November 2008 in Case T-398/08 R *Stowarzyszenie Autorów, ZAiKS v Commission* (not published), Case T-401/08 R *Säveltäjän Tekijänoikeustoimisto Teosto v Commission* (not published), Case T-410/08 R *GEMA v Commission* (not published), Case T-411/08 R *Artisjus v Commission* (not published), Case T-422/08 R *Sacem v Commission* (not published), of 20 November 2008 in Case T-433/08 R *SIAE v Commission* (not published), and of 5 December 2008 in Case T-425/08 R *KODA v Commission* (not published), and the judge hearing an application for interim measures (Mr Papasavvas), in Case T-392/08 *AEPI v Commission* (order of 19 November 2008, not published), rejected eight of the applications for want of urgency, for the applicants had not established serious irreparable harm was imminent if the contested decision were to be put into immediate effect. In those orders, it was observed in particular that the contested decision, far from dealing with the field of what are known as 'offline' activities of the applicants (concerts, radio, discothèques, bars, etc.), concerned what is known as the 'online' use of copyright (by Internet, satellite and cable retransmission), which had not been shown by any of the applicants to form a considerable portion of their revenue. Furthermore, according to those orders, in the contested decision the Commission did not prohibit the system of reciprocal representation agreements as such or prevent the applicants from practising certain territorial delimitations but merely criticised the coordinated nature of the approach followed to that end by all the management companies. Lastly, inasmuch as the applicants feared that the contested decision might, because it gave rise to legal uncertainty concerning the validity and content

<sup>(40)</sup> With regard to those two actions, the conditions for *lis alibi pendens* had not been satisfied, the second having been introduced within the period prescribed by the fifth paragraph of Article 230 EC and based on pleas in law independent of those raised in the first action.

<sup>(41)</sup> Commission Decision C (2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 — CISAC).

of future reciprocal representation agreements, expose them to the risk of being penalised by the Commission for breach of their duty to review, it was considered that the risk invoked was of a purely hypothetical nature and that it was for the Commission, if ever it should intend to impose a penalty on them, to establish that the applicants' conduct in the future amounted to infringement, the applicants being in no way prevented from bringing proceedings before the Community judicature for a declaration that the penalties imposed were unlawful, pleading the ambiguity of the obligation to review imposed in the contested decision.

Lastly, mention must be made of the order of the President of the Court of First Instance in Case T-411/07 R *Aer Lingus Group v Commission* (order of 18 March 2008), on account of the important clarifications it contains as to the admissibility of applications for interim measures. It was stated that the judge hearing an application for interim measures may not, as a rule, adopt an interim measure which would constitute an interference with the exercise of the powers of another institution. An application for interim measures seeking to have the Commission required to apply Article 8(4) and (5) of Regulation No 139/2004 <sup>(42)</sup> in a particular manner, by adopting certain measures against the other party to a prohibited concentration, must in consequence be rejected. Were it to be decided in the judgment in the main application that the Commission has power to order the measures set out in Article 8(4) and (5) of Regulation No 139/2004, it would be for the Commission, should it consider it necessary in the context of the powers of control accorded to it in the field of concentrations, to take the necessary measures to comply with the judgment, in accordance with Article 233 EC.

Moreover, it was emphasised that the broad wording is obviously intended to grant sufficient powers to the judge hearing an application to prescribe any measure which he deems necessary to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice. It cannot be ruled out that the judge hearing the application may impose orders directly on third parties, if necessary, having due regard, on the one hand, to the procedural rights, and in particular the right to be heard, of the addressee of the interim measures and of parties directly affected by those measures and, on the other, to the strength of the *prima facie* case and to the imminence of serious and irreparable harm. Even where a third party has not had an opportunity to be heard in the context of proceedings for interim measures, it cannot be excluded that interim measures might be imposed on that party, in exceptional circumstances and bearing in mind the temporary nature of such measures, if it appears that, without such measures, the applicant would be exposed to a situation liable to endanger its very existence. The judge hearing the application carries out such assessments when weighing up the various interests at stake.

<sup>(42)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).