

A — Proceedings of the General Court in 2010

By Mr Marc Jaeger, President of the General Court

For the General Court, 2010 was a year that entailed a partial renewal of its membership affecting 14 Judges. Whilst 11 of those Judges had their term of office renewed, the General Court had cause to regret the departure of three members totalling between them more than 27 years' experience at the Court: Mr A. W. H. Meij and Mr M. Vilaras, Judges at the Court since 1998, and Mr V. M. Ciucă, Judge at the Court since 2007, who were replaced by Mr M. Van der Woude, Mr D. Gratsias and Mr A. Popescu respectively. The Court was also affected by the resignation on 29 June 2010 of Mr T. Tchipev, a Judge at the Court since 2007. In January 2011, no candidate had yet been proposed to replace him.

Those circumstances had a significant effect on the timetabling of cases (the eight ordinary formations of the Court each included at least one member whose term of office was coming to an end in 2010) and exceptional organisation was required in order to prevent judicial activity from being adversely affected.

In addition, this was the first time that the panel provided for in Article 255 TFEU was called upon — in exercise of the responsibility entrusted to it by the Treaty of Lisbon — to give an opinion, prior to the decision of the governments of the Member States, on candidates' suitability to perform the duties of Judge. Whilst this procedure, which is intended to guarantee both independence and competence of members of the Court of Justice and the General Court, can only be welcomed, it nevertheless delayed the carrying out of the partial renewal. It is important that in the future all the participants in the appointment process manage to prevent such delays together with the serious obstacles to the proper administration of justice to which they give rise. The General Court's statistics for 2010 cannot be analysed without taking account of these factors beyond its control that do not assist its efforts to deal with changes in the nature of proceedings, whose increase in number, diversity and complexity is unparalleled.

From a statistical point of view, 2010 was marked by several trends. The first is the large increase in the number of new cases brought, rising from 568 (in 2009) to 636 (in 2010), a level never reached before ⁽¹⁾. The second trend is maintenance of the number of cases completed at appreciably above 500 (527 cases completed), notwithstanding the unfavourable circumstances referred to above. This was nevertheless not sufficient to contain the increase in pending cases, which reached 1 300 as at 31 December 2010. The third trend concerns the duration of proceedings, a fundamental criterion for evaluating the Court's work. As a result of the emphasis placed on dealing with cases quickly, the duration of proceedings was reduced significantly, by an average of 2.5 months (from 27.2 months in 2009 to 24.7 months in 2010). The reduction is even more appreciable as regards cases decided by judgment in the areas that since the Court's creation have been at the heart of its caseload (that is to say, the areas other than appeals and intellectual property), for which a reduction of more than seven months in the duration of proceedings was recorded.

The reforms to be pursued and the substantial efforts made by the Court should enable those figures to be improved to a certain extent. However, that cannot be at the expense of the quality of judicial review, quality that guarantees the effectiveness of judicial protection which is a cornerstone of a European Union governed by the rule of law.

⁽¹⁾ Except when there have been large groups of identical or similar cases.

The following account is intended to provide an overview of the Court's diverse, and sometimes complex, field of activity when it exercises its jurisdiction over 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 for annulment

1. Measures against which an action may be brought

Measures against which an action for annulment may be brought under Article 263 TFEU are those producing binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his legal position ⁽²⁾.

In Case T-258/06 *Germany v Commission* (judgment of 20 May 2010, not yet published), the Court examined the circumstances in which a Commission communication published in the C Series of the Official Journal may be considered a challengeable measure.

In the case in point, the Federal Republic of Germany sought the annulment of a communication ⁽³⁾ the aim of which is to make known the Commission's general approach as regards the application, in cases where the award of a contract is not subject, or not subject in full, to the public procurement directives ⁽⁴⁾, of the set of basic rules for the award of public contracts, which flow directly from the rules and principles of the Treaty and, in particular, from the principles of non-discrimination and transparency.

In order to establish whether that communication, claimed by the Commission to be purely interpretative in nature, was open to challenge, the Court sought to determine whether, having regard to its content, it is designed to produce legal effects which are new as compared with those entailed by the application of the fundamental principles of the Treaty. It therefore had to be determined whether the communication merely fleshes out the provisions applicable to contracts which are not subject, or not subject in full, to the public procurement directives, and concerning the free movement of goods, the freedom of establishment, the freedom to provide services, the principles of non-discrimination and equal treatment, the principle of proportionality and the rules on transparency and mutual recognition, or whether it lays down obligations which are specific or new as compared with those provisions, principles and rules. The mere fact that an interpretative communication does not — by its form, its nature or its wording — purport to be a measure intended to produce legal effects is not enough to support the conclusion that it does not produce binding legal effects. Nor is the fact that that measure has or has not been published relevant in this regard.

After carrying out a detailed examination of the content of the communication, the Court concluded that the communication does not contain new rules for the award of public contracts which

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

⁽³⁾ Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2).

⁽⁴⁾ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

go beyond the obligations under the law as it currently stands; in those circumstances, the communication did not produce binding legal effects liable to affect the legal situation of the Federal Republic of Germany.

2. Temporal application of Article 263 TFEU

Under the fourth paragraph of Article 230 EC, the admissibility of actions brought by individuals against acts of which they are not the addressees is subject to the twofold condition that the applicants be directly and individually concerned by the contested act. According to the 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 ⁽⁵⁾.

When the Treaty of Lisbon entered into force on 1 December 2009, the conditions governing the admissibility of actions for annulment were amended. According to the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Before even broaching the substantive interpretation of those provisions, the Court was called upon in 2010 to decide the issue of their temporal application. Given the importance of this question, it was the Grand Chamber of the Court that ruled on this occasion.

The two cases at issue, Case T-532/08 *Norilsk Nickel Harjavalta and Umicore v Commission* and Case T-539/08 *Etimine and Etiproduits v Commission* (orders of 7 September 2010, not yet published), concerned applications for annulment of Directive 2008/58/EC ⁽⁶⁾ and Regulation (EC) No 790/2009 ⁽⁷⁾, which have the effect of amending the classification of certain nickel carbonate compounds and borates.

Since the actions were brought on 5 December 2008, the Commission raised a plea of inadmissibility, submitting that the contested measures were not of individual concern to the applicants within the meaning of Article 230 EC. As the Treaty of Lisbon had entered into force in the meantime, the applicants contended that, under the new provisions in the fourth paragraph of Article 263 TFEU, that condition governing admissibility could no longer apply with regard to the contested measures. The question thus arose whether the fourth paragraph of Article 263 TFEU was applicable, *ratione temporis*, to the actions in question and, more generally, to all actions that were pending when the Treaty of Lisbon entered into force.

Noting that no transitional provision is laid down in the FEU Treaty in this regard, the Court stated that it is settled case-law, first, that in accordance with the maxim *tempus regit actum* the question

⁽⁵⁾ Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107.

⁽⁶⁾ Commission Directive 2008/58/EC of 21 August 2008 amending, for the purpose of its adaptation to technical progress, for the 30th time, Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 2008 L 246, p. 1).

⁽⁷⁾ Commission Regulation (EC) No 790/2009 of 10 August 2009 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (OJ 2009 L 235, p. 1).

of the admissibility of an application must be resolved on the basis of the rules in force at the date on which it was submitted and, second, that the conditions of admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application, a defect in which can be rectified only before the expiry of the period for bringing proceedings. The contrary view would lead to the danger of arbitrariness in the administration of justice, since the admissibility of an application would then depend on the — uncertain — date of delivery of the decision of the Court putting an end to the proceedings.

That conclusion is not affected by the argument that Article 263 TFEU forms part of the procedural rules in respect of which the case-law has held that, unlike substantive rules, they are generally taken to apply to all proceedings pending at the time when they enter into force. Even if it were considered that jurisdictional questions are within the field of procedural rules, the Court held that, for the purposes of determining the applicable provisions by reference to which the admissibility of an action for the annulment of a European Union act must be assessed, the maxim *tempus regit actum* must be applied.

3. Legal interest in bringing proceedings

The Court explained various aspects, as addressed below, of the concept of a legal interest in bringing proceedings, a condition governing the admissibility of actions for annulment.

First, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences or, in accordance with a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it ⁽⁸⁾. The interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate ⁽⁹⁾.

In Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1 ⁽¹⁰⁾, the Court explained how the question of a legal interest in bringing proceedings is to be assessed where, following an application for access to Commission documents, the person concerned brings two actions in turn, one for annulment of the implied decision of the Commission rejecting the access application and the other for annulment of the express decision of the Commission taken after the initial implied decision.

In the case in point, Co-Frutta, an undertaking governed by Italian law that engaged in the ripening of bananas, had applied to the Commission's Directorate-General for Agriculture (Agriculture DG) for access to Commission documents relating to banana importers registered in the European Community. Following a negative response from the Director-General of the Agriculture DG, the applicant addressed a confirmatory application to the Secretary-General of the Commission, to which it received an implied negative response on expiry of the 15-day time-limit prescribed by Regulation (EC) No 1049/2001 ⁽¹¹⁾. The applicant contested the legality of those two decisions before the Court (the subject of Case T-355/04).

⁽⁸⁾ See Case T-310/00 *MCI v Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited.

⁽⁹⁾ Case C-362/05 P *Wunenburger v Commission* [2007] ECR I-4333, paragraph 42.

⁽¹⁰⁾ See also the judgment of 10 December 2010 in Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission*, not yet published.

⁽¹¹⁾ 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).

Two months later, the Secretary-General of the Commission adopted an express decision in which he confirmed his implied decision for the most part whilst, however, granting access to some of the documents requested. The applicant brought a fresh action against that decision (the subject of Case T-446/04).

The Court held that, because of the adoption of the subsequent express decision whose annulment it also sought, the applicant had lost its interest in bringing proceedings against the implied decision and that there was no longer any need to adjudicate on the action brought in Case T-355/04. By adopting the express decision, the Commission had, in fact, withdrawn the implied decision adopted previously. The Court also found that annulment of the implied decision on grounds of a procedural defect could do no more than give rise to another decision identical in substance to the express decision. Moreover, consideration of the action against the implied decision could not be justified either by the objective of preventing its alleged unlawfulness from recurring in the future or by that of facilitating a potential action for damages, since it was possible to attain both those objectives through consideration of the action challenging the express decision, the sole action held admissible.

Second, in Case T-121/08 *PC-Ware Information Technologies v Commission* (judgment of 11 May 2008, not yet published), the Court applied the case-law according to which, whilst the interest in bringing proceedings is assessed by having regard in particular to the direct advantage that annulment of the measure in question would procure to the applicant, the action brought by the applicant is also admissible where the annulment sought would have the effect of preventing future repetition of the alleged illegality ⁽¹²⁾. It thus held that an action brought by an unsuccessful candidate in a public procurement procedure against the Commission's decision rejecting its tender was admissible although the contract had already been partially performed. The Court held that in the case of a framework contract, such as the one at issue creating a single point of purchase for the acquisition of software products and licences from the supplier Microsoft, that was likely to serve as a model for similar future procurement contracts, there was an interest in preventing the unlawfulness alleged by the applicant from recurring in the future.

Third, in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others v Commission* (not yet published, under appeal), the Court noted the particular situation provided for by the Treaty in the case of Member States as regards demonstration of a legal interest in bringing proceedings, and it distinguished this concept from the concept of a challengeable measure.

Thus, the Court pointed out that the Treaty draws a clear distinction between the right of the institutions and Member States to bring an action for annulment and that of natural and legal persons; all Member States are given the right to contest the legality of decisions of the Commission by means of an action for annulment without having to establish any legal interest in bringing proceedings. A Member State need not therefore prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible. Furthermore, the concept of a legal interest in bringing proceedings must not be confused with the concept of a challengeable act, pursuant to which an act must be intended to produce legal effects capable of adversely affecting the interests of those concerned in order for it to be capable of being the subject of an action for annulment, a matter which must be determined by looking to its substance. In the case in point, since the contested decision constituted such a challengeable act producing binding legal effects, the French Republic, solely in its capacity

⁽¹²⁾ Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 41.

as a Member State, was entitled to bring an action for annulment without being required to show a legal interest in bringing proceedings in that regard.

Competition rules applicable to undertakings

1. General

(a) Concept of an association of undertakings

In Case T-23/09 *CNOP and CCG v Commission* (judgment of 26 October 2010, not yet published), the Court adopted a less restrictive approach towards classification of an association of undertakings in the context of Commission inspection decisions. Article 20(4) of Regulation (EC) No 1/2003 ⁽¹³⁾ states that the Commission may conduct all necessary inspections of undertakings and associations of undertakings. In the case which gave rise to that judgment, the Conseil national de l'Ordre des pharmaciens (CNOP) and the Conseil central de la section G (CCG) de l'Ordre national des pharmaciens (ONP), the addressees of the contested decision together with the ONP, contested the Commission's classification of them as undertakings or associations of undertakings, and consequently, that the Commission was able to carry out inspections at their premises. The Court stated, first of all, that it is necessary to take into account the specific nature of inspection decisions. In particular, in view of the fact that such decisions are adopted at the start of an inquiry, there can be no question at that stage of assessing definitively whether the acts or decisions of the addressee entities or other entities can be regarded as agreements between undertakings, as decisions by associations of undertakings or as concerted practices contrary to Article 81(1) EC (now Article 101(1) TFEU) or else as practices referred to in Article 82 EC (now Article 102 TFEU). It is not a matter at that stage of carrying out an assessment of specific conduct, since the very purpose of the inspection is to obtain evidence relating to alleged conduct. The Court then went on to observe that the Commission found that the ONP and the applicants are organisations which bring together and represent a number of professionals who may be described as undertakings within the meaning of Article 81 EC. The question whether or not, in the exercise of their specific powers, the applicants escaped the application of Article 81 EC was clearly premature and would have to be determined in the final decision. The Court therefore concluded that the Commission was entitled to consider that, at the stage when the contested decision was adopted, the ONP and the applicants were associations of undertakings within the meaning of Article 20(4) of Regulation (EC) No 1/2003.

