A — Proceedings of the General Court in 2011

By Mr Marc Jaeger, President of the General Court

Although it was not a year entailing partial renewal of the General Court's membership, 2011 did not prove to be a year in which the Court's composition remained absolutely stable. Whilst the Court welcomed Ms M. Kancheva, appointed to replace Mr T. Tchipev who had resigned in June 2010, it also regretted the departure of Mr E. Moavero Milanesi. Such changes, outside the established timetable for partial renewal of membership every three years, have become a recurring feature in the life of the Court, to be met by appropriate organisational measures and measures for the administration of justice.

From a statistical point of view, 2011 can without doubt be classified as a record year. The total of 722 new cases registered amounts to an increase of nearly 15 % compared with 2010 (636 new cases), a year which likewise saw the number of cases brought rise to a level not reached before. Also, the remarkable advance in the number of cases decided (+ 35 %) meant an unprecedented degree of activity for the Court, it completing 714 cases (as against 527 in 2010), to which 52 applications for interim measures should be added. These figures must be seen as the fruit of the far-reaching reforms implemented by the General Court as regards both case management, in the broad sense, and drafting methods and the development of computing tools.

Even though the Court must endeavour to maintain, in the longer term, the pace kept to in 2011, the fact that other factors will from time to time obtain means that it cannot be guaranteed that that pace will be systematically reproduced from year to year. Reforms must therefore be continued, so that the Court can not only respond to the systemic growth of the caseload but also reduce its backlog. It should thus be noted that, despite the exceptional results described above, the number of cases pending increased, reaching 1 308 cases, and the duration of proceedings rose, averaging 26.7 months (as against 24.7 months in 2010).

As the possibilities for internal reform have been fully exploited, thought should now be directed towards modernisation of the Rules of Procedure of the General Court, with a view to ensuring greater efficiency and improved flexibility in the procedural treatment of the various types of cases before the Court, whilst observing parties' procedural rights. Above all, however, beyond these admittedly necessary improvements, the statistics for 2011 tell us that the Court cannot reasonably contemplate the future without structural change and the addition of new resources, in an economic, financial and budgetary context which is nevertheless not auspicious.

As regards the nature of the Court's caseload, in 2011 the number of cases concerning State aid grew (67 new cases), the large proportion of intellectual property cases was confirmed (219 cases, that is to say, 30 % of the total number) and there was a sudden and substantial inflow of actions relating to restrictive measures adopted by the European Union in connection with the situation in certain non-member countries (93 new cases), this illustrating with particular clarity the way in which the European Union's legislative and regulatory activity directly affects the Court's situation. Generally, the caseload was also increasingly diverse and complex, as is indicated by the following account devoted to the Court's various fields of activity when exercising 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 brought under Article 263 TFEU

1. Time-limit for bringing an action

In order for an action for annulment to be admissible it must comply with the time-limit laid down in the sixth paragraph of Article 263 TFEU, according to which proceedings for annulment must be instituted within two months of the publication of the contested measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. Under Article 102(1) of the Rules of Procedure of the General Court, where the contested measure is published, that period starts to run at the end of the 14th day after publication.

In Case T-268/10 *PPG and SNF* v *ECHA* (order of 21 September 2011 made by a chamber in extended composition, not yet published, under appeal), the contested measure was a decision of the European Chemicals Agency which, in accordance with the latter's obligation under the REACH regulation, ([1]) had been published on its website. Observing that Article 102(1) of the Rules of Procedure relates only to decisions published in the *Official Journal of the European Union* and that, in the case in point, no provision required publication of the contested decision in the Official Journal (unlike, for example, decisions relating to State aid), the Court held that the 14-day increase in the period was not applicable. It thus concluded that the action was inadmissible.

Also, in Case T-468/10 *Doherty* v *Commission* (order of 1 April 2011, not yet published), the Court held that the time to be taken into account when an application is lodged by fax is the time recorded at the Court Registry, given the provisions of Article 43(3) of the Rules of Procedure (which states that in the reckoning of time-limits for taking steps in proceedings only the date of lodgment at the Registry is to be taken into account). That time is Luxembourg time, in light of the fact the seat of the Court of Justice of the European Union is located in Luxembourg under Protocol No 6 to the FEU Treaty.

Finally, in Case T-409/09 *Evropaïki Dynamiki* v *Commission* (order of 22 June 2011, not yet published, under appeal), the Court held that the 10-day extension on account of distance, laid down in Article 102(2) of the Rules of Procedure, relates only to procedural time-limits and not to the five-year limitation period provided for in Article 46 of the Statute of the Court of Justice of the European Union, the passing of which results in actions to establish non-contractual liability being barred. Thus, procedural time-limits, such as those prescribed for bringing proceedings, and the five-year limitation period in respect of actions to establish non-contractual liability against the European Union are time-limits which are, by nature, different. Indeed, the periods prescribed for bringing proceedings are a matter of public policy and are not subject to the discretion of the parties or the Court, since they were laid down with a view to ensuring clarity and legal certainty. The European Union judicature must therefore examine, even of its own motion, whether the action was brought within the prescribed period. By contrast, the Court may not of its own motion raise the issue of time limitation of actions to establish non-contractual liability.

([1]) 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).

2. Fourth paragraph of Article 263 TFEU — First instances of its application

(a) Concept of a regulatory act

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 by that decision only if it 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. [2]

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. The Court has provided its first interpretations of this new provision, which is intended to relax the requirements governing the access of individuals to the European Union judicature.

Thus, in Case T-18/10 *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (order of 6 September 2011 made by a chamber in extended composition, not yet published), the Court defined 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU for the first time. Interpreting that provision, the Court observed that, even though the provision omits the word 'decision', it permits the institution of proceedings, first, against individual acts, second, against acts of general application which are of direct and individual concern to a natural or legal person and, third, against a regulatory act which is of direct concern to such a person and does not entail implementing measures. According to the Court, it is apparent from the ordinary meaning of the word 'regulatory' that the acts covered by that third possibility are also of general application. That possibility does not, however, relate to all acts of general application, but only those which are not legislative in nature, as is apparent from the broad logic of Article 263 and from the history of the process which led to the adoption of that provision, which had initially been proposed as the fourth paragraph of Article III-365 of the draft Treaty establishing a Constitution for Europe. The Court, then conducting a teleological analysis, added that it is consistent with the purpose of that provision — namely to allow individuals to institute proceedings against an act of general application which is not a legislative act, thereby avoiding the situation in which they would have to infringe the law to have access to the courts — that the conditions of admissibility of an action challenging a legislative act are still more restrictive than those relating to proceedings instituted against a regulatory act.

In the case in point, the Court observed that the contested act, namely the regulation on trade in seal products, [3] was adopted in accordance with the co-decision procedure, under the EC Treaty (Article 251 EC). Pointing out that it is apparent from Article 289 TFEU that acts adopted under the procedure defined in Article 294 TFEU (the ordinary legislative procedure) constitute legislative acts, and that that procedure reproduces, in essence, the co-decision procedure, the

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

[3] 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).

Court concluded, in the light of the various categories of legal acts provided for by the TFEU, that the contested regulation must be categorised as a legislative act. Thus, categorisation as a legislative act or a regulatory act under the TFEU is based on the criterion of the procedure, legislative or not, which led to its adoption. In the case in point, therefore, if the action brought by the applicants were to be admissible, they had to show that the regulation was of direct and individual concern to them within the meaning of the second possibility referred to above provided for by the fourth paragraph of Article 263 TFEU.

(b) Direct concern and concept of an act requiring implementing measures

It was on the basis of that definition of the concept of a regulatory act that the Court concluded in Case T-262/10 *Microban International and Microban (Europe) v Commission* (judgment of 25 October 2011, not yet published) that an action was admissible where it had been brought against the Commission's decision concerning the non-inclusion of triclosan, a chemical substance produced by the applicants, in the list of additives which may be used in the manufacture of plastic materials and articles intended to come into contact with foodstuffs.

The Court found, first, that the contested decision was adopted by the Commission in the exercise of implementing powers and not in the exercise of legislative powers and, second, that that decision was of general application in that it applied to objectively determined situations and produced legal effects with respect to categories of persons envisaged in general and in the abstract. The Court therefore concluded that the contested decision constituted a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.

Observing that the fourth paragraph of Article 263 TFEU, by allowing natural or legal persons to institute proceedings against regulatory acts of direct concern to them which do not entail implementing measures, pursues an objective of opening up the conditions for bringing direct actions, the Court held that the concept of direct concern as recently introduced in that provision cannot be subject to a more restrictive interpretation than the notion of direct concern as it appeared in the fourth paragraph of Article 230 EC. After establishing that the applicants were directly concerned by the contested decision within the meaning of the concept of direct concern as laid down by the fourth paragraph of Article 230 EC, the Court deduced from this that they were also directly concerned by the contested decision within the meaning of the concept of direct concern as recently introduced in the fourth paragraph of Article 263 TFEU.

As regards the question whether the contested decision entailed implementing measures, the Court noted that, by virtue of Directive 2002/72, ([4]) only additives appearing in the provisional list could continue to be used after 1 January 2010. Moreover, under that directive an additive is to be removed from the provisional list when a decision is taken by the Commission not to include it in the positive list. Accordingly, the decision not to include triclosan had the immediate consequence of its removal from the provisional list and a prohibition on its marketing, without the Member States needing to adopt any implementing measure. In addition, the transitional provision, allowing the possibility of marketing triclosan to be extended until 1 November 2011, did not in itself require any implementing measure on the part of the Member States, as any intervention by those States before 1 November 2011 was purely optional. Finally, the Court pointed out that although, in that last situation, the transitional provision could give rise to implementing measures on the part of the Member States, that provision was intended solely to facilitate the implementation of the

([4]) Commission Directive 2002/72/EC of 6 August 2002 relating to plastic materials and articles intended to come into contact with foodstuffs (OJ 2002 L 220, p. 18).

contested decision. It was thus ancillary to the main purpose of the contested decision which was the prohibition on the marketing of triclosan.

Since the Court found that the contested act constituted a regulatory act of direct concern to the applicants which did not entail any implementing measures, it held the action admissible on the basis of the new provisions in Article 263 TFEU.

3. Jurisdiction of the General Court to annul decisions enforcing penalty payments imposed by the Court of Justice for failure to comply with a judgment establishing a failure to fulfil obligations

In Case T-33/09 *Portugal* v *Commission* (judgment of 29 March 2011, not yet published, under appeal), an action was brought before the General Court for annulment of the Commission's decision requiring payment of the penalty payments due pursuant to the judgment of the Court of Justice of 10 January 2008 in Case C-70/06 *Commission* v *Portugal*, ([5]) which had itself followed an initial judgment ([6]) in which it was declared that that State had failed to fulfil its obligations by not repealing its national legislation making the award of damages to persons harmed by a breach of European Union law in the field of public procurement conditional on proof of fault or fraud.

The General Court found that the Treaty does not make any specific provision regarding the settlement of disputes between a Member State and the Commission at the time of recovery of the sums stated to be payable pursuant to a judgment delivered by the Court of Justice finding a failure to fulfil obligations and ordering a Member State to pay a penalty payment to the Commission in the event of failure to comply with the initial judgment establishing a failure to fulfil obligations. It follows that the remedies established by the Treaty apply and that the decision by which the Commission determines the amount due from the Member State in terms of the penalty payment which it has been ordered to make can be the subject of an action for annulment, which falls within the General Court's jurisdiction.