(b) Market definition

Case T-427/08 *CEAHR v Commission* (judgment of 15 December 2010, not yet published) afforded the Court an opportunity to recall the method for defining the relevant market in the case of aftermarkets. In that judgment, the Court observed that, in the contested decision, the Commission stated that the spare parts market for primary products of a particular brand might not be a separate relevant market in two situations: first, if it is possible for a consumer to switch to spare parts manufactured by another producer; second, if it is possible for the consumer to switch to another primary product in order to avoid a price increase on the market for spare parts. The Court stated, however, in this respect that the Commission must show that in the event of a moderate and permanent increase in the price of secondary products, a sufficient number of consumers would switch to other primary or secondary products, in order to render such an increase unprofitable. The Court added that the demonstration of the existence of a purely theoretical possibility

⁽¹³⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003, L 1, p. 1).

of consumers switching to another primary product is not a sufficient demonstration for the purposes of the definition of the relevant market, since that definition is based on the concept that effective competition exists. The Court held that, by finding that the primary and secondary products were part of the same market in the case in point, without even having shown that a moderate increase in the price of the products of a manufacturer on the secondary market would cause a shift in demand to products of other manufacturers on the primary market, the Commission committed a manifest error of assessment.

(c) Inspections

Obligation to state reasons

In *CNOP and CCG v Commission*, the Court clarified the extent of the Commission's obligation to state reasons in the context of an inspection decision. The Court noted, first of all, that the contested decision did not contain any specific arguments relating to the reasons why a professional body such as that in question and its organs should be regarded as associations of undertakings. However, the Court then observed that, in view of the stage of the administrative procedure at which inspection decisions are taken, the Commission does not at that time have precise information enabling it to analyse whether the lines of conduct or acts covered can be categorised as decisions by undertakings or associations of undertakings within the meaning of Article 81 EC. The Court pointed out that it is precisely by taking account of the specific nature of inspection decisions that the case-law concerning the statement of reasons has made clear the types of information which must be contained in an inspection decision in order to enable the addressees to assert their rights of defence at that stage of the administrative procedure. To impose a more onerous obligation to state reasons on the Commission would not take due account of the preliminary nature of the inspection. The Court therefore held that the Commission was not required to set out in the contested decision the specific legal analysis on the basis of which it categorised the addressees as associations of undertakings, beyond the explanations contained in that regard in that decision.

Burden of proof

In Case T-141/08 *E.ON Energie v Commission* (judgment of 15 December 2010, not yet published), the Court upheld the fine of EUR 38 million imposed on E.ON Energie AG for having broken a seal affixed by the Commission on a room of that undertaking during an inspection. This first case involving application of Article 23(1)(e) of Regulation (EC) No 1/2003 led the Court to examine more specifically the issue of the burden of proof in this type of situation.

In that connection, the Court recalled the principle that, concerning the burden of proof of an infringement in competition law, where the Commission acts on the basis of direct evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which may affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance could not have affected the probative value of that evidence. On the contrary, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance which it alleges and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission, except in cases where such evidence cannot be provided by the undertaking concerned due to the conduct of the Commission itself. Moreover, although the onus is on the Commission to prove the breach of seal, it is not, on the other hand, its responsibility to demonstrate that the room which had been sealed was actually entered or that the documents stored there were tampered with. In any event, the Court held in the case in point that it was for the applicant to take the necessary measures to prevent

any tampering with the seal at issue, *a fortiori* since the applicant had been clearly informed of the significance of the seal at issue and of the consequences of a breach of seal.

Fines

In *E.ON Energie v Commission*, the applicant also claimed that the fine imposed of EUR 38 million was disproportionate. The Court noted, however, in its judgment, that the Commission took into consideration the fact that the breach of seal in question was the first case to which Article 23(1)(e) of Regulation (EC) No 1/2003 had applied, while pointing out that, quite apart from that circumstance, first, the applicant had at its disposal extensive legal expertise in antitrust law, second, the amendment of Regulation (EC) No 1/2003 dated from more than three years prior to the inspections in which the applicant had been involved, third, the applicant had been informed of the consequences of a breach of seal and, fourth, other seals had already been affixed in the buildings of other companies of the applicant's group a few weeks previously. Furthermore, the Court pointed out that the mere fact that the seal is broken nullifies its safeguarding effect and is therefore sufficient to constitute the infringement. Lastly, the Court held that a fine of EUR 38 million, which corresponded to approximately 0.14% of the applicant's turnover, cannot be regarded as disproportionate to the infringement, in the light of the particularly serious nature of a breach of seal, the size of the applicant and the need to ensure that the fine has a sufficiently deterrent effect, in order that it cannot pay for an undertaking to break a seal affixed by the Commission in the context of inspections.

2. Points raised on the scope of Article 81 EC (now Article 101 TFEU)

(a) Continuous infringement

In Case T-18/05 *IMI and Others v Commission* (judgment of 19 May 2010, not yet published) the Court's examination related inter alia to whether or not the applicants' participation in the infringement was uninterrupted. The Court stated, in this respect, that, although the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the fact remains that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract but needs to be assessed in the context of the functioning of the cartel in question. In the case in point, the Court observed that the period during which there were no contacts or manifestations of collusion on the part of the applicants exceeded by more than one year the intervals at which the undertakings which were members of the cartel habitually manifested their respective intentions to restrict competition. The Court concluded that, by taking the view that the applicants had participated uninterruptedly in the cartel during the period in dispute, the Commission erred in law, and the Court amended the amount of the fine imposed on the applicants in order to take account of their sequential participation in the cartel, reducing the increase in the amount of the fine in respect of the duration of the infringement from 110 to 100%.

(b) Calculation of the amount of the fine

The actions against the Commission's decisions imposing fines in respect of the 'industrial thread', 'plumbing tubes' and 'Spanish tobacco' cartels have enabled the Court to clarify and illustrate a number of elements used in the calculation of the amount of fines.

Starting amount

In Case T-452/05 *BST v Commission* (judgment of 28 April 2010, not yet published), as regards the effective economic capacity of undertakings which infringe the competition rules to cause

damage to competition, the Court observed that although, depending on the circumstances, vertical integration and the extent of the product range may be relevant factors in the assessment of the influence which an undertaking may exercise on the market, and provide a further indication of that influence in addition to market shares and turnover in the relevant market, it was necessary to hold that, in the case in point, the applicant's arguments concerning the vertical integration of the other undertakings concerned did not show that those undertakings enjoyed any particular and significant competitive advantages on the relevant market.

Differential treatment

In Case T-21/05 *Chalkor v Commission* (judgment of 19 May 2010, not yet published, under appeal) and in *IMI and Others v Commission*, the Commission had concluded that there was no need to treat offenders who had participated only in one of the branches of the cartel (the 'plumbing tunes' cartel) differently from those who had also participated in another branch of that cartel, since the cooperation within that second branch had not been significantly closer than that which existed within the first branch. The Court held, however, in its judgments, that an undertaking whose liability is established in relation to several branches of a cartel contributes more to the effectiveness and the seriousness of the cartel than an offender involved in only one branch of it and therefore commits a more serious infringement. That assessment necessarily has to be made at the stage when a specific starting amount is set, since the taking into account of attenuating circumstances only allows the basic amount of the fine to be adjusted by reference to the arrangements for the offender's implementation of the cartel. Consequently, the Court reduced the starting amount of the fine by 10% for each of the applicants in those cases.

Upper limit of 10% of turnover

In Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky v Commission* (judgment of 28 April 2010, not yet published), the Court observed that, at least in situations where there is no indication that an undertaking has ceased its commercial activities or has diverted its turnover in order to avoid the imposition of a heavy fine, the Commission is obliged to fix the maximum limit of the fine by reference to the most recent turnover corresponding to a complete year of economic activity. In the case in point, the Court observed that there were serious grounds — such as a nil turnover over several years, the lack of employees or the lack of solid evidence that it was making use of its real estate or had investment projects for that purpose — for supposing that Zwicky & Co. AG did not continue to carry on a normal economic activity within the meaning of the case-law. Consequently, the Court held that, for the purposes of determining the upper limit of 10% of turnover not to be exceeded when calculating the amount of the fine provided for in Article 23(2) of Regulation (EC) No 1/2003, the Commission should have referred to the last turnover for Zwicky & Co. arising from real economic activities on its part, and not to that of the undertaking which took over Zwicky & Co. after the latter had ceased its activities.

Aggravating circumstances

In Case T-29/05 *Deltafina v Commission* (judgment of 8 September 2010, not yet published, under appeal), the Commission found that the applicant had acted as the leader of the cartel and, first, therefore increased the basic amount of the fine by 50% for aggravating circumstances and, second, took account of that role in reducing the amount of the fine by only 10% for cooperation. In its judgment, the Court held that the Commission had erred in this respect. The Court noted, first of all, that, in order to be characterised as a leader, the undertaking in question must have represented a significant driving force in the cartel and borne individual and specific liability for the operation of the cartel. However, the Court noted that, in the case in point, while the evidence

relied on by the Commission demonstrated that the applicant played an active and direct role in the tobacco processors' cartel, it did not, however, suffice to establish that that company represented such a driving force in that cartel or even that its role was more important than that of any of the Spanish processors. The Court pointed out, in particular, that there was nothing in the file to show that Deltafina SpA took any initiatives to create the cartel or that it was instrumental in securing the participation of the Spanish processors, or, moreover, that it assumed responsibility for activities usually associated with acting the part of leader of a cartel, such as chairing meetings or centralising and distributing certain data. Accordingly, in the exercise of its unlimited jurisdiction, the Court reduced the fine imposed on Deltafina from EUR 11.88 million to EUR 6.12 million.

(c) Imputability of the infringement — Joint and several liability for payment of fine

In Case T-40/06 *Trioplast Industrier v Commission* (judgment of 13 September 2010, not yet published), the Court provided some clarification as regards the rules applicable to the joint and several liability of successive parent companies for the payment of the fine imposed on their subsidiary.

First of all, the Court stated that the approach of ascribing to a parent company the same starting amount as that attributed to a subsidiary participating directly in a cartel, without dividing up that starting amount in any way even where there are several successive parent companies, is not in and of itself inappropriate. Indeed, the objective pursued by the Commission is to make it possible to ascribe to a parent company the same starting amount as it would ascribe to it if it had been directly involved in the cartel, which is quite in line with the objectives of competition policy.

The Court went on to observe that, where an infringement is committed by a subsidiary which has belonged to various successive economic units during the course of the infringement, it cannot be said to be necessarily inappropriate for the combined value of the amounts ascribed to the parent companies to be greater than the amount, or combined amounts, ascribed to the subsidiary.

However, the Court held that the contested decision was wrong to confer on the Commission an unfettered discretion to recover the fine from one or other of the legal persons concerned according to their ability to pay. That discretion means that the amount actually recovered from the applicant will depend on the amounts recovered from the former parent companies, and vice versa, although those companies have never formed a common economic unit and are not therefore joint and severally liable. The Court added that the principle that penalties should fit the individual offence requires that the amount actually paid by the applicant does not exceed its share of its joint and several liability, a share that corresponds to the proportion of the fine imposed on the applicant relative to the cumulative total of the limits up to which the successive parent companies are jointly and severally liable for payment of the fine imposed on the subsidiary. In the case in point, the Court held that the decision was inconsistent with the obligation which rests upon the Commission to enable the applicant to know for certain the exact amount which it must pay in respect of the period for which it is held jointly and severally liable with its subsidiary for the infringement. Consequently, the Court partially annulled that decision and set the amount ascribed to Trioplast Industrier at EUR 2.73 million, that amount being the basis on which the Commission will have to determine the applicant's share in the joint and several liability of the successive parent companies for payment of the fine imposed on their subsidiary.

3. Points raised on the scope of Article 82 EC (now Article 102 TFEU)

In Case T-321/05 *AstraZeneca v Commission* (judgment of 1 July 2010, not yet published, under appeal) the Court ruled on the lawfulness of a Commission decision finding that the applicant had infringed Article 82 EC, first, by making misleading representations to national patent offices and,

second, by deregistering marketing authorisations for a pharmaceutical product whose patent was due to expire.

As regards the first abuse, the Court held that the submission to the public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled, or to which it is entitled for a shorter period, constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition.

The misleading nature of representations made to public authorities must be assessed on the basis of objective factors, and proof of the deliberate nature of the conduct and of the bad faith of the undertaking in a dominant position is not required for the purposes of identifying an abuse of a dominant position. However, the fact that the concept of abuse of a dominant position is an objective concept and implies no intention to cause harm does not lead to the conclusion that the intention to resort to practices falling outside the scope of competition on the merits is in all events irrelevant, even if the finding of abuse should primarily be based on an objective finding that the conduct in question actually took place.

As regards the second abuse, namely the deregistration of marketing authorisations for a pharmaceutical product whose patent was due to expire, the Court held that, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, it cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification. The preparation by an undertaking, even in a dominant position, of a strategy whose object it is to minimise erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits.

After the expiry of the period of exclusivity for the use of data relating to the results of pharmacological and toxicological tests and clinical trials, conduct designed to prevent manufacturers of generic products from making use of their right to benefit from that information produced for the purposes of marketing the original product is not based in any way on the legitimate protection of an investment which comes within the scope of competition on the merits. The fact that the dominant undertaking's competitors could have obtained marketing authorisations by means of alternative procedures does not suffice to make the deregistration of marketing authorisations non-abusive, since that conduct serves to exclude from the market, at least temporarily, competing manufacturers of generic products.

In Case T-155/06 *Tomra Systems and Others v Commission* (judgment of 9 September 2010, not yet published, under appeal), the Court examined whether the Commission must, in order to prove the foreclosure of competitors from the market as a whole, determine the minimum viability threshold necessary to operate on the relevant market and then determine whether the non-contestable portion of the market (that is to say, the part of demand tied by the practices in question) is sufficiently large to be capable of having an exclusionary effect vis-à-vis competitors. The Court held that foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.

Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.