However, in exercising such jurisdiction, the General Court cannot impinge on the exclusive jurisdiction reserved to the Court of Justice with regard to failure by Member States to fulfil their obligations. The General Court may not rule, therefore, in the context of an action for annulment brought against a decision of the Commission relating to the enforcement of such a judgment of the Court of Justice, on a question relating to the infringement by the Member State of its obligations under the Treaty that has not been previously decided by the Court of Justice.

The General Court also stated that, in the context of enforcing a judgment of the Court of Justice imposing a penalty payment on a Member State, the Commission must be able to assess the measures adopted by the Member State to comply with the judgment of the Court of Justice, without prejudicing either the rights of Member States as resulting from the Treaty infringement procedure or the exclusive jurisdiction of the Court of Justice to rule on the compliance of national legislation with European Union law. The Commission is therefore obliged to determine, before recovering a penalty payment, whether the complaints upheld by the Court of Justice in a judgment delivered at the end of the Treaty infringement procedure still pertain on the date of expiry of the period within which the Court of Justice required the Member State to bring the failure to fulfil obligations

([5]) [2008] ECR I-1. A dispute of the same nature gave rise to Case T-139/06 *France v Commission* (judgment of 19 October 2011, not yet published).

([6]) Judgment of the Court of Justice of 14 October 2004 in Case C-275/03 *Commission* v *Portugal*, not published in the ECR.

to an end. However, the Commission is not entitled to decide, in this context, that the measures adopted by a Member State to comply with a judgment are not consistent with European Union law so as to draw conclusions from this for the calculation of the penalty payment determined by the Court of Justice. If the Commission considers that the new system of rules introduced by a Member State still does not constitute a correct transposition of a directive, it must initiate the Treaty infringement procedure.

In the case in point, the General Court noted that it followed from the judgment of the Court of Justice in Case C-70/06 *Commission* v *Portugal* that that Member State had to repeal the national legislation at issue and that the penalty payment was due until the date of that repeal. The legislation was repealed by a law which entered into force on 30 January 2008. The Commission nevertheless refused to accept that the failure to fulfil oblgations had ended on that date, taking the view that it had ceased on 18 July 2008, the date on which fresh legislation entered into force. The General Court held that the Commission had thereby failed to have regard to the operative part of that judgment and it annulled the contested decision.

Competition rules applicable to undertakings

1. General issues

(a) Concept of an undertaking

In Joined Cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission* (judgment of 16 June 2011, not yet published, under appeal), the Court specified the conditions for the application of the case-law according to which the direct or indirect involvement of an entity in the economic activity of an undertaking in which it holds a controlling shareholding enables that entity to be classified as an undertaking for the purposes of competition law. In its decision the Commission had considered that Portielje, a foundation holding, as trustee, shares in Gosselin, indirectly played a part in the economic activity carried on by Gosselin. However, the Court observed that, as the case-law had not established a presumption of 'involvement' in the management of an undertaking, the burden of proving that element was borne by the Commission. The Court considered in this case that the Commission had put forward merely structural argument — merely noting that Portielje held virtually the entire capital of Gosselin and that the three main members of its management were at the same time members of Gosselin's board of directors — and had provided no firm evidence capable of showing that Portielje was actually involved in the management of Gosselin. The Court therefore concluded that the Commission had not established that Portielje was an undertaking.

(b) Restriction of competition — Potential competition

In Case T-461/07 *Visa Europe and Visa International Service* v *Commission* (judgment of 14 April 2011, not yet published), the applicants took issue with the Commission for having evaluated the effects on competition of the unlawful conduct of which they were accused by applying a test which was economically and legally incorrect, namely that there was scope for further competition in the market in question. The Court rejected that argument, pointing out that the fact that the Commission had acknowledged that competition on the relevant market was not inefficient did not prevent it from penalising conduct having the effect of excluding a potential competitor. Indeed, examination of the conditions of competition on a given market must be based not only on the existing competition between undertakings already present on the market in question, but also on potential competition. The Court therefore endorsed the Commission's approach based on the assessment of the effects restrictive of competition that might result for potential competition and for the structure of the market concerned.

That judgment also provided the Court with the opportunity to clarify the definition of potential competition. Thus, it stated that while the intention of an undertaking to enter a market may be of relevance for the purpose of determining whether it can be considered to be a potential competitor, the essential factor on which such a description must be based is whether it has the ability to enter that market.

(c) Reasonable period

In Case T-240/07 *Heineken Nederland and Heineken* v *Commission* and Case T-235/07 *Bavaria* v *Commission* (judgments of 16 June 2011, not yet published, under appeal), relating to the Netherlands beer cartel, the Commission had accorded a reduction of EUR 100 000 in the amount of the fine imposed on each undertaking owing to the unreasonable length of the administrative procedure, which had lasted more than seven years after the inspections. In that regard, the Court considered that the length of the administrative procedure had entailed a breach of the reasonable time principle and that the lump-sum reduction granted by the Commission had not taken account of the amount of the fines imposed on those undertakings — namely EUR 219.28 million on Heineken NV and its subsidiary and EUR 22.85 million on Bavaria NV — so that that reduction was not capable of providing an adequate remedy for that breach. The Court therefore increased the reduction in question to 5 % of the amount of the fine.

2. Points raised in the field of Article 101 TFEU

(a) The taking of evidence

The judgments delivered regarding the gas-insulated switchgear cartel enabled the Court to make a number of observations concerning the rules governing evidence in cartel matters.

— Admissibility

In Case T-132/07 *Fuji Electric* v *Commission* (judgment of 12 July 2011, not yet published), the Commission maintained that both the complaints not formulated during the administrative procedure and the documents not produced during that procedure and submitted for the first time by the applicant before the Court were inadmissible. The Court rejected that approach and observed that the rules setting out the rights and duties within the administrative procedure provided for by competition law cannot be interpreted as obliging a person to cooperate and, in response to the statement of objections sent to it by the Commission, to set out, at the stage of the administrative procedure, all the complaints on which it may wish to rely in support of an action for annulment.

The Commission likewise argued that the complaints whereby the applicant challenged facts or points of law which it had expressly acknowledged during the administrative procedure were inadmissible. However, the Court observed that where the person concerned decides voluntarily to cooperate and, within the administrative procedure, accepts explicitly or implicitly facts or points of law which justify the attribution of the infringement to it, the actual exercise of its right to bring proceedings under the Treaty is not thereby restricted. In the absence of a specific legal basis, such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence.

— Witness statements

In Case T-112/07 *Hitachi and Others* v *Commission* (judgment of 12 July 2011, not yet published), the Court recalled, first of all, that a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by those other undertakings unless it is supported by other evidence. The Court further stated that the written witness statements of the employees of a company, drawn up under the supervision of that company and submitted by it in its defence in the administrative procedure carried out by the Commission, cannot, in principle, be classed as evidence which is different from, and independent of, the statements made by that same company. They merely complement those statements, and can explain them and express them in concrete form. Consequently, they must also be corroborated by other evidence.

— Contextual evidence

In the judgments of 12 July 2011 in *Hitachi and Others* v *Commission*, in Case T-113/07 *Toshiba* v *Commission* (not yet published, under appeal) and in Case T-133/07 *Mitsubishi Electric* v *Commission* (not yet published, under appeal), the Court recalled that, where the Commission relies solely on the conduct of the undertakings at issue on the market to conclude that there was an infringement, it is sufficient for those undertakings to prove the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another plausible explanation of those facts to be substituted for the one adopted by the Commission. However, although the lack of documentary evidence may be relevant in the global assessment of the set of indicia on which the Commission relies, it does not in itself enable the undertaking concerned to call the Commission's claims into question by submitting an alternative explanation of the facts. That is the case only where the evidence put forward by the Commission does not enable the existence of the infringement to be established unequivocally and without the need for interpretation.

— Review by the Court

In *Mitsubishi Electric* v *Commission*, the applicant challenged the case-law according to which, because of the difficulties faced by the Commission when trying to prove an infringement, a more lenient evidential standard is acceptable. In support of its argument, the applicant observed that fines imposed in cartel cases had constantly increased in recent years, which must affect the intensity with which the Commission's decisions are reviewed. The Court rejected that argument, observing that while it is true that the increase in the amounts of fines may have more serious consequences for the parties on which such fines are imposed, it has the consequence, since the Commission's initiative in that regard is generally well known, that if undertakings make themselves liable for an infringement, they will make an even greater effort to limit as far as possible the number of items that may serve as evidence, thereby making the Commission's task more difficult.

In addition, the Court also observed, in Case T-348/08 *Aragonesas Industrias y Energía* v *Commission* (judgment of 25 October 2011, not yet published), that, in so far as it is the Court's task to assess whether the evidence and the other factors referred to by the Commission in the contested decision are sufficient to establish the existence of an infringement, it must also identify the evidence relied on by the Commission to show that the applicant participated in the infringement at issue. For that purpose, the identification of those items of evidence can relate only to the part of the grounds of the contested decision in which the Commission describes the *inter partes* stage of the administrative procedure.

(b) Participation in a single and continuous infringement

In Case T-210/08 *Verhuizingen Coppens* v *Commission* (judgment of 16 June 2011, not yet published, under appeal), the Court observed that in order for an undertaking to be held liable for a single and continuous infringement, its awareness of the offending conduct of the other participants in the infringement is required. The Court observed, first of all, that in this case, although the applicant had indeed participated in providing false quotes for removal services, it had not, on the other hand, been aware of the anti-competitive activities of the other undertakings concerning the agreements as to financial compensation for rejected offers or for not quoting. In so far as — irrespective of the operative part — it was clear from the grounds of the decision that the Commission had considered that those practices formed a single and continuous infringement, the Court annulled both the finding of infringement and the fine imposed.

(c) Calculation of the amount of the fine

The year 2011 was marked by the very large number of cartel cases raising problems in connection with the calculation of the fine imposed and by the first cases in which the Court interpreted the 2006 Guidelines. ([7])

— The value of sales

In Joined Cases T-204/08 and T-212/08 *Team Relocations and Others* v *Commission* (judgment of 16 June 2011, not yet published, under appeal), the Court found it necessary to interpret the concept of 'sales' to be taken into account in the application of the 2006 Guidelines. The Court rejected on that occasion the applicant's argument that only the value of sales resulting from the service actually affected by the infringement should be taken into consideration and concluded that the value of sales, within the meaning of those guidelines, must be taken to refer to sales in the relevant market.