4. Points raised on the scope of the control of concentrations

(a) Concept of a challengeable act

Case T-58/09 *Schemaventotto v Commission* (order of 2 September 2010, not yet published) enabled the Court to clarify further the application of Article 21 of Regulation (EC) No 139/2004 ⁽¹⁴⁾. In that case, the proposed concentration between Abertis Infrastructures SA and Autostrade SpA, authorised initially by the Commission, was abandoned by those companies in the light, in particular, of difficulties posed by legislative changes in Italy. Those changes had been the subject of a preliminary assessment by the Commission finding that there had been an infringement of Article 21 of Regulation (EC) No 139/2004. In the light of proposed legislative amendments, the Commission nonetheless communicated to the Italian authorities, on 13 August 2008, its decision to terminate the procedure under Article 21 of Regulation (EC) No 139/2004. By letter of 4 September 2008 the Commission informed the applicant of that decision, which was the subject-matter of the action before the Court.

First, the Court held in that order that, by the letter, the Commission only gave notice of its decision to discontinue the procedure in the *Abertis v Autostrade* case in relation to possible infringements identified in the preliminary assessment, and that that decision did not approve the new national legislative provisions.

Second, the Court examined whether that measure constituted a challengeable act, namely whether it produced legal effects which were binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position. In that connection, the Court observed that the procedure laid down in Article 21(4) of Regulation (EC) No 139/2004 relates to the monitoring of specific concentration transactions by the Commission under that regulation. Consequently, the Commission must adopt a decision addressed to the Member State concerned, consisting either in the recognition of the interest at issue in view of its compatibility with the general principles and other provisions of European Union law or in the non-recognition of the interest by reason of its incompatibility with those principles and provisions. Thus, as the proposed concentration was abandoned, the Commission was no longer competent in the case in point to terminate the procedure initiated pursuant to Article 21(4) of that regulation by a decision concerning the recognition of a public interest protected by the national measures at issue.

That conclusion cannot be called into question by the fact that the procedure laid down in Article 21(4) of Regulation (EC) No 139/2004 has not only an objective function, but also a subjective function, namely, to protect the interests of the undertakings concerned relating to the proposed concentration from the viewpoint of ensuring the legal certainty and the speed of that procedure. The subjective function ceased to be relevant because the proposed concentration was abandoned.

The Commission could therefore only take the formal decision to take no further action in the procedure in question. Since that decision had no other effect, it could not therefore constitute a challengeable act.

⁽¹⁴⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

In Case T-279/04 *Éditions Jacob v Commission* (judgment of 13 September 2010, not published, under appeal), the Commission raised an objection of inadmissibility against the applicant's action brought against the decision authorising, subject to the sale of assets, the purchase of Vivendi Universal Publishing SA by Lagardère SCA. The Commission took the view that an earlier decision by which it had decided to initiate an in-depth control of the proposed concentration had had the effect of classifying, implicitly but necessarily, the prior acquisition of the target assets by Natexis Banques Populaires SA as an acquisition of securities in an undertaking with a view to reselling them. The contested decision was therefore just a purely confirmatory decision. The Court rejected the Commission's interpretation, and observed that the decision to initiate the phase of in-depth control does not constitute an act which may be the subject of an action, but a preparatory step whose sole aim is to initiate enquiries intended to identify the matters which will allow the Commission to rule, by means of a final decision at the end of that procedure, on the compatibility of that transaction with the common market. The Court added that the initiation of the phase of in-depth control has the sole purpose of making a preliminary finding on the existence of serious doubts raised as to the compatibility of the notified transaction.

(b) Concept of concentration

In Case T-411/07 *Aer Lingus Group v Commission* (judgment of 6 July 2010, not yet published), the applicant, relying on national legislative provisions, sought the extension of the concept of concentration, as defined in European Union law, to cases in which, where control has not been obtained, a shareholding by an undertaking in the capital of another undertaking does not, as such, confer the power of exercising decisive influence on the other undertaking. Ryanair Holdings plc had launched a public bid for the entire share capital of Aer Lingus Group plc, but had had to abandon its plans on account of the Commission's decision declaring the concentration incompatible with the common market. Following that decision, however, Aer Lingus Group had requested the Commission to require Ryanair Holdings to divest itself also of its minority shareholding already held in the capital of Aer Lingus Group. The Commission rejected that request and Aer Lingus Group brought an action against that decision.

In its judgment, the Court observed that the power to require the disposal of all the shares acquired by an undertaking in another undertaking exists only to restore the situation prevailing prior to the implementation of the concentration. Accordingly, if control has not been acquired, and the concentration has not therefore been implemented, the Commission does not have the power to dissolve that 'concentration'. The Court also stated that, generally, Regulation (EC) No 139/2004 does not seek to protect companies from commercial disputes between them and their shareholders or to remove all uncertainty in relation to the approval of important decisions by those shareholders, since such disputes fall within the jurisdiction of the national courts. Similarly, the bounds of the powers invested in the Commission for the purposes of merger control would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding in a competitor undertaking on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly.

In *Éditions Jacob v Commission*, the applicant disputed the legal classification of the acquisition by Natexis Banques Populaires of the target assets as an acquisition of securities in an undertaking with a view to reselling them falling within Article 3(5)(a) of Regulation (EEC) No 4064/89 ⁽¹⁵⁾. The

⁽¹⁵⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version, OJ 1990 L 257, p. 13).

applicant claimed that that ‘holding’ transaction was, in fact, a concentration within the meaning of Article 3(1)(b) of that regulation, since it had enabled Lagardère to acquire either sole control of the target assets, through the intermediary of Natexis Banques Populaires, or joint control of them, together with Natexis Banques Populaires, and, therefore, to have the possibility of exercising a decisive influence over the activity associated with the target assets.

The Court held that the allegations of sole control could not be upheld. It was apparent from the wording of the sale contract that Lagardère did not have either a property right over, or a right to use, the target assets before the Commission adopted the conditional authorisation decision, or any rights enabling it to exercise a decisive influence over the organs of the companies controlling the target assets. As regards joint control, the Court observed that, even on the assumption that the holding of the target assets did enable Lagardère to exercise jointly with Natexis Banques Populaires a decisive influence over the activity associated with the target assets as of completion of the holding transaction, the concentration which would result from this would in any event constitute a concentration distinct from the concentration notified by Lagardère. The error allegedly made by the Commission in classifying the holding of the target assets as ‘an acquisition of securities with a view to reselling them’ and not as an acquisition of sole or joint control had no effect, in any event, on the legality of the decision declaring compatible with the common market, subject to the sale of assets, the purchase of Vivendi Universal Publishing by Lagardère.

(c) Efficiency gain — Verifiability

In *Ryanair v Commission*, the Court observed, first of all, that the Commission took the view that it is apparent from both Regulation (EC) No 139/2004 and the guidelines on the assessment of horizontal mergers ⁽¹⁶⁾ that, to counteract the negative effects of a merger on consumers, the resulting efficiency gains need to be verifiable, likely to benefit consumers and could not have been achieved to a similar extent by means that are less anti-competitive than the proposed concentration. As regards the first condition, the Court stated that, contrary to the view taken by the Commission in the contested decision, pursuant to the guidelines, the condition relating to the verifiability of efficiencies does not require the notifying party to provide data capable of being independently verified by a third party or documents, dated pre-merger, which serve to objectively and independently assess the scope for efficiency gains generated by the acquisition. The Commission was not therefore entitled to reject the data submitted by Ryanair Holdings on that basis. The Court added that business life does not always allow such documents to be produced in due time and the documents used by an undertaking to initiate a public bid, whether they come from that undertaking or from its advisers, are by nature likely to be of some relevance as regards substantiating efficiency claims.

(d) Commitments

Trustee

In Case T-452/04 *Éditions Jacob v Commission* (judgment of 13 September 2010, not published, under appeal), the Court was called upon to rule on the legality of the decision relating to the approval of Wendel Investissement as purchaser of the assets sold in accordance with the Commission’s decision of 7 January 2004 authorising, subject to the sale of assets, the purchase of Vivendi Universal Publishing by Lagardère. One of the pleas raised alleged that the approval of Wendel Investissement had been based on the report of a trustee who was not independent. In this respect,

⁽¹⁶⁾ Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5).

the Court observed, first, that the trustee was appointed even though he was a member of the executive board of the company holding the target assets and, second, that he carried out his duties as a trustee simultaneously with the duties of a member of the board of that company holding the target assets. Accordingly, he was dependant on that company, to an extent that questions might be raised as to the neutrality he should exhibit in carrying out his duties as trustee. In so far as in his capacity as trustee he drew up the report assessing Wendel Investissement as a prospective purchaser of the assets sold, which had a decisive influence on the approval decision adopted by the Commission, the Court held that the illegality established justified the annulment of the decision approving Wendel Investissement as purchaser.

State aid

Cases concerning State aid accounted for a significant part of the Court's activity in 2010, 50 cases having been disposed of. It is possible only to give an overview of the Court's decisions, concerning (i) questions of admissibility, (ii) questions of substance, and (iii) procedural questions.

1. Admissibility

The case-law in 2010 brought further clarification with respect to the assessment of standing to bring proceedings, in the case of actions challenging a Commission decision declaring aid incompatible with the common market.

First, in Case T-193/06 *TF1 v Commission* (judgment of 13 September 2010, not yet published), the applicant sought annulment of a Commission decision relating to support measures for the cinema and audiovisual industry in France, by which the Commission decided not to raise any objections to the measures at issue on the conclusion of the preliminary examination stage laid down under Article 88(3) EC.

Contending that the contested decision was formally addressed to the French Republic, the Commission disputed the admissibility of the action brought by the applicant, and maintained that the applicant was not individually concerned by that decision.

The Court observed that the preliminary examination stage is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid. It is only in connection with the examination stage under Article 88(2) EC that the Commission is required to give the parties concerned notice to submit their comments. Thus, where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds that the aid is compatible with the common market, the persons intended to benefit from those procedural guarantees, inter alia competitors of the aid recipients, do have standing to bring an action seeking to have their procedural rights safeguarded. By contrast, if an applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as 'concerned' within the meaning of Article 88(2) EC cannot suffice for the action to be declared admissible.

In the case in point, the Court first of all examined the nature of the applicant's pleas before concluding that none of those pleas for annulment sought to establish the existence of serious difficulties raised by the support measures at issue in the light of their classification as State aid or their compatibility with the common market, difficulties which would have obliged the Commission to initiate the formal procedure. The applicant did not call into question the Commission's refusal to initiate the formal investigation procedure referred to in Article 88(2) EC and it did not plead infringement of procedural rights stemming from that provision, but rather sought exclusively the annulment of the decision on the substance, as it confirmed at the hearing in response to a question put by the Court.

Accordingly, the action did not seek to safeguard the procedural rights of the applicant, which therefore had to show that it had a particular status within the meaning of the case-law resulting from *Plaumann v Commission* ⁽¹⁷⁾, inter alia on the ground that its market position was substantially affected by the measures covered by the decision, since the effect on its competitive position had to be examined in relation to the beneficiaries of the aid measures at issue, namely operators with a production activity in the cinematographic and audiovisual fields. In the case in point, since the compulsory investment percentage applied to the turnover was the same for all competitors, the fact that the applicant's investment obligations exceeded the expenses of the other competitors, in view of its high turnover, was not such as to confer on it a particular status and, therefore, did not distinguish it individually just as in the case of the person addressed within the meaning of *Plaumann v Commission*.

Second, in Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others v Commission* (judgment of 13 September 2010, not yet published), the Court held that, as long as the applicants were recognised as having, even after being placed in liquidation, a legal interest in seeking the annulment of the contested decision, the intervener retained a corresponding interest in intervening in support of the Commission to argue for the legality of that decision, if only for the purposes of making claims for compensation, followed by possible actions, based on the unlawful grant of aid which caused it injury.

Third, and lastly, in Joined Cases T-231/06 and T-237/06 *Netherlands and NOS v Commission* (judgment of 16 December 2010, not yet published), the Court recalled that the administrative procedure in State aid matters is only initiated against the Member State concerned. Undertakings that receive aid are only considered to be interested parties in this procedure. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case.

2. Substantive rules

(a) Individual aid granted under a general aid scheme approved by the Commission

In Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others v Commission* (judgment of 3 March 2010, not yet published), the Court held that, when the Commission has before it a specific grant of aid alleged to have been made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the EC Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid measure, go back on its decision approving the aid scheme, which had already involved an examination in the light of Article 87 EC. Aid which constitutes the strict and foreseeable application of the conditions laid down in the decision approving the general aid scheme is thus considered to be existing aid which does not need to be notified to the Commission or examined in the light of Article 87 EC.

The Court also stated that a Commission decision ruling on whether an aid measure is consistent with the relevant scheme falls within the scope of the Commission's obligation to ensure the application of Articles 87 EC and 88 EC. Consequently, the Commission's examination of the consistency of an aid measure with that scheme does not constitute a step that exceeds its powers. Therefore,

⁽¹⁷⁾ Case 25/62 [1963] ECR 95.

the Commission's assessment cannot be limited by the assessment of the national authorities that granted the aid.

(b) Granting of an economic advantage

In Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others v Commission* (judgment of 21 May 2010, not yet published), the Court held that public declarations made by national authorities result in an appreciable advantage for a company inasmuch as they enable the financial markets to recover confidence. They also make it possible, easier and cheaper for a company to gain access to new loans necessary in order to finance its short-term debts and ultimately help to stabilise a company's very fragile financial situation. Those declarations decisively influence the reaction of rating agencies. Any positive influence on a company's rating, if only as a result of public declarations which are likely to create or strengthen investor confidence, produces an immediate impact on the level of costs which the company must incur in order to refinance itself on the capital markets.