— Gravity

In Case T-199/08 *Ziegler* v *Commission* (judgment of 16 June 2011, not yet published, under appeal), the applicant claimed that there had been a failure to state reasons with regard to the calculation of the basic amount of the fine. In that regard, the Court observed that the 2006 Guidelines had brought about a fundamental change in the methodology for calculating fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') had been abolished, and a scale from 0 % to 30 % introduced in order to enable finer distinctions to be made. Furthermore, the basic amount of the fine will in future be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement'. As a general rule, 'the proportion of the value of sales taken into account will be set at a level of up to 30 %'. With respect to horizontal price-fixing, market-sharing and output-limitation agreements 'which … are, by their very nature, among the most harmful restrictions of competition', the proportion of the value of sales taken into account must generally be set 'at the higher end of the scale'. In those circumstances, and as a corollary of the discretion which it enjoys in that regard, the Commission is required to state its reasons for choosing the proportion of sales taken into account and cannot simply state reasons only for the classification of an infringement as 'very serious'. More generally, while accepting that the decision stated sufficient reasons on

([7]) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, adopted on 1 September 2006 (OJ 2006 C 210, p. 2).

that point, in the light of the existing case-law, the Court emphasised that that case-law had been developed by reference to the preceding guidelines and therefore requested the Commission, in applying the 2006 Guidelines, to augment its reasoning as to the calculation of fines in order, in particular, to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them.

In *Team Relocations and Others* v *Commission,* the Court, after observing that the 2006 Guidelines abolished both the categorisation of infringements and the flat-rate amounts of fines and enable a finer distinction to be made according to the gravity of the infringements, concluded that the Commission is free to determine the gravity of the role played by each individual undertaking either when determining the percentage of the value of sales adopted or when assessing the mitigating and aggravating circumstances. In the latter case, however, assessment of mitigating and aggravating circumstances must enable sufficient account to be taken of the relative gravity of the participation in a single infringement and also of any variation of that gravity over time.

— Duration

In *Team Relocations and Others* v *Commission,* the automatic multiplication of the amount determined on the basis of the value of sales by the number of years of an undertaking's participation in the infringement, as provided for in the 2006 Guidelines, was challenged since that system was said to confer on the alleged duration of the infringement an importance disproportionate in relation to the other relevant factors, in particular the gravity of the infringement. Although the Court, in line with what has been indicated in relation to the gravity of the infringement, observed that the Commission's new approach represents, in this regard too, a fundamental change in methodology, in so far as multiplication by the number of years of participation in the infringement is equivalent to increasing the amount by 100 % per year, it none the less pointed out that Article 23(3) of Regulation No 1/2003 [8] does not preclude such a development.

In its judgment of the same date in *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, on the other hand, the Court specified the effect that that change would have on the Commission's work. Thus, it observed that, while it is settled case-law that the burden of proof relating to infringements of Article [101](1)[TFEU] is borne by the Commission and that the Commission must adduce precise and consistent evidence to substantiate the firm conviction that the alleged infringement has been committed, that applies particularly in relation to evidence of the duration of the infringement, a criterion the weight of which was considerably increased in the 2006 Guidelines.

— Equal treatment — Turnover taken into consideration

In *Toshiba* v *Commission* and *Mitsubishi Electric* v *Commission,* the Court observed that the Commission had chosen the year 2001 as the reference year for the purpose of determining the value of worldwide sales and for the calculation of the starting amount of the fines to be imposed on Toshiba and Mitsubishi Electric, whose gas-insulated switchgear activities had been taken over by their joint venture TM T & D in 2002, whereas it had chosen 2003, the last full year of the infringement, for the European producers. The Commission maintained that that distinction reflected its desire to take into consideration the fact that, for most of the period of the infringement, Toshiba had held a considerably smaller share of the worldwide market than Mitsubishi. While the Court

[8] 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).

considered that such an objective was lawful, it none the less took the view that other non-discriminatory methods could have been used in order to achieve it, such as the division of the starting amount of the fine, calculated on the basis of turnover for 2003, in accordance with the proportion of sales of the product concerned during the year preceding the creation of the joint venture. As the Commission had committed a breach of the principle of equal treatment, and in the absence of any factor enabling the Court to calculate a new amount for the fine, the Court annulled the fines imposed on those two undertakings.

— Deterrence

In Case T-217/06 *Arkema France and Others* v *Commission* (judgment of 7 June 2011, not yet published), the Commission had applied an increase of 200 % in order to ensure that the financial penalty would have a sufficient deterrent effect, in view of the size and economic power of the undertaking concerned. That increase had been based on the worldwide turnover of Total, the undertaking's parent company. However, the Court observed that, a few days before the Commission adopted its decision, the applicant had ceased to be controlled by Total, and therefore considered that the increase of the fine for deterrence was not justified. The Court observed that the need to ensure that a fine has sufficient deterrent effect requires, in particular, that the amount be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible or, on the contrary, excessive, particularly in the light of the undertaking's financial capacity. Consequently, that objective of deterrence can be validly achieved only if regard is had to the situation of the undertaking on the day on which the fine is imposed. Since the economic unity linking Arkema to Total had been broken before the date on which the decision was adopted, Total's resources could not be taken into consideration for the determination of the increase in the fine imposed on Arkema and its subsidiaries. The Court therefore held that the increase of 200 % was excessive so far as those undertakings were concerned and that an increase of 25 % was adequate to ensure that the fine imposed on them would have a sufficiently deterrent effect. On that ground, the Court decided to reduce the amount of the fine imposed on Arkema from EUR 219.1 million to EUR 113.1 million.

— Cooperation

In *Fuji Electric* v *Commission,* the Court observed that, while it is correct that the date on which evidence is delivered to the Commission has an effect on whether that evidence is to be classified as having significant added value, since that classification is dependent on what evidence is already held by the Commission at the date of delivery, the mere fact that such evidence has been delivered after the notification of the statement of objections does not mean that it may not still constitute, notwithstanding the advanced stage of the administrative proceedings, significant added value. In particular, in an application under the Leniency Notice submitted after the statement of objections has already been sent, an undertaking may focus on the facts which, in its opinion, have not been proved to the requisite legal standard in order to provide significant added value by comparison with the evidence already in the Commission's possession.

In Case T-12/06 *Deltafina* v *Commission* (judgment of 9 September 2011, not yet published, under appeal), the Commission had decided, for the first time, to grant the applicant conditional immunity under a Leniency Notice. The Court stated that, in view of the fact that the grant of total immunity from fines constitutes an exception to the principle that the undertaking is personally liable for the breach of the competition rules, it is logical that the Commission may, in return, require the undertaking not to omit to inform the Commission of the relevant facts of which it is aware and which are capable of affecting the conduct of the administrative procedure and the effectiveness of the investigation. The Court observed that at a meeting with its competitors the applicant had disclosed, voluntarily and without informing the Commission, the fact that it had submitted an application for leniency to the Commission before the Commission had the opportunity to carry out the inspections relating to the cartel in question. As such conduct did not indicate a spirit of genuine cooperation, the Court held that the Commission had not erred in not granting Deltafina definitive immunity.

— Aggravating circumstances

In Case T-343/08 *Arkema France* v *Commission* (judgment of 17 May 2011, not yet published), the Court observed that while no limitation period precludes a finding by the Commission of repeated infringement, the fact none the less remains that, in accordance with the principle of proportionality, the Commission cannot take one or more previous decisions penalising an undertaking into account without limitation in time. In this case, the Court found that the applicant had infringed the competition rules by participating in cartels continuously from 1961 until May 1984, for which it had been penalised first in 1984, then in 1986 and finally in 1994, and that, in spite of that series of decisions, it had repeated its unlawful conduct by participating in a new cartel, penalised in the contested decision, from 17 May 1995 until 9 February 2000. In consequence, the Commission had increased the basic amount of the fine imposed on the applicant by 90 %. The Court approved the Commission's approach, stating that, since that series of decisions, the adoption of which had been separated by short intervals and the last of which had been adopted one year before the applicant had participated in the infringement penalised in the contested decision, demonstrated the applicant's tendency towards infringing the competition rules, the Commission had not breached the principle of proportionality in taking that series of decisions into consideration when assessing the applicant's conduct from the aspect of repeated infringement.

In the decision contested in Case T-39/07 *ENI* v *Commission* and Case T-59/07 *Polimeri Europa* v *Commission* (judgments of 13 July 2011, not yet published, under appeal), the Commission, observing that EniChem had already been fined for its participation in two previous cartels, had considered that the basic amount of the fine imposed on the applicants, Eni and its subsidiary Polimeri, should be increased by 50 % to reflect the aggravating circumstance of repeated infringement. The Commission had taken the view that, although the legal persons involved in the infringements in issue were not the same, the same undertaking had none the less repeated the infringement in issue. The Court was careful to observe, however, that, as the development of the structure and control of the companies concerned was complex, the Commission had to be particularly precise and to adduce all the detailed evidence necessary to show that the companies to which the contested decision was addressed and the companies to which the previous decisions had been addressed formed the same 'undertaking' for the purposes of Article [101 TFEU]. The Court considered that in this case that had not been done and that the repeated infringement had not been demonstrated. It therefore reduced the amount of the fine from EUR 272.25 million to EUR 181.5 million.

In a judgment delivered on the same date in Joined Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others* v *Commission* (not yet published, under appeal), the Court observed that the Commission had increased the amount of the fines imposed on the parent company, ThyssenKrupp AG, its subsidiary, ThyssenKrupp Elevator AG, and certain national subsidiaries by 50 % for repeated infringement, as certain companies in the ThyssenKrupp group had already been penalised in 1998 for their participation in a cartel on the market affected by the 'alloy surcharge'. In that regard, the Court observed that the Commission had found, in that earlier decision, an infringement committed only by the companies of that group, and not by their then parent companies, to which ThyssenKrupp AG was the economic and legal successor. Nor had the Commission considered that the subsidiaries and their parent companies formed an economic entity. The Court noted, moreover, that the subsidiaries which had been fined in connection with the cartel in the sector affected by the 'alloy surcharge' were not among the undertakings penalised in the contested decision. Thus, the infringements found could not be regarded as constituting a repeated infringement by the same undertaking.

— Mitigating circumstances

In *Ziegler* v *Commission,* the applicant relied, as a mitigating circumstance, on the fact that it had terminated the infringement. The Court observed that, although the 2006 Guidelines provide that the basic amount of the fine may be reduced on that basis, that 'will not apply to secret agreements or practices (in particular, cartels)'. In addition, the benefit of that mitigating circumstance is limited to cases where the infringement ceases following the Commission's first involvement. Pointing out that the applicant had participated in the infringement until 8 September 2003, whereas the inspections had taken place after that date, namely on 16 September 2003, the Court rejected the applicant's complaint.

In the same case, the applicant claimed that the fact that the Commission had been aware of the offending practice and that it had tolerated it for years had led it to the legitimate, albeit mistaken, belief that that practice was lawful. In that regard, the Court emphasised that mere knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission within the meaning of the 2006 Guidelines. Alleged inaction cannot be treated in the same way as a positive act, such as an authorisation or encouragement, that would lead to recognition of a mitigating circumstance.

In *Arkema France* v *Commission* the applicant maintained that the Commission had wrongly refused to grant it a reduction of the amount of the fine for its cooperation outside the scope of a Leniency Notice. The Court explained that in order to maintain the practical effect of a notice of that type it can only be in exceptional situations that the Commission is required to grant a reduction of the fine to an undertaking on a different basis. The Court considered that that is the case, in particular, where cooperation provided by an undertaking, which goes beyond the undertaking's legal obligation to cooperate, but does not give rise to the right to a reduction of the amount of the fine under that notice, is of objective use to the Commission. The cooperation in question must be found to be of such use where the Commission bases its final decision on evidence without which it would not have been in a position to penalise the infringement concerned in whole or in part.