The Court also stated that the requirement of the connection between the advantage identified and the commitment of State resources presupposes, in principle, that that advantage is closely linked to a corresponding charge included in the State budget or to the creation, on the basis of legally binding obligations entered into by the State, of a sufficiently real economic risk to that budget. In order that declarations may be treated in the same way as a State guarantee or interpreted as disclosing an irrevocable commitment to provide specific financial assistance, such as repayment of short-term debts, they must consist in a concrete, unconditional and irrevocable commitment of public resources and set out explicitly either the exact sums to be invested, or the specific debts to be guaranteed, or, at the very least, a predefined financial framework, such as a credit line up to a certain amount, as well as the conditions for granting the proposed assistance. The mere fact that a Member State has used its particular reputation with the financial markets cannot suffice to demonstrate that its resources were exposed to a risk such as can be considered to constitute a transfer of State resources within the meaning of Article 87(1) EC, which is sufficiently linked to the advantage conferred by its declarations.

In Case T-177/07 *Mediaset v Commission* (judgment of 15 June 2010, not yet published, under appeal), the Court recalled that the case-law has acknowledged that an advantage granted directly to certain natural or legal persons who are not necessarily undertakings may constitute an indirect advantage, hence State aid, for other natural or legal persons who are undertakings. The argument that a subsidy granted to consumers cannot be categorised as State aid to traders providing consumer goods or services must therefore be rejected.

(c) Services of general economic interest

In Joined Cases T-568/08 and T-573/08 *M6 and TF1 v Commission* (judgment of 1 July 2010, not yet published, under appeal), the Court held that the view that fulfilment of the fourth condition of the conditions set out in paragraphs 88 to 93 of *Altmark Trans and Regierungspräsidium Magdeburg* ⁽¹⁸⁾ is a requirement for application of the derogation provided for in Article 86(2) EC is based on confusion between the conditions which establish the classification as State aid within the meaning of Article 87(1) EC and those which are used to assess the compatibility of aid pursuant to Article 86(2) EC. The sole purpose of the conditions laid down in *Altmark Trans and Regierungspräsidium Magdeburg* is the classification of the measure in question as State aid, for the purposes of

⁽¹⁸⁾ Case C-280/00 [2003] ECR I-7747.

establishing the existence of an obligation to notify the measure to the Commission in the case of new aid or to cooperate with the Commission in the case of existing aid.

The Court also stated that the question of whether an undertaking responsible for a broadcasting service of general economic interest could fulfil its public service obligations at lower cost is irrelevant for assessing the compatibility of the State funding of that service in the light of the Community State aid rules. What Article 86(2) EC seeks to prevent, though the assessment of the proportionality of the aid, is that the operator responsible for the service of general economic interest benefits from funding which exceeds the net costs of the public service.

In *Netherlands and NOS v Commission*, the Court stated that Member States have wide discretion to define what they regard as services of general economic interest. Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error. As regards the definition of public service in the broadcasting sector, although it is true that it is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product, it must, as guardian of the Treaty, be able to intervene in the event of manifest error.

(d) Private investor in a market economy test

In Case T-163/05 *Bundesverband deutscher Banken v Commission* (judgment of 3 March 2010, not yet published), the Court rejected the argument that the exercise of ascertaining whether the transaction took place under normal conditions of a market economy must necessarily be made by reference to the single investor or to the single undertaking benefiting from the investment, when it is the interaction between the various economic operators which is precisely the feature of a market economy. Thus, the Commission can examine whether an undertaking would have been able to procure funds entailing the same advantages from other investors and, if necessary, under what conditions. Nor, furthermore, does that exercise require the constraints connected with the nature of the asset transferred to be disregarded altogether.

Furthermore, the Court held that the fact that one aspect of the transaction entails an increase in the risk run by an investor does not justify an increase in the remuneration unless that aspect constitutes an advantage for the bank or the bank is not in a position to refuse the funds proposed. By contrast, if the increase in risk for the investor stems from a decision which he has taken for his own reasons, without being influenced by the bank's wishes or requirements, the bank will refuse to pay a remuneration premium and will obtain funds from other investors.

In *Greece and Others v Commission*, after recalling that it follows from Article 87(1) EC that the concept of aid is an objective one, the test being whether a State measure confers an economic advantage on the recipient undertaking that it would not have obtained under normal market conditions, the Court held that the fact that the transaction is reasonable for the public authorities or public undertaking granting the aid does not dispense with the obligation to apply the private investor test.

(e) Obligation to recover aid

In *Greece and Others v Commission*, the Court addressed the issue of the recovery of aid in the event of financial continuity between two undertakings. Where such continuity exists, the new undertaking may be regarded as the effective recipient of the aid benefiting the sector of activity in question which had been granted to the former undertaking before those activities were taken over by the new undertaking. By contrast, in the absence, after the hiving-off, of economic unity

between the two undertakings, the aid granted to the former undertaking after the hiving-off cannot be recovered from the new undertaking on the sole ground that that undertaking obtained an indirect benefit from it. That fact cannot itself lead to the conclusion that the new undertaking is the effective recipient of the aid granted to the former undertaking.

As regards apportionment of the recovery obligation between recipients of aid, the Court observed that, in a decision finding that aid is incompatible and requiring its recovery, the Commission is not required to state to what extent each recipient undertaking has benefited from the amount of the aid in question. It is for the Member State concerned to determine the amount which must be repaid by each of those undertakings in its recovery of the aid, in cooperation with the Commission, in accordance with Article 10 EC.

Moreover, the criteria laid down in the case-law for identifying the effective recipient of aid are objective. Financial continuity can be established on the basis of various objective elements, such as the absence of payment in consideration for the transferred assets, or of a price consistent with market conditions, or the objective fact that the effect of the transfer is to circumvent the obligation to repay the aid at issue.

The finding that there has been financial continuity between two undertakings cannot lead to the presumption that, having regard to the persistence of the financial difficulties of those two companies after the hiving-off, the new measures in favour of the new undertaking, examined in the contested decision, constitute the logical continuation of the earlier aid and, therefore, also come within the category of State aid. It is in any case for the Courts of the European Union to ascertain whether, having regard to the relevant factors, those measures can reasonably be severed from the earlier aid measures.

3. Procedural rules

(a) Formal investigation procedure

In Case T-36/06 *Bundesverband deutscher Banken v Commission* (judgment of 3 March 2010, not yet published), the Court held that the question whether the Commission misapplied the private investor test is not to be confused with the question whether there are serious difficulties which require the formal investigation procedure to be initiated. Furthermore, the fact that the Commission did not respond to certain complaints raised by the applicant in connection with a parallel case does not imply that the Commission was not in a position to take a decision on the measure in question on the basis of the information available to it or that it was, therefore, required to initiate the formal investigation procedure in order to complete its enquiry. Where the Commission has initiated the formal investigation procedure in respect of similar transactions and, on that occasion, there has been some discussion about the importance of certain characteristics common to all the transactions, it may be concluded that the Commission has the information allowing it to assess the relevance of those characteristics.

(b) Obligation to state reasons

In *Freistaat Sachsen and Others v Commission*, the Court annulled, because of an inadequate statement of reasons, a Commission decision finding the existence of State aid incompatible with the common market, which contained no reference, in its calculation of the amount of aid to the firms in difficulty, to the practice of the financial markets on accumulation of risks (firm in difficulty, absence of collateral, etc.), since the premiums as fixed by the Commission and the specific situation of the undertakings at issue did not appear clearly, creating the impression that the premiums

may have been randomly chosen whereas the Commission notice on the method for setting the reference and discount rates ⁽¹⁹⁾ does not mention anywhere that risks can be cumulative. The Commission should have explained why it resorted to additional premiums and how it chose their amounts by way of an analysis of market practice in order to allow those companies to question whether the premiums were appropriate and the Court to review their legality.

Furthermore, in *Mediaset v Commission*, the Court stated, with regard to the categorisation of a measure as aid, the obligation to state reasons requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 87(1) EC be stated. As regards the existence of a distortion of competition in the common market, while the Commission must at the very least refer to the circumstances in which aid was granted in the statement of the reasons for its decision where those circumstances show that the aid is such as to affect trade between Member States and to distort or threaten to distort competition, it is not required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States. Furthermore, in the case of aid granted illegally, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. If that were the case, such a requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify the aid at the planning stage. In particular, the Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and distorts or threatens to distort competition. It does not have to define the market in question.

Community trade mark

Decisions relating to the application of Regulations (EC) Nos 40/94 ⁽²⁰⁾ and 207/2009 ⁽²¹⁾ continued to represent in 2010 a significant number of the cases disposed of by the Court (180 cases, that is to say 34% of the total number of cases disposed of in 2010).

1. Absolute grounds for refusal

Article 7(1)(b) of Regulations (EC) Nos 40/94 and 207/2009 prohibits the registration as a Community trade mark of signs which are devoid of any distinctive character; that distinctive character must be assessed by reference to the goods or services for which registration has been sought and to the relevant public's perception of those signs.

In Case T-547/08 *X Technology Swiss v OHIM (Orange colouring of the toe of a sock)* (judgment of 15 June 2010, not yet published, under appeal), the Court dismissed the action brought against the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), according to which an orange colouration in the form of a hood covering the toe of hosiery articles is, for the average consumer, a sign which is devoid of any distinctive character. First, the Court held that the Board of Appeal did not err in applying the case-law on three-dimensional marks to the mark applied for, which was classified by the applicant as a 'positional mark'. The Court stated that the classification of a 'positional mark' as a figurative or three-dimensional mark, or as a specific category of marks, is irrelevant for the purpose of assessing its distinctive character, the decisive factor governing the applicability of that case-law being the fact

⁽¹⁹⁾ Commission Notice 97/C 273/03 on the method for setting the reference and discount rates (OJ 1997 C 273, p. 3).

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

⁽²¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

that a sign is indistinguishable from the appearance of the product designated. Second, the Court held that when a sign is not capable of identifying the commercial origin of the goods, it cannot be registered as a trade mark, notwithstanding the fact that it relates to goods which are subject to fashion trends and that, consequently, numerous similar signs exist or are constantly being created within the industrial sector concerned. Lastly, the Court clarified the fact that the risk that a feature of the presentation of a product or a service may be copied by a competitor does not affect the interpretation of Article 7(1)(b) of Regulation (EC) No 40/94, since a trader who uses, in the course of trade, a sign which does not meet the requirement laid down in that provision may, where relevant, be able to establish that the sign has become distinctive in consequence of the use which has been made of it within the meaning of Article 7(3) of Regulation (EC) No 40/94, or seek other legal means which may be open to it, such as the law on designs or proceedings alleging unfair competition.

Furthermore, in Case T-404/09 *Deutsche Bahn v OHIM (Horizontal combination of the colours grey and red)* and Case T-405/09 *Deutsche Bahn v OHIM (Vertical combination of the colours grey and red)* (judgments of 12 November 2010, not published) the Court returned to the issue of the distinctive character of a combination of colours. In those two judgments, the Court confirmed the restrictive approach to applications for registration as a mark with a combination of colours and found that, for the public concerned, the combination of colours was not perceptibly different from the colours commonly used for the services in question and was therefore devoid of any distinctive character.

2. Relative grounds for refusal

In Case T-255/08 *Montero Padilla v OHIM — Padilla Requena (JOSE PADILLA)* (judgment of 22 June 2010, not yet published), the Court further clarified the grounds on which an opposition may be based. The applicant had requested, in essence, that the Court should review the legality of the decision of the Board of Appeal of OHIM in the light of Article 9 of Regulation (EC) No 40/94 relating to the scope of the right conferred by a Community trade mark. The Court stated that the grounds on which opposition may be based, as laid down in Article 42(1) of Regulation (EC) No 40/94, are solely the relative grounds for refusal in Article 8 of that regulation, since Article 9 of that regulation defines the scope of the right conferred by a Community trade mark and, therefore, the effects of its registration, but does not concern the conditions for registration. Consequently, Article 9 of Regulation (EC) No 40/94 does not form part of the legal framework to be taken into consideration by OHIM when it examines an application for registration or a notice of opposition. The Court further held that it follows from the wording of Article 8(5) of Regulation (EC) No 40/94, which uses the expression ‘for which the earlier trade mark is registered’, that this provision applies to earlier trade marks within the meaning of Article 8(2) of that regulation only in so far as they have been registered. Consequently, Article 8(5) of Regulation (EC) No 40/94 protects, in relation to goods or services which are not similar, only those well-known marks within the meaning of Article 6bis of the Paris Convention ⁽²²⁾ for which proof of registration has been provided. Lastly, the Court stated that copyright cannot constitute a ‘sign used in the course of trade’ within the meaning of Article 8(4) of Regulation (EC) No 40/94, as is apparent from the scheme of Article 52 of that regulation. Article 52(1)(c) provides that a Community trade mark is to be declared invalid where there is an earlier right as referred to in Article 8(4) of Regulation (EC) No 40/94 and the conditions set out in that paragraph are fulfilled. Article 52(2)(c) provides that a Community trade mark is also to be declared invalid where the use of such trade mark may be prohibited pursuant to any ‘other’

⁽²²⁾ Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended.

earlier right and in particular a copyright. It follows that copyright is not one of the earlier rights as referred to in Article 8(4) of Regulation (EC) No 40/94.

3. Relationship between absolute grounds for refusal and relative grounds for refusal

In *JOSE PADILLA*, the Court stated that it follows from the wording of Article 42(1), and from the scheme of Articles 42 and 43 of that regulation, that the absolute grounds for refusal in Article 7 of that regulation do not fall to be examined in opposition proceedings. The grounds on which opposition may be based, as laid down in Article 42(1) of Regulation (EC) No 40/94, are solely the relative grounds for refusal in Article 8 of the regulation.

4. Procedural issues

In Case T-225/09 *Claro v OHIM — Telefónica (Claro)* (judgment of 28 April 2010, not published, under appeal), the Court dismissed the action brought against the decision of the Board of Appeal of OHIM, by which the Board of Appeal found an appeal inadmissible on the ground that no written statement setting out the grounds had been lodged within the period laid down in Article 59 of Regulation (EC) No 40/94. The applicant had claimed that the submission of a written statement served no useful purpose on account, first, of the fact that it was disputing in its entirety the decision of the Opposition Division upholding the opposition on the basis of the relative ground for refusal referred to in Article 8(1)(b) of Regulation (EC) No 40/94 and, second, of the continuity of functions between the departments of OHIM, which are required to base their decisions by reference to the procedure before the lower adjudicating body. The Court stated that the submission of a written statement setting out the grounds of appeal did serve a useful purpose, since it is for the party which has brought an appeal before a Board of Appeal to set out the grounds on which that appeal is based. By contrast, it is not the task of the Board of Appeal to determine, by deductions, the grounds on which the appeal that it is hearing is based. Furthermore, as regards continuity of functions, the Court again applied the principles established by the Court of Justice in *OHIM v Kaul* ⁽²³⁾, stating that it follows from Article 62(1) of Regulation (EC) No 40/94 that, through the effect of the appeal brought before it, the Board of Appeal is called upon to carry out a new, full examination of the merits of the opposition, in terms of both law and fact. However, such an examination presupposes that the appeal before the Board of Appeal is admissible, since, if it is inadmissible, the Board of Appeal must dismiss it without examining the substance.

Next, in Case T-487/08 *Kureha v OHIM — Sanofi-Aventis (KREMEZIN)* (judgment of 16 June 2010, not published), the Court adjudicated on the probative value of a publication of the World Intellectual Property Organisation (WIPO) submitted late with a view to proving the existence of the earlier mark. The Court held that no provision of Regulations (EC) Nos 40/94 or 2868/95 ⁽²⁴⁾ precludes the various levels of OHIM from considering that publication by WIPO of international registration meets the requirements of Rule 19(2) of Regulation (EC) No 2868/95. Consequently, a possible challenge to the probative value of a WIPO publication of international registration is governed by Rule 20(2) and (4) of Regulation (EC) No 2868/95, since those two provisions govern the exchange of observations and evidence between the parties through OHIM, whereas Rule 19 of that regulation concerns only communication between OHIM and the opposing party. Furthermore, the Court held that it is apparent from a combined reading of the applicable provisions of Regulations (EC) Nos 40/94 and 2868/95 that, in the context of the application of Rule 20 of Regulation (EC) No 2868/95, OHIM may, first, invite the parties to file observations as often as it deems necessary

⁽²³⁾ Case C-29/05 P [2007] ECR I-2213.

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

and, second, take into account, if it considers it to be appropriate, evidence communicated to it by the parties out of time.

Furthermore, Case T-292/08 *Inditex v OHIM — Marín Díaz de Cerio (OFTEN)* (judgment of 13 September 2010, not yet published) afforded the Court an opportunity to clarify whether the issues of the proof of genuine use of an earlier mark and of the similarity of the goods at issue, which have not been raised before a Board of Appeal of OHIM, form part of the context of the dispute before that department if they have been raised before an Opposition Division. As regards the issue of genuine use, the Court held that it is specific and preliminary in character, since it leads to a determination whether, for the purposes of the examination of the opposition, the earlier trade mark can be deemed to be registered in respect of the goods or services in question. Consequently, that issue does not fall within the context of the examination of the opposition proper if the plea alleging that the proof of genuine use was insufficient was not part of the subject-matter of the dispute before the Board of Appeal, which was limited to an examination of the existence of a likelihood of confusion. On the other hand, opposition based on the existence of a likelihood of confusion requires OHIM to adjudicate on both whether the goods and services covered by the marks in question are identical or similar and whether those marks themselves are identical or similar in view of the interdependence of the factors taken into account in the global assessment of the likelihood of confusion.

Lastly, in Case T-303/08 *Tresplains Investment v OHIM — Hoo Hing (Golden Elephant Brand)* (judgment of 9 December 2010, not yet published), the Court recalled that pleas which have not been raised by the applicant before the departments of OHIM are not admissible before the Court. However, according to settled case-law, OHIM may be called upon to take account of the national law of a Member State in which the earlier mark, on which the application for a declaration of invalidity is based, is protected, on account of the fact that restricting the factual basis of the examination by OHIM does not preclude it from taking into consideration, in addition to the facts which have been expressly put forward by the parties, facts which are well known, where those facts are necessary in order for OHIM to assess the applicability of the ground for invalidity in question and, in particular, the probative value of the documents lodged. In the case in point, the applicant claimed that the Board of Appeal of OHIM ought, in its examination as to whether there was misrepresentation, to have taken account of the fact that the intervener had adduced no evidence of any instance of confusion. If the applicant claims that the laws of a Member State (in this instance the United Kingdom) require, in the event of coexistence of two trade marks on the market, that evidence of specific instances of confusion be adduced in the context of an action for passing-off at national level, such an argument is admissible even if the applicant has not advanced it before OHIM, provided that it is apparent from the documents in the case that the marks have coexisted. Furthermore, the Court held that the fact that the intervener became aware of the legal position only in the course of the procedure, in so far as, at the time when the intervener lodged its response, the Court had not yet dismissed the separate action brought by that party as inadmissible, cannot constitute a new matter of law or of fact within the meaning of Article 48(2) of the Rules of Procedure of the Court.

5. Community designs

During 2010, the Court was called upon to apply Regulation (EC) No 6/2002 ⁽²⁵⁾ for the first time.

In Case T-9/07 *Grupo Promer Mon Graphic v OHIM — PepsiCo (Representation of a circular promotional item)* (judgment of 18 March 2010, not yet published, under appeal), the Court stated that the grounds on which a Community design may be declared invalid listed in Article 25(1) of Regula-

⁽²⁵⁾ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

tion (EC) No 6/2002 must be regarded as exhaustive and do not include the bad faith of the proprietor of a contested Community design. The Court also defined certain fundamental concepts of Regulation (EC) No 6/2002. As regards the concept of 'conflict', the Court observed that Article 25(1)(d) of Regulation (EC) No 6/2002 must be interpreted as meaning that a Community design is in conflict with a prior design when, taking into consideration the freedom of the designer in developing the Community design, that design does not produce on the informed user a different overall impression from that produced by the prior design relied on. Moreover, the Court clarified the scope of the concepts of 'the degree of freedom of the designer in developing his design', of 'informed user' and of 'overall impression'. As regards a designer's degree of freedom in developing his design, the Court held that it must be established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. As regards the informed user, the Court stated that he is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied, although he is particularly observant and has some awareness of the state of the prior art, that is to say the previous designs relating to the product in question that had been disclosed on the date of filing of the contested design, or, as the case may be, on the date of priority claimed. Lastly, the Court stated that, in the specific assessment of the overall impression of the designs at issue, the designer's degree of freedom in developing the contested design must be taken into account. Thus, in so far as similarities between the designs at issue relate to common features, those similarities will have only minor importance in the overall impression produced by those designs on the informed user. Consequently, the more the designer's freedom in developing the contested design is restricted, the more likely minor differences between the designs at issue will be sufficient to produce a different overall impression on the informed user.

Next, in Case T-148/08 *Beifa Group v OHIM — Schwan-Stabilo Schwanhäußler (Instrument for writing)* (judgment of 12 May 2010, not yet published), the Court brought further clarification to the interpretation of Article 25(1)(e) of Regulation (EC) No 6/2002, which provides that a Community design may be declared invalid only if a distinctive sign is used in a subsequent design, and Community law or the law of the Member State governing that sign confers on the right holder of the sign the right to prohibit such use. According to the Court, that article also covers the situation of similarity between signs and not only that of identity, so that the Board of Appeal did not err in law by interpreting the provision in question as meaning that the proprietor of a distinctive sign may rely on that provision for the purposes of applying for a declaration of invalidity in respect of a subsequent Community design, where use is made in that design of a sign similar to its own. The Court also examined the issue of the procedure for requesting proof of genuine use, to be followed by the proprietor of the Community design in respect of which an application for a declaration of invalidity has been brought in the absence of specific provisions in that regard in Regulation (EC) No 6/2002. The Court observed that that request must be submitted to OHIM expressly and in due time. On the other hand, a request for proof of genuine use of the earlier sign relied on in support of an application for a declaration that a Community design is invalid cannot be made for the first time before the Board of Appeal.

Lastly, in Case T-153/08 *Shenzhen Taiden v OHIM — Bosch Security Systems (Communications Equipment)* (judgment of 22 June 2010, not yet published), the Court stated that, as is apparent from recital 14 in the preamble to Regulation (EC) No 6/2002, in the assessment as to whether a design has individual character, within the meaning of Article 6 of that regulation, account should be taken of the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs. In addition, the Court clarified the concept of 'informed user', noting that the status of 'user' implies that the person concerned uses the product in which the design is incorporated in accordance with the purpose for which that product is intended and that the qualifier 'informed' suggests that the user, without being a designer or a technical

expert, knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them. However, that factor does not imply that the informed user is able to distinguish, beyond the experience gained by using the product concerned, the aspects of the appearance of the product which are dictated by the product's technical function from those which are arbitrary.

Environment

1. System for greenhouse gas emission allowance trading

Since 2007 the Court has found a fresh, unceasing source of cases in the system for greenhouse gas emission allowance trading, introduced by Directive 2003/87/EC ⁽²⁶⁾.

This year mention is made of Case T-16/04 *Arcelor v Parliament and Council* (judgment of 2 March 2010, not yet published). In the context of an action for damages seeking compensation for the damage allegedly suffered by the applicant in consequence of the adoption of that directive, the Court held that the Community legislature enjoys broad discretion when exercising its powers in the field of environmental issues under Article 174 EC and Article 175 EC. The exercise of that discretionary power implies first, the need for the Community legislature to anticipate and evaluate ecological, scientific, technical and economic changes of a complex and uncertain nature and, second, the weighing up and arbitration by that legislature of the various objectives, principles and interests set out in Article 174 EC. That is reflected in Directive 2003/87/EC in the establishment of a series of objectives and sub-objectives which are in part contradictory.

Furthermore, the Court noted that the Community institutions must, in the same way as the Member States, respect the fundamental freedoms, such as freedom of establishment, which serve to attain one of the essential objectives of the Union, inter alia, that of the completion of the internal market. It does not follow that the Community legislature is required to regulate the area at issue in such a way that the Community legislation, particularly where that legislation takes the form of a directive, must provide an exhaustive, definitive solution to certain problems raised from the perspective of completing the internal market or effect a complete harmonisation of national legislation in order to exclude any conceivable barriers to intra-Community trade. When the Community legislature is called on to restructure or establish a complex scheme, such as the allowance trading scheme, it is entitled to have recourse to a step-by-step approach and to carry out only a progressive harmonisation of the national legislation at issue.

The Court stressed that, by virtue of the principle of subsidiarity, European Union legislation in the sphere of environmental protection does not seek to effect complete harmonisation, the Member States being free to adopt more stringent protective measures, subject only to the conditions that those be compatible with the EC Treaty and be notified to the Commission. The mere fact that the Community legislature left open a particular question falling within the scope of Directive 2003/87/EC and of a fundamental freedom does not in itself justify that omission's being classified as contrary to the rules of the Treaty. In addition, the implementation of Directive 2003/87/EC being subject to review by the national courts, it is incumbent upon those courts, if they should

⁽²⁶⁾ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

encounter difficulties relating to the interpretation or validity of that directive, to refer a question to the Court of Justice for a preliminary ruling.

Last, the applicant claimed that Directive 2003/87/EC infringes the principle of legal certainty, because there is no provision governing the extent of the financial consequences which may result from both a possible insufficiency of allowances allocated to an installation and the price of those allowances, that price being determined exclusively by the market forces which came into being following the establishment of the allowance trading scheme. The Court found that regulation of the prices of allowances might thwart the main objective of Directive 2003/87/EC, which is to reduce greenhouse gas emissions through an efficient allowance trading scheme in which the cost of emissions and investments made to reduce such emissions is essentially determined by market forces. In the event of an insufficiency of allowances, the incentive for operators to reduce, or not to reduce, their greenhouse gas emissions will depend on a complex economic decision taken in the light of the price of emission allowances available on the exchange market and of the costs of possible measures to reduce emissions which may aim either to reduce production or to invest in more efficient methods of production in terms of energy output. In such a scheme, the increase in the cost of emissions cannot be regulated in advance by the legislature without reducing, or even completely removing, the economic incentives which constitute its very basis and thereby adversely affecting the effectiveness of the allowance trading scheme.

The fact that it is not possible to predict how the exchange market will develop constitutes an element inherent in and inseparable from the economic mechanism characterising the allowance trading scheme subject to the classic rules of supply and demand and cannot be contrary to the principle of legal certainty.

2. Air transport — External relations

In Case T-319/05 *Swiss Confederation v Commission* (judgment of 9 September 2010, not yet published, under appeal), the Court adjudicated in a dispute concerning the Agreement between the European Community and the Swiss Confederation on Air Transport ⁽²⁷⁾ and German measures relating to the approaches to Zurich airport (Switzerland).

Given the proximity to the German border, most flights landing in Zurich and most take-offs in the early morning and late evening must use German airspace. From 1984 to 2001 the use of that airspace was the subject of a bilateral agreement, and then of negotiations, between the Swiss Confederation and the Federal Republic of Germany. In 2003 the German federal aviation authorities adopted national air traffic regulations. Those were designed, essentially, to prevent, in normal weather conditions, overflight at low altitude over the German territory close to the Swiss border between 21.00 hours and 7.00 hours on weekdays and between 20.00 hours and 9.00 hours at weekends and on public holidays, with a view to reducing the noise to which the local population was exposed.

On the basis of the Agreement between the European Community and the Swiss Federation on Air Transport (applying, for the purpose of the agreement, Regulation (EEC) No 2408/92) ⁽²⁸⁾, the Swiss Confederation made a complaint to the Commission, requesting the latter to take a decision to the effect that the Federal Republic of Germany should cease to apply the measures introduced by the

⁽²⁷⁾ Agreement between the European Community and the Swiss Confederation on Air Transport, signed at Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 73).

⁽²⁸⁾ Council regulation on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

domestic regulations. That complaint being rejected, the Swiss Confederation brought an action claiming, in particular, breach of the principles of equal treatment, proportionality and freedom to provide services in the air transport sector.

The Court found, first of all, that the Commission did not err in law in considering that the German measures did not impose conditions on, limit or refuse the exercise of traffic rights. The German measures in no way involve, even conditionally or in part, any prohibition whatsoever of passage through German airspace for flights leaving or arriving at Zurich airport, but merely alter the path of the flights concerned, after take-off from or before landing at Zurich airport.

Furthermore, so far as concerns breach of the principle of equal treatment to the detriment of Swiss air carriers using Zurich airport as a hub, the Court emphasised that the finding that a measure leads to the same result as discrimination on grounds of nationality is not sufficient to conclude that it is incompatible with Article 3 of the agreement in question, and that it is to be ascertained whether that measure is not justified by objective considerations and whether it is not proportionate to the objective pursued. Closeness to a tourist destination which is, as such, particularly vulnerable to noise emissions constitutes an objective circumstance justifying the adoption of those measures with regard solely to Zurich airport. In addition, the Court considered that the German measures at issue were justified by objective considerations and were proportionate to the objective pursued, namely, the reduction of noise pollution by aircraft at night and during the weekend, in a part of German territory bordering Switzerland, and that the Federal Republic of Germany had no other means at its disposal to obtain the desired reduction in noise pollution. In particular, compliance with a noise quota could be very difficult to check, and its infringement impossible to penalise, unlike the obligations connected with the fixing of minimum flight altitudes.

Lastly, when considering whether there had been any breach of freedom to provide services in the air transport sector, the Court emphasised that the objective of reducing noise pollution constitutes a specific aspect of environmental protection, which is one of the overriding reasons related to the general interest capable of justifying restrictions on the fundamental freedoms guaranteed by the EC Treaty, including, in particular, freedom to provide services, and that the measures at issue are proportionate to that objective.

Common foreign and security policy

In 2010 the Court delivered five judgments concerning restrictive measures taken against persons in connection with the common foreign and security policy. In particular, in two judgments of 9 and 30 September 2010, the Court was prompted to develop its already extensive case-law on the combating of terrorism.

First, concerning the extent of judicial review of fund-freezing measures adopted in order to give effect to resolutions of the United Nations Security Council, the judgment in Case T-85/09 *Kadi v Commission* (judgment of 30 September 2010, not yet published, under appeal) draws the appropriate conclusions from the judgment of the Court of Justice in Joined Cases *Kadi and Al Barakaat International Foundation v Council and Commission* ⁽²⁹⁾, setting aside the judgment of the Court of First Instance in T-315/01 *Kadi v Council and Commission* ⁽³⁰⁾. In that judgment, the Court of Justice overturned the decision of the Court of First Instance and held that the [European Union] judica-

⁽²⁹⁾ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

⁽³⁰⁾ T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

ture has full jurisdiction to review the lawfulness of measures adopted by the Community which give effect to resolutions of the United Nations Security Council. Deciding the case, the Court of Justice then annulled the fund-freezing regulation on the grounds that it had been adopted in breach of the fundamental rights of the person concerned, but maintained its effects in force for a period not to exceed three months, in order to allow for the remedying of the infringements found by the Court of Justice.

Following the judgment of the Court of Justice, the Commission informed the applicant of its intention to maintain his inclusion in Regulation (EC) No 881/2002 ⁽³¹⁾, on the basis of a summary of reasons provided by the Sanctions Committee of the Security Council for the inclusion of the applicant in the list of persons to whom the freezing of funds was to be applied, and invited him to submit his observations in that connection. On 28 November 2008 the Commission adopted a new regulation maintaining the freezing of the applicant's funds ⁽³²⁾.

Hearing the action brought by the applicant for annulment of that regulation, the Court considered that, in the light of the judgment of the Court of Justice in *Kadi and Al Barakaat International Foundation v Council and Commission*, its task was to ensure in the circumstances of the case a full and rigorous review of the lawfulness of the regulation, without affording the latter any immunity from jurisdiction on the ground that it is intended to give effect to resolutions adopted by the Security Council of the United Nations. That must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection. That review must concern, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them. That is all the more justified given that the measures at issue have a marked and long-lasting effect on the fundamental rights of the applicant, who for nearly 10 years now has been subject to measures freezing all his funds indefinitely. In the scale of a human life, 10 years in fact represent a substantial period of time and the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open question.

In the context of that full review, and transposing the criteria used by the European Court of Human Rights in its judgment in *A. and Others v United Kingdom* ⁽³³⁾, the Court considered that the applicant's rights of defence had been 'observed' only in the most formal and superficial sense. The Commission failed to take due account of the applicant's comments and did not grant him even the most minimal access to the evidence against him, and no balance was struck between his interests and the need to protect the confidential nature of the information in question. In those circumstances, the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him.

The Court held that the contested regulation had been adopted in breach of the applicant's rights of defence. Furthermore, given the lack of any proper access to the information and evidence used against him, the applicant has also been unable to defend his rights with regard to that evidence in satisfactory conditions before the [Union] judicature, with the result that it must be held that his right to effective judicial review had also been infringed. Lastly, the Court found that, given

⁽³¹⁾ Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2002 L 139, p. 9).

⁽³²⁾ Regulation (EC) No 1190/2008 amending for the 101st time Regulation (EC) No 881/2002 (OJ 2008 L 322, p. 25).

⁽³³⁾ Judgment of 19 February 2009 (not yet published in the *Reports of Judgments and Decisions*).

the general application and the duration of the fund-freezing measures, the regulation also constituted an unjustified restriction of his right to property.

Second, concerning national decisions that may form the basis of a fund-freezing measure adopted by the Council, in its judgment of 9 September 2010 in Case T-348/07 *Al-Aqsa v Council* (judgment of 9 September 2010, not yet published), the Court clarified the conditions in which an order of the court hearing an application for interim measures in the context of an action seeking the suspension, by way of interlocutory order, of operation of a national fund-freezing measure (the *Sanctieregeling*), constitutes a 'decision' taken by a competent authority, within the meaning of Article 1(4) of Common Position 2001/931/CFSP ⁽³⁴⁾ and of Article 2(3) of Regulation (EC) No 2580/2001 ⁽³⁵⁾.

Here the Court noted that the order of the court hearing the application for interim measures did not, any more than the *Sanctieregeling*, constitute, in the proper sense, a decision 'instigat[ing] investigations or prosecution for a terrorist act', nor did it lead to the 'conviction' of the applicant, within the strictly criminal meaning of the term. Nonetheless, in the light of its content, effect and context, the order of the court hearing the application for interim measures, taken together with the *Sanctieregeling*, did indeed constitute a 'decision' taken by a competent authority, within the meaning of the abovementioned provisions of Common Position 2001/931/CFSP and of Regulation (EC) No 2580/2001, which do not require the national 'decision' to be taken in criminal proceedings *stricto sensu*.

Moreover, a national decision to 'instigat[e] ... investigations or prosecut[e]' must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventative or punitive nature, in connection with the combating of terrorism. The Court considered that, unlike a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity, the order of the court hearing the application for interim measures relied upon by the Council in the present case formed a sufficiently direct part of national proceedings seeking chiefly to impose an economic sanction on the person concerned, namely, the freezing of its funds under the *Sanctieregeling* itself, as a result of that person's involvement in terrorist activity.

The question also arose whether the order of the court hearing the application for interim measures could provide a basis for the Council's decision when the *Sanctieregeling* had been repealed by the national authorities after the dismissal of the application for interim measures. The Court held that it could not. By that order, the court hearing the application for interim measures simply refused to suspend the effects of the *Sanctieregeling* by way of an interim ruling. The *Sanctieregeling* definitively ceased to have any legal effects as a result of its repeal. The same must necessarily apply, in consequence, to the legal effects attaching to the order of the court hearing the application for interim measures, all the more so because that order contained only an interim ruling, without prejudice to a subsequent substantive ruling at the end of the proceedings. It was not, moreover, compatible with the general scheme of Regulation (EC) No 2580/2001, a feature of which is the precedence that matters of national procedure must have in the Council's assessment, for the *Sanctieregeling*, which no longer has any effects within the Netherlands legal order, to

⁽³⁴⁾ Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

⁽³⁵⁾ Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

continue to have effect indirectly and indefinitely within the Community legal order, by means of the order of the court hearing the application for interim measures. The Council had overstepped the bounds of its discretion by continuing to include the applicant indefinitely in the list at issue, when periodically reviewing the latter's situation, solely on the ground that the decision of the court hearing the application for interim measures had not been challenged, in the Netherlands legal order, by the judicial body hearing an appeal in interlocutory proceedings or by the judicial body adjudicating on the substance, when the administrative decision whose effects that court had been asked to suspend had in the meantime been repealed by the body which issued it.

Access to documents of the institutions

The procedure for access to Commission documents, governed in particular by Articles 6 to 8 of Regulation (EC) No 1049/2001, comprises two stages. First, the applicant must send the Commission an initial application for access to documents. Second, in the event of a total or partial refusal, the applicant may make a confirmatory application to the Secretary-General of the Commission. Only the measure adopted by the Secretary-General is capable of producing legal effects such as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment.

In Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1 ⁽³⁶⁾, the Court found it necessary to describe the consequences of the expiry of the period of 15 working days — which may be extended — within which the institution must reply to the confirmatory application. According to the Court, that period, laid down in Article 8(1) and (2) of Regulation (EC) No 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision. No legal principle makes the administration lose its power to respond to an application, even outside the time-limits laid down for that purpose. The mechanism of an implied refusal decision was established in order to counter the risk that the administration would choose not to reply to an application for access to documents and escape review by the courts, not to render unlawful every late decision. On the other hand, the administration is required, in principle, to provide, even late, a reasoned response to every application by a citizen. That approach is consistent with the function of the mechanism of the implied refusal decision, which is to enable citizens to challenge inaction on the part of the administration with a view to obtaining a reasoned response.

Likewise, an institution which has received a request for access to a document originating from a Member State must, once that request has been notified by the institution to the Member State, immediately commence, together with that Member State, a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation (EC) No 1049/2001. On that occasion, they must pay attention to the need to enable the institution to adopt a position within the time-limits laid down in Articles 7 and 8 of that regulation, which require it to decide on the request for access. Nonetheless, failure to comply with the time-limits laid down in Article 8 of Regulation (EC) No 1049/2001 does not automatically lead to annulment of the decision adopted after the deadline. Annulment of a decision solely because of failure to comply with the time-limits laid down in Regulation (EC) No 1049/2001 would merely cause the administrative procedure for access to documents to be reopened. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

⁽³⁶⁾ See also the judgment of 10 December 2010 in Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission*, not yet published.

Furthermore, in Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission*, (judgment of 10 December 2010, not yet published), the Court drew the appropriate conclusions from the judgment of the Court of Justice in Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* ⁽³⁷⁾.

The Court recalled that, in accordance with that judgment, for the purposes of interpreting the exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, concerning protection of the objectives of investigation activities, it is appropriate to take account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and, therefore, to acknowledge the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities.

Thus, the Commission may, pursuant to the third indent of Article 4(2) of Regulation (EC) No 1049/2001, refuse access to all the documents relating to the procedure for the review of State aid, and may do so without first making a concrete, individual examination of those documents. That general presumption does not exclude the right of those interested parties to demonstrate that a given document whose disclosure has been requested is not covered by that presumption, or the possibility that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation (EC) No 1049/2001.

The applicant having put forward no argument to the effect that the documents at issue were not covered by the general presumption, the Court dismissed the action.

A similar problem was dealt with by the Court in Case T-237/05 *Éditions Jacob v Commission* (judgment of 9 June 2010, not yet published). In the circumstances of the case, however, the documents to which access was sought related to a procedure concerning a concentration between undertakings which had been closed by the date on which the request for access was made. In that context, the Court held that the exception relating to protection of the objectives of inspection, investigation and audit activities applies only if disclosure of the documents in question may endanger the completion of those activities. Admittedly, the various acts performed during the investigation may remain covered by that exception as long as the investigations or inspections continue, even if the particular investigation or inspection giving rise to the report to which access is sought has been completed. Nevertheless, to concede, as claimed by the Commission, that the documents sought in this case remained covered by that exception until the decisions closing the procedure became final, that is to say, until such time as the General Court and, possibly, the Court of Justice, should have dismissed the actions brought against those decisions or, in the event of annulment, until one or more new decisions should have been adopted by the Commission, would make access to those documents dependent on an uncertain, future and possibly distant event. It followed that, when the decision to refuse access was adopted, the documents sought no longer fell within the scope of the exception relating to protection of the objectives of investigation activities. Even if they had fallen within the ambit of that exception, it was in no way apparent from the statement of reasons for the contested decision that the Commission had carried out any specific, individual examination of those documents.

In addition, the Court stated that the duty of professional secrecy under Article 17 of Regulation (EC) No 139/2004 and Article 287 EC is not so extensive that it can justify any general, abstract refusal of access to documents sent in the context of the notification of a concentration. Assessing

⁽³⁷⁾ Judgment of 29 June 2010, not yet published.

whether or not information is confidential requires the legitimate interests opposing its disclosure to be weighed against the public interest which is that activities of the Community institutions should be conducted in the greatest observance possible of the principle of openness. By carrying out a specific, individual examination of the documents sought, the Commission is thus in a position to ensure the practical effect of the provisions applicable in the field of concentrations in a manner fully consistent with Regulation (EC) No 1049/2001. The Court added, in particular, that in the field of concentrations, correspondence between the Commission and interested parties is not to be regarded as obviously covered by the exception relating to the protection of commercial interests and that the Commission must check whether that exception does apply, by means of a proper, specific examination of each document.

Status of the Members of the European Parliament

1. Privileges and immunities

Case T-42/06 *Gollnisch v Parliament* (judgment of 19 March 2010, not yet published) arose out of certain statements made at a press conference by Mr Gollnisch, at that time a Member of the European Parliament, which were capable of amounting to a criminal offence. Following the opening of an investigation into denial of crimes against humanity, and at the request of Mr Romagnoli, another Member of the European Parliament, the President of the Parliament referred to the Committee on Legal Affairs a request for defence of the applicant's parliamentary immunity, pursuant to Rule 6(3) of the Parliament's Rules of Procedure ⁽³⁸⁾. After considering that request and following the proposal to this effect by the Committee, the Parliament rejected the request for immunity by decision of 13 December 2005, on the grounds that, in accordance with Article 9 of the Protocol on the Privileges and Immunities of the European Communities ⁽³⁹⁾, the immunity of Members of the Parliament concerned opinions expressed or votes cast by them in the performance of their duties, which was not the case in that instance.

Hearing an application for compensation for the damage allegedly suffered by Mr Gollnisch as a result of that decision, the Court held that, while the privileges and immunities conferred by the protocol have a functional character, inasmuch as they are intended to prevent any interference with the functioning and independence of the Communities, the fact remains that the protocol creates an individual right for the persons concerned, observance of which is ensured by the system of legal remedies established by the Treaty.

Furthermore, referring to point (a) of the first paragraph of Article 10 of the protocol, Mr Romagnoli had stated that the parliamentary immunity enjoyed by Mr Gollnisch was that provided for by the French Constitution, which provides that the assembly to which a member belongs may require a prosecution to be suspended. Under that article of the Protocol on Privileges and Immunities, during the sessions of the Parliament, its Members enjoy, in the territory of their own State, the immunities accorded to members of their parliament. It followed that the Parliament was dealing with a request for suspension of the prosecution of Mr Gollnisch in France, and not with a request for defence of immunity on the basis of Article 9 of the Protocol on Privileges and Immunities. Although the Parliament has a broad discretion as to the direction it wishes to give to a decision following a request such as that made in this case, the fact remained that the question whether the decision must be taken on the basis of Article 9 or on that of point (a) of the first paragraph of Article 10 of the Protocol on Privileges and Immunities did not fall within the ambit of the Parliament's

⁽³⁸⁾ OJ 2005 L 44, p. 1.

⁽³⁹⁾ Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (OJ 1967, 152, p. 13).

discretion. The Court thus found that the Parliament had not adopted a decision on a possible suspension of prosecution, whereas Article 10 of the Protocol on Privileges and Immunities refers to national laws to determine the extent and implications of the immunity enjoyed by Members in their national territory and Article 26(3) of the French Constitution provides for suspension of criminal proceedings during their Parliamentary mandate. In the circumstances of this case, the applicant might, therefore, in his action for damages, rely on the unlawfulness of the Parliament's refusal to take a decision on the basis of point (a) of the first paragraph of Article 10 of the Protocol on Privileges and Immunities.

The claim for compensation for the loss caused by the damage to his reputation was, however, dismissed, on the grounds that there was no direct, causal link between that loss and the unlawfulness established. Having regard to the wide discretion enjoyed by the Parliament, if the latter had relied on point (a) of the first paragraph of Article 10 of the Protocol on Privileges and Immunities, it could properly have adopted either a decision to request suspension of the prosecution or a decision not to request suspension of the prosecution. Thus, the illegality vitiating the contested decision could not be the direct and determining cause of the damage to his reputation claimed by the applicant.

2. Expenses and allowances

In Case T-276/07 *Martin v Parliament* (judgment of 16 December 2010, not published), the Court heard an application for annulment of the decision of the Secretary-General of the European Parliament declaring unjustified the payment to Mr Martin, a Member of the Parliament, of the sum of EUR 163 381.54 by way of secretarial allowance and informing him that steps would be taken for its recovery.

In the interest of transparency, the Parliament adopted the Rules governing the payment of expenses and allowances to Members [of the European Parliament] ('the Rules'), Article 14 of which provides that the Members of the Parliament are to submit an application for the assistance allowance including, in particular, the assistant's name, address, nationality, country and place and date of birth, and also the assistant's signature confirming that the information is correct. The Court found that as time passed those requirements had been reinforced, in particular, by the obligation to enclose with the application a copy of the contract between the Member of Parliament and his assistant, and to make notification of any changes made in respect of the application. Likewise, the Court observed that every Member of the Parliament, on commencement of his term of office, was to receive a copy of the Rules and to acknowledge receipt thereof in writing. Lastly, the Member of the Parliament formally undertook to pay the secretarial allowance to the assistant, appointed by name, from the start of his activities, the list of declared Parliamentary assistants being, moreover, accessible to the public.

From all the foregoing, the Court inferred that the conditions laid down in Article 14 of the Rules, especially as regards the information to be included in the application for the allowance, submitted by the Member of the Parliament, concerning the assistant(s) employed by him, are substantive in nature. In the circumstances of the case, the Court noted that the applicant had not declared to the Parliament certain final recipients of payments and that the Parliament had not been notified of the termination of certain contracts. In addition, not only had the applicant failed to reimburse the sums unused at the end of the year but also he had used the sums paid for certain assistants in order to pay other persons. In those circumstances, the applicant had infringed the Rules and might not, therefore, in his action for annulment, plead an unconditional right to use the sums received.

Furthermore, the Court emphasised that Article 71(3) of the Financial Regulation (EC, Euratom) No 1605/2002 ⁽⁴⁰⁾ imposes on the Parliament an unconditional duty to recover amounts wrongly paid. That duty is also imposed on the Secretary-General by Article 27(3) of the Rules.

II. Actions for damages

1. Whether the dispute is of a contractual or non-contractual nature

In Case T-19/07 *Systran and Systran Luxembourg v Commission* (judgment of 16 December 2010, not yet published), the Court recalled that its jurisdiction to hear and determine disputes relating to compensation for damage varies, depending on the contractual or non-contractual nature of the liability in question. Thus, in respect of contractual liability, the Court has jurisdiction only if there is an arbitration clause for the purpose of Article 238 EC. If there is no such clause, the Court may not, on the basis of Article 235 EC, adjudicate, in actual fact, on an action for damages of a contractual origin. To do so would extend its jurisdiction beyond the limits placed by Article 240 EC on the disputes of which it may take cognisance, for that article gives national courts jurisdiction over the disputes to which the Community is a party. In contrast, in the sphere of non-contractual liability, the Court of Justice has jurisdiction without any need for the parties to the proceedings to express their agreement beforehand. The Court of Justice's jurisdiction arises directly out of Article 235 EC and the second paragraph of Article 288 EC.

In order to establish whether it has jurisdiction under Article 235 EC, the General Court must consider, in the light of the various relevant matters in the documents before it, whether the obligations on which the claim for damages put forward by the applicants is based are, objectively and generally, contractual or non-contractual in origin. Those matters may be deduced, in particular, from an examination of the claims of the parties, from the event giving rise to the damage for which compensation is claimed and from the content of the contractual or non-contractual provisions relied on to settle the question at issue. In this context, jurisdiction is conferred on the Court in derogation from the ordinary rules of law and must, therefore, be construed narrowly, with the result that the Court may hear and determine only claims arising from the contract or claims directly connected with the obligations stemming therefrom.

So, in the instant case, the Court must examine the content of the various contracts concluded between the Systran group and the Commission. Such analysis forms part of the determination of jurisdiction, lack of which constitutes an absolute bar to proceeding with an action, and it cannot have the effect of altering the nature of the case by giving it a contractual basis.

Carrying out a thorough examination of the arguments raised by the parties, the Court concluded that the dispute in question was non-contractual in nature. The issue was to assess the allegedly wrongful, damaging nature of the Commission's conduct in disclosing to a third party information protected by an intellectual property right or know-how without the holder's express authorisation, in the light of the general principles common to the laws of the Member States applicable in that sphere and not of contractual terms.

⁽⁴⁰⁾ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

2. Causal link

In Joined Cases T-252/07, T-271/07 and T-272/07 *Sungro and Others v Council and Commission* [2010] ECR II-55, the Court dismissed the actions for damages brought by the applicants, seeking compensation for loss allegedly caused by a scheme of State aid for the cotton sector annulled by the Court of Justice in Case C-310/04 *Spain v Council* [2006] ECR I-7285. In this respect, it relied on the consideration that, in order to determine the harm attributable to a wrongful act of a Community institution, account must be taken of the effects of the failure which caused liability to be incurred and not of those of the measure of which it forms part, provided that the institution could or should have adopted a measure having the same effect without breaching any rule of law. In other words, the analysis of the causal link may not start from the incorrect premise that, in the absence of unlawful conduct, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful act and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

3. Sufficiently serious breach of a rule of law intended to confer rights on individuals

For the Union to incur non-contractual liability, it is necessary for the applicant to establish a sufficiently serious breach of a rule of law intended to confer rights on individuals ⁽⁴¹⁾.

In the context of an action for compensation for damage allegedly caused to the applicant by a Commission decision ordering, on the basis of Article 15a of second Directive 75/319/EEC ⁽⁴²⁾, the withdrawal of marketing authorisations for medicinal products for human use containing amfepramone, the Court, in Case T-429/05 *Artegodañ v Commission* (judgment of 3 March 2010, not yet published, under appeal), recalled that the requirement of a sufficiently serious breach is intended to prevent any hindering of the exercise of the institution's general-interest powers by the risk of having to bear the losses alleged by the undertakings concerned.

It also stated that, when the institution in question has only considerably reduced, or even no, discretion, there is no automatic link between that institution's lack of discretion and classifying the infringement as a sufficiently serious breach of Community law. The extent of the discretion enjoyed by the authorities concerned is, admittedly, determinative, but it is not an exclusive yardstick. It is for the Community courts to take account of the complexity of the situation to be resolved, difficulties in applying or interpreting provisions, the degree of clarity and precision of the rule infringed and whether the error committed was inexcusable. It follows that only the finding of an irregularity which, in comparable circumstances, would not have been committed by normally prudent and diligent authorities makes it possible for the Union to incur liability.

In the instant case, the Court noted that, in the context of application of Directive 65/65/EEC ⁽⁴³⁾, the authority competent to adopt a decision withdrawing or suspending marketing authorisation is bound to observe the general principle of the supremacy of protection of public health, specifically enunciated in the substantive provisions of that directive. That principle requires, in the

⁽⁴¹⁾ Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 42 and 43.

⁽⁴²⁾ Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1975 L 147, p. 13).

⁽⁴³⁾ Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965–66, p. 20).

first place, account to be taken exclusively of considerations relating to the protection of public health, in the second place, re-evaluation of the benefit/risk balance of a medicinal product when new data give rise to doubts as to its efficacy or safety and, in the third place, application of rules of evidence in accordance with the precautionary principle. In the circumstances of the case, the applicant could not, therefore, in the context of its action for damages, plead infringement of Article 11 of Directive 65/65/EEC. Difficulties linked to the systematic interpretation of the conditions for the withdrawal or suspension of marketing authorisation might, in the light of the whole Community system of prior authorisation of medicinal products, reasonably explain, there being no similar precedent, the Commission's error in law. In addition, the Court stressed that, for want of any identification, in the applicable guidelines, of changes in the decisive scientific criterion for marketing authorisation of medicinal products for human use containing amfepramone, the Commission had to adopt its decision on the basis of a complex examination of successive preparatory scientific reports written during the examination procedure leading to the final opinion on amfepramone, and on the basis of the guidelines mentioned in that final opinion. In those circumstances, the Court considered that the breach of Community law was not sufficiently serious.

It is also to be noted that, with regard to the condition that the alleged breach must be of a rule of law intended to confer rights on individuals, the Court held that it is not the purpose of the relevant provisions of Directive 75/319/EEC defining the respective spheres of competence of the Commission and of the Member States to confer rights on individuals. Those provisions are specifically designed to arrange the division of powers between national authorities and the Commission so far as concerns the mutual recognition of national marketing authorisations. In the circumstances, the applicant could not, therefore, in its action for damages, plead the fact that the Commission's decision lacked a basis in law, by reason of the Community's lack of competence, and that for that reason in particular the applicant had obtained its annulment.

4. Infringement of copyright and of know-how

Case T-19/07 *Systran and Systran Luxembourg v Commission* (judgment of 16 December 2010, not yet published) indicated some innovating developments concerning actions for compensation and observance of copyright and know-how, and settled a complicated dispute between the company Systran and the Commission, arising from a call for tenders relating to the maintenance and linguistic enhancement of the Commission's machine translation system.

Between 22 December 1997 and 15 March 2002, the company Systran Luxembourg adapted, under the name EC-Systran Unix, its Systran-Unix machine translation software to the Commission's specific needs in that sphere. On 4 October 2003 the Commission issued a call for tenders relating to the maintenance and linguistic enhancement of its machine translation system.

Following that call for tenders, Systran — Systran Luxembourg's parent company — made contact with the Commission in order to inform the latter that the planned work appeared likely to infringe its intellectual property rights. After several contacts between Systran and the Commission, the latter took the view that Systran had not produced 'probative documents' capable of establishing the rights that Systran might claim in respect of its EC-Systran Unix machine translation system. The Commission thus considered that the Systran group had no right to object to the work carried out by the company that had been successful in the call for tenders and it therefore awarded the contract that was the subject-matter of that call.

Taking the view that the Commission had unlawfully disclosed their know-how to a third party and had committed an act of infringement when the successful tenderer carried out unauthorised developments of the EC-Systran Unix version, Systran and Systran Luxembourg brought an action

for damages against the Commission. The Court considered that, by giving itself the right to carry out work necessarily entailing alteration of elements of the EC-Systran Unix version of the Systran software, without first obtaining the consent of the Systran group, the Commission had acted unlawfully, infringing the general principles common to the laws of the Member States applicable to copyright and know-how. That wrongful act, which is a sufficiently serious breach of the copyright and know-how held by Systran in the EC-Systran Unix version of the Systran software, is such as to give rise to non-contractual liability on the part of the Commission.

The Commission's wrongful act having been established, the Court found that the loss alleged, namely, in essence, commercial damage caused by the loss of potential customers and the complicating of discussions with Systran's current customers, and financial damage caused by Systran's becoming less attractive in economic terms to investors and by depreciation of its intangible assets, were the direct result of the Commission's infringement of Systran's copyrights and know-how.

The Court fixed the compensation for the losses sustained by Systran at the sum of EUR 12 001 000 damages and interest, including the amount of the fees that would have been payable if the Commission had sought permission to use Systran's intellectual property rights in order to carry out the work specified in the call for tenders, for the effect that the Commission's conduct could have had on Systran's turnover and compensation for non-material damage. In addition, it is to be noted that, exceptionally, the Court stated that the publication of a press release was also a form of non-pecuniary compensation for the non-material damage caused by the harm done to Systran's reputation as a result of the Commission's unlawful conduct.

III. Appeals

During the course of the year 2010, 24 appeals were brought against decisions of the Civil Service Tribunal and 37 cases were brought to a close by the Appeal Chamber of the General Court. Two of those cases merit particular attention.

First, in Case T-160/08 P *Commission v Putterie-De-Beukelaer* (judgment of 8 July 2010, not yet published), the Court held that the incompetence of the author of an act adversely affecting the applicant is a ground involving a question of public policy which the Union judicature must examine, if necessary of its own motion, and that failure to comply with the procedural rules relating to the adoption of an act adversely affecting an individual constitutes a breach of essential procedural requirements, which the Union judicature may examine, even of its own motion. Thus, refusal to examine an internal appeal, provided for in the procedural rules applicable to the adoption of an act adversely affecting an individual, constitutes a breach of essential procedural requirements and may therefore be raised by the Civil Service Tribunal of its own motion.

Second, attention is drawn to the fact that for the first time a case was referred back to the Court by the Court of Justice after review of a judgment given on appeal. In Case T-12/08 P-RENV-RX *M v EMA* (judgment of 8 July 2010, not yet published), the Court held that the appeal court may, in certain circumstances, rule on the substance of an action, even though the proceedings at first instance were confined to a plea of inadmissibility which that court upheld. That may be so where, first, the setting aside of the judgment or order under appeal necessarily brings about a definitive resolution of the substance of the action in question or, second, the examination of the substance of the application for annulment is based on arguments exchanged by the parties in the appeal proceedings following reasoning adopted by the court at first instance. If no such special circumstances exist, the state of the proceedings does not permit the Court to give final judgment in the matter for the purposes of Article 61 of the Statute of the Court of Justice of the European Union

and Article 13(1) of Annex I to the Statute. The appeal court cannot, therefore, do other than refer the case back to the court of first instance for the latter to rule on the claims that are the substance of the action. So, the Court in its turn referred the case back to the Civil Service Tribunal.

IV. Applications for interim relief

In 2010, 41 applications for interim measures were brought before the President of the General Court, an appreciable increase compared with the number of applications (24) made in 2009. In 2010 the judge hearing such applications disposed of 38 cases, as against 20 in 2009.

In Cases T-95/09 R II and T-95/09 R III *United Phosphorus v Commission* (orders of 15 January and 25 November 2010, not published), the President of the Court allowed two applications for extension of suspension of the operation of a decision (prohibiting the marketing of an active plant protection substance). In Case T-95/09 R *United Phosphorus v Commission* (order of 28 April 2009, not published), the President of the Court had already recognised urgency, considering conclusive the fact that, following the adoption of that decision, the applicant had instituted a newly created accelerated, administrative procedure in which its chances of success appeared greater than they had been in the procedure leading to the prohibition decision, and that that accelerated assessment procedure was likely to be concluded only a few months after the date imposed for the withdrawal from the market of the active substance at issue. He deduced therefrom that it would be unreasonable to allow the prohibition of the marketing of a substance in respect of which it was not improbable that its marketing would be authorised only a few months later. In consequence, after recognising the existence of a *prima facie* case, and finding that the balance of interests tipped in favour of the applicant, the President of the Court had suspended operation of the prohibition decision until 7 May 2010.

The applicant then obtained, by order of 15 January 2010, extension of the suspension granted until 30 November 2010, on the grounds that it had been confirmed that the accelerated procedure would not be concluded before 7 May 2010 and that there was no change in the circumstances justifying the original grant of suspension of operation. Early in November 2010, the applicant made a new application for extension, relying on the fact that the accelerated assessment procedure was to end in success for the applicant. The Commission had, in fact, launched the procedure to authorise the substance in question, and a directive authorising the substance was to enter into force on 1 January 2011. In those circumstances, by order of 25 November 2010 the President of the Court extended until 31 December 2011 suspension of the operation of the prohibition decision, in so far as it refused to authorise the substance in question. With regard to plant protection products containing that substance, he recalled that the prohibition decision obliged the Member States to withdraw the authorisations for such products and that the suspension granted by the earlier orders applied to the withdrawal of authorisation of those products also. Even after the entry into force of authorisation of the substance in question, the applicant would have to make fresh applications to the national authorities for authorisation of its plant protection products containing that substance, those products having had to be withdrawn from the market before the national authorisations were granted. In this connection, the President of the Court found that the new authorising directive did not contain any provision repealing the prohibition decision, with the result that the latter ordered the withdrawal of product authorisations currently held by the applicant, unless the suspension of operation previously granted were to be extended. In addition, there was no provision in the new directive taking account of the suspension granted in the orders of 28 April 2009 and 15 January 2010, for the purpose of preventing a gap in the marketing of those plant protection products and of providing for a reasonable transitional period between the prohibition decision and implementation of the new directive. The President of the Court

extended, therefore, until 31 December 2011 the suspension previously granted, as regards the withdrawal of authorisations of plant protection products containing the active substance at issue, emphasising that such a measure took into consideration the innocuousness of that substance, as finally revealed at the end of the accelerated assessment procedure.

So far as concerns applications for interim measures based on the applicant's alleged inability to pay fines imposed by the Commission for contravention of the rules on competition, in Case T-410/09 R *Almamet v Commission* (order of 7 May 2010, not published), the President of the Court reaffirmed the case-law in accordance with which the applicant must produce specific particulars, supported by detailed certified documents giving a true and comprehensive picture of its financial situation, enabling the judge hearing the application to assess the precise consequences that the party would, in all probability, have to bear if the interim measures sought were not granted. Following that case-law, the President considered it insufficient for the applicant to plead the purely oral refusal of the bank it had approached with a view to obtaining a bank guarantee. He added that, although the case-law on taking the group into consideration has often been applied with regard to the majority shareholder, the underlying reasoning does not make it impossible for it to retain, in an appropriate case, all its relevance with regard to minority shareholders, for the interests of certain minority shareholders, having regard to the structure of the shareholders, may just as much warrant account's being taken of their financial resources. In the case in point, the shareholdings in the applicant company consisting of two principal shareholders, holding respectively 50% and 30% of its capital, that company ought to have given the judge hearing the application for interim measures precise information concerning the minority member with a 30% holding ⁽⁴⁴⁾.

Moreover, the first application for interim measures made in the context of Regulation (EC) No 1907/2006 ⁽⁴⁵⁾ raised the question of a causal link between the damage alleged and the measure whose suspension was sought. In Case T-1/10 R *SNF v ECHA* (order of 26 March 2010, not published), the President of the Court dismissed the claim for suspension of operation of the inclusion of a chemical substance in the 'list of substances of very high concern', on the grounds that Regulation (EC) No 1907/2006 contains no provision that would have the legal effect of prohibiting or restricting the manufacture, marketing or use of a chemical merely because the latter was included in that list. So far as concerns the fear that the list in question might be perceived by the industry and by consumers as a 'blacklist' of substances to be avoided, it was considered that, given that inclusion of substances in the list at issue did not lead automatically to their progressive replacement by suitable alternative substances, negative reactions of the applicant's customers could not be regarded as conclusions that an economic operator could reasonably have drawn from the mere identification of the substance as being of very high concern. The President of the Court held that, assuming that those negative reactions were explained by a change of policy by the economic operators in question, based on increased awareness with regard to dangerous substances, it would

⁽⁴⁴⁾ Another case may be mentioned in this connection — covered by confidentiality, having regard to the risk of precipitating the applicant's bankruptcy, were its precarious financial situation to be revealed — concerning a request to be released from the obligation, imposed by the Commission, to provide a bank guarantee as a condition for the fine imposed by the decision's not being recovered immediately. The applicant having already put in hand a plan of staggered payments to the Commission, the President of the Court adopted a suspending order, pursuant to Article 105(2) of the Rules of Procedure, followed by a hearing, in order to encourage the parties to reach a judicial agreement. The parties' efforts having in fact borne fruit, the application for interim measures was removed from the register.

⁽⁴⁵⁾ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

be an independent choice made by those economic operators that constituted the decisive cause of the damage pleaded.

As regards tendering procedures, it is appropriate to mention Case T-299/10 R *Babcock Noell v European Joint Undertaking for ITER and the Development of Fusion Energy* (order of 31 August 2010, not published), a case concerning the international project to build and operate an international thermonuclear experimental reactor (ITER), intended to demonstrate the scientific and technical feasibility of fusion energy. In connection with that project a European Joint Undertaking for ITER was set up, whose task it is to contribute to the rapid realisation of fusion energy. To that end, the joint undertaking conducts procurement procedures relating to the supply of assets, the performance of works or the provision of services. In respect of a call for tenders launched for the purpose of awarding a contract for the supply of ITER toroidal field coils winding packs, the applicant, a company active in the field of nuclear technology, submitted a bid for that contract, which was rejected on the grounds that it did not comply with the tender specifications. The applicant brought an action for annulment of that rejection decision and of the decision awarding the contract to another undertaking, together with an application for interim measures which was dismissed, none of the conditions for the grant of the provisional measures sought having been satisfied in the case in point.

So far as the condition relating to urgency was concerned, the alleged damage to the applicant's reputation was not accepted by the judge hearing the application, for participation in a public tendering procedure involves risks for all the participants and the rejection of a tenderer's bid under the tender rules is not in itself in any way prejudicial. In the case of the unlawful rejection of an undertaking's bid, there is even less reason to believe that the undertaking would be liable to suffer serious and irreparable harm to its reputation, its exclusion being unconnected with its competence and because the annulling judgment would, in principle, enable any harm to its reputation to be made good. In addition, as regards the weighing up of interests, the judge hearing the application stated that the applicant's interest in being able to refer to the contract at issue for advertising purposes must yield to the general interest of the European Union, including that of its citizens, in prompt completion of the ITER project, the political and economic importance of which is evident, on account of the fact that that project is designed to harness fusion as a potentially limitless, safe, sustainable, environmentally responsible and economically competitive source of energy, from which the European Union could derive significant benefit ⁽⁴⁶⁾.

Last, emphasis must be placed on the legal, economic, social and cultural effect of the orders that the President of the Court found it necessary to make in Cases T-18/10 R, T-18/10 R II, T-18/10 R II INTP and T-18/10 R II *Inuit Tapiriit Kanatami and Others v Parliament and Council* (orders of 30 April, 19 August, 19 October and 25 October, respectively, not published, under appeal). Those orders arose from Regulation (EC) No 1007/2009 ⁽⁴⁷⁾ which, in the interest of animal welfare and for the purpose of establishing harmonised rules on the marketing of seal products, prohibited, from 20 August 2010, the placing of seal products on the market except those resulting from hunts traditionally conducted by Inuit communities and contributing to their subsistence. This exception was justified by the fundamental economic and social interests of Inuit communities engaged in the hunting of seals, the hunt being an integral part of the culture and identity of those

⁽⁴⁶⁾ As regards public procurement, mention may be made of the unpublished orders dismissing applications for interim measures in Case T-415/10 R *Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy* (order of 15 October 2010); Case T-6/10 R *Sviluppo Globale v Commission* (order of 26 March 2010); Case T-514/09 R *De Post v Commission* (order of 5 February 2010); and Case T-443/09 R *Agriconsulting Europe v Commission* (order of 20 January 2010).

⁽⁴⁷⁾ Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ 2009 L 286, p. 36).

communities. Authorisation for those Inuit communities was to be put into effect by means of an implementing regulation to be adopted by the Commission.

In January 2010, several seal hunters and trappers, seal-product processors and companies active in marketing such products or using them for medical purposes brought an action for annulment of Regulation (EC) No 1007/2009 and, in February 2010, made an application for suspension of operation of that regulation. By order of 30 April 2010, the President of the Court dismissed that application. After finding that it could not be excluded that the main action was admissible and that the pleas in law supporting the claim for annulment appeared to be relevant and serious enough to constitute a *prima facie* case, he nonetheless decided that there was no urgency, noting, in particular, that the Commission had not yet adopted the implementing regulation intended to give effect to the authorisation in favour of the Inuit communities.

In July 2010, the applicants made a fresh application for interim measures, based on a new fact, namely: the publication of the Commission draft implementing regulation. They argued that the future implementing regulation, which was to enter into force on 20 August 2010, was completely inappropriate in that it would render the authorisation in favour of the Inuit meaningless. By order of 19 August 2010, the President of the Court allowed that new application, pursuant to Article 105(2) of the Rules of Procedure, and suspended the operation of Regulation (EC) No 1007/2009 in that it restricted, so far as concerned the applicants, the placing on the market of seal products, until the order bringing the proceedings for interim measures to an end should be adopted.

By order of 25 October 2010, the President of the Court closed the proceedings for interim measures and dismissed, for want of urgency, the new application made in July 2010. First of all, the applicants not including any entity governed by public law, they could not plead the general economic, social and cultural interests of the Inuit; rather, it was for each of them to show that Regulation (EC) No 1007/2009 could cause him, individually, serious and irreparable harm if the application for interim relief were dismissed. Such evidence was not, however, adduced by the applicants. The seal hunters, seal trappers and processors of seal products did not specify the income they received from hunting or other activities or their personal fortunes, or produce attestations from a competent authority stating their right to social assistance, unemployment benefit or other form of allowance, whereas a report, produced by the applicants themselves, set out the subsidy schemes in Greenland and Canada, their countries of origin, to support seal hunting. The commercial companies active in that sector did not produce any figures enabling an assessment of the seriousness of the damage alleged, having regard to the size and turnover of each individual company.

Last, so far as concerns the Commission's implementing regulation, the applicants failed to show that it would be impossible to create the traceability system required by the regulation that would make it possible to identify seal products derived from hunting by the Inuit. On the contrary, the report they had themselves produced referred to traceability systems already actually in use in Greenland (use of a label with a bar-code and the words 'Traditional hunt conducted by Inuit communities for subsistence purposes'). The applicants failed to set out the reasons why it would be impossible to adapt those Greenland traceability systems to the requirements of the implementing regulation.