— Exceptional circumstances

In *Ziegler* v *Commission,* the Court examined the application of the 2006 Guidelines with regard to taking account of the ability of the undertaking concerned to pay the fine. It observed that in order to benefit from an exceptional reduction in the fine on account of economic difficulties, under those guidelines, in addition to an application to that effect, two cumulative conditions must be met, namely, first, an insuperable difficulty in paying the fine and, second, the existence of a specific 'social and economic context'. As regards the first condition, the Court found that the Commission had simply observed that the fine represented only 3.76 % of the undertaking's worldwide turnover in 2006 and had thus concluded that the fine would not irretrievably jeopardise its economic viability. The Court considered, first, that that assessment was abstract and took no account of the applicant's specific circumstances and, second, that a simple calculation of the fine as a percentage of the undertaking's worldwide turnover could not of itself lead to the conclusion that the fine was not liable to jeopardise irretrievably the undertaking's economic viability. However, as the second condition was not met, the Court concluded that the Commission had been justified in rejecting the applicant's arguments.

— The ceiling of 10 % of turnover

In Case T-211/08 *Putters International* v *Commission* (judgment of 16 June 2011, not yet published), the Court stated that the mere fact that the fine ultimately imposed amounted to 10 % of the applicant's turnover, while that percentage was lower for the other participants in the cartel, could not constitute a breach of the principles of equal treatment or proportionality. That consequence is inherent in the interpretation of the 10 % ceiling as a capping ceiling which is applied after any reduction in the fine on account of mitigating circumstances or the principle of proportionality. However, the Court observed that the multiplication of the amount determined on the basis of the value of sales by the number of years of participation in the infringement may mean that, in the context of the 2006 Guidelines, the application of the 10 % ceiling is now the rule rather than the exception for any undertaking which operates mainly on a single market and has participated in a cartel for over a year. In that case, any distinction on the basis of gravity or mitigating circumstances will as a matter of course no longer be capable of impacting on a fine which has been capped in order to be brought below the 10 % ceiling. The Court thus emphasised that the failure to draw a distinction with regard to the final fine that results presents a difficulty in terms of the principle that penalties must be specific to the offender and the offence, which is inherent in the new methodology.

(d) Imputability of the infringement and joint and several liability for payment of the fine

— Conditions governing application of the presumption of liability of a parent company for the acts of its subsidiary

In Case T-234/07 *Koninklijke Grolsch* v *Commission* (judgment of 15 September 2011, not yet published), the Court observed that the Commission had not adduced evidence of the applicant's direct participation in the cartel In fact, the applicant was assimilated to its (wholly owned) subsidiary without the Commission having distinguished between the legal persons or provided the reasons why the infringement should be attributed to the parent company. The Court considered that, in thus failing to have regard to the economic, organisational or legal links between the applicant and its subsidiary, the Commission had deprived the applicant of the possibility of challenging the substance of that attribution of liability before the Court by rebutting the presumption that it actually exercised decisive influence over the subsidiary and had not put the Court in a position to exercise its power of review in that regard, which justified the annulment of the decision.

— Rebuttal of the presumption

In Case T-185/06 *Air liquide* v *Commission* (judgment of 16 June 2011, not yet published) and Case T-196/06 *Edison* v *Commission* (judgment of 16 June 2011, not yet published, under appeal), the Court found, first of all, that the Commission had been entitled to presume the actual exercise of decisive influence by the applicants over their respective subsidiaries, in the light of the undisputed 100 % control linking them. The Court observed, next, that the applicants had raised a specific argument in order to rebut that presumption, by attempting to demonstrate that their respective subsidiaries were autonomous. In response to those arguments, the Commission had merely referred to certain additional indicia of the applicants' exercise of decisive influence over their respective subsidiaries. The Court considered that the Commission had thus failed to set out in the contested decision the reasons why the evidence adduced by the applicants was not sufficient to rebut the presumption in question. The Commission's duty to state reasons for its decision on that point follows clearly from the rebuttable nature of the presumption in question, the rebuttal of which involves the applicants' producing evidence covering all the economic, organisational and legal links between themselves and their respective subsidiaries. As the Commission had not adopted a detailed position in that regard, the Court annulled the contested decision for breach of the obligation to state reasons.

In *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission,* the Commission had applied the presumption that Portielje exercised decisive influence over Gosselin, since the parent company held virtually all the capital of its subsidiary. However, the Court observed that the evidence adduced by Portielje enabled that presumption to be rebutted. Among that evidence, the Court placed particular emphasis on the fact that the only possibility for the parent company to influence its subsidiary would have been to make use of the voting rights associated with the shares which it held when a general meeting of the subsidiary was held. The Court observed that no shareholders' meeting had been held during the infringement period and therefore decided to annul the Commission's decision in so far as it concerned Portielje.

— The scope of the liability

In Case T-382/06 *Tomkins* v *Commission* (judgment of 24 March 2011, not yet published, under appeal), the applicant had been held liable for the offending conduct of its subsidiary, Pegler, on the ground that it held 100 % of the latter's capital. Among the pleas which it put forward, the applicant disputed its subsidiary's participation in the cartel during part of the infringement period. By judgment of the same date in Case T-386/06 *Pegler* v *Commission* (not yet published), the Court annulled the Commission's decision concerning Pegler's participation in the copper fittings cartel during a longer part of the infringement period than that referred to in the plea put forward by Tomkins, the parent company. The Court observed, in that regard, that since the European Union judicature cannot rule *ultra petita*, the scope of the annulment which it pronounces may not go further than that sought by the applicant. However, under competition law Tomkins and its subsidiary, which had been partly successful following the action for annulment in *Pegler* v *Commission*, constituted a single entity. Therefore, the Commission's imputation of liability to the applicant meant that the applicant had the benefit of the partial annulment of the contested decision in that case. Indeed, the applicant had put forward a single plea challenging the duration of Pegler's participation in the infringement and had claimed that the contested decision should be annulled on that ground. The Court thus considered that, where it has before it actions for annulment brought separately by a parent company and by its subsidiary, it does not rule *ultra petita* if it takes into account the outcome of the action brought by the subsidiary, if the form of order sought in the action brought by the parent company has the same object.

On the other hand, in *Tomkins* v *Commission* the applicant had expressly withdrawn the complaint alleging an error of assessment with regard to the increase in the amount of the fine for the purpose of deterrence. The Court inferred that it could not rule on that point without going beyond the bounds of the dispute as defined by the parties in the case, even though it had considered in *Pegler* v *Commission* that the Commission had erred in applying that multiplier.

— Joint and several payment

In Case T-41/05 *Alliance One International* v *Commission* (judgment of 12 October 2011, not yet published), the Court considered that the applicant could not be held liable for the infringement on the part of Agroexpansión in respect of the period before 18 November 1997, since it was only from that date that it had formed an economic unit with Agroexpansión and thus an undertaking within the meaning of Article [101 TFEU]. Since joint and several liability for payment of a fine can cover only the period of the infringement during which the parent company and the subsidiary constituted such an undertaking, the Commission had not been justified in requiring the applicant to pay jointly and severally, with Agroexpansión, the total amount imposed on Agroexpansión, namely EUR 2 592 000, an amount relating to the entire infringement period. Consequently, the Court reduced the increase applied for duration from 50 % to 35 %.

(e) Unlimited jurisdiction

Under Article 261 TFEU and Article 31 of Regulation No 1/2003, the Court has unlimited jurisdiction, which authorises it, in addition to carrying out a mere review of the lawfulness of the penalty, where its only option is to dismiss the action for annulment or to annul the contested measure, to vary the contested measure, even without annulling it, in the light of all the factual circumstances, by amending, for example, the fine imposed. ([9])

In *Arkema France and Others* v *Commission* the Court pointed out that the Commission had not contested the accuracy of the applicants' statements according to which, from 18 May 2006, they had no longer been controlled by Total and Elf Aquitaine. The Court was asked by the applicants to exercise its unlimited jurisdiction in order to reduce the amount of the fine in the light of that fact, and it reduced from 200 % to 25 % the increase imposed in order to ensure that the fine had a sufficiently deterrent effect, as that increase was deemed excessive because it had been calculated on the basis of the parent company's worldwide turnover. Consequently, the amount of the fine imposed on Arkema was reduced to EUR 105.8 million.

In *Ziegler* v *Commission* and *Team Relocations and Others* v *Commission,* the Court observed that the augmented statement of reasons concerning the calculation of the amount of the fine, made necessary as a result of the fundamental change in methodology brought about by the application of the 2006 Guidelines, is also intended to facilitate the exercise by the Court of its unlimited jurisdiction, which must enable it to review not only the legality of the contested decision but also the appropriateness of the fine imposed.

In *Putters International* v *Commission,* the Court held that the failure to draw a distinction with respect to the final fine, which sometimes results from the 2006 Guidelines, may require the Court to exercise its unlimited jurisdiction in those specific cases where the application of the 2006 Guidelines alone does not enable an appropriate distinction to be drawn.

In Case T-11/06 *Romana Tabacchi* v *Commission* (judgment of 5 October 2011, not yet published), the Court, after finding that the Commission had made errors of assessment of the facts concerning the duration of the applicant's participation in the cartel and, furthermore, had breached the principle of equal treatment in assessing the specific weight of that participation, redressed that situation by exercising its unlimited jurisdiction. Thus, the Court considered that, taking account in particular of the cumulative effect of the illegalities previously found and also of the applicant's weak financial capacity, an equitable assessment of all the circumstances of the case would be made if the Court set the final amount of the fine imposed on the applicant at EUR 1 million instead of EUR 2.05 million. The Court observed, in that regard, that a fine of such an amount made it possible to penalise the applicant's conduct effectively, in a manner which was not negligible and which remained sufficiently deterrent, and, moreover, that any fine above that amount would be disproportionate to the infringement found as against the applicant appraised as a whole.

([9]) See, in particular, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692.

3. Points raised in the field of concentrations

In Case T-224/10 *Association belge des consommateurs test-achats* v *Commission* (judgment of 12 October 2011, not yet published), the Court clarified the conditions governing the admissibility of an action brought by third parties, first, against a Commission decision declaring a merger (in this case between EDF and Segebel) compatible with the common market and, second, against the rejection of the national authorities' request that examination of the merger be referred in part to those authorities (the non-referral decision).

(a) *Locus standi* of third parties

In that regard, the Court recalled that it follows from the case-law that, for decisions of the Commission relating to the compatibility of a merger with the common market, the *locus standi* of third parties concerned by a merger must be assessed differently depending on whether they, first, rely on defects affecting the substance of those decisions ('first category' of interested third parties) or, second, submit that the Commission infringed procedural rights granted to them by the acts of European Union law governing the control of concentrations ('second category' of interested third parties).

As regards the first category, those third parties must be affected by the contested decision by virtue of attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and which thereby distinguish them individually just as in the case of the person addressed. In this case the applicant was not covered by the first category, since it was not individually affected by the Commission's decision. As to whether the applicant came within the second category, the Court observed that consumer associations have a procedural right — the right to be heard — in the context of the administrative procedure in respect of the merger investigation, subject to compliance with two conditions: first, that the merger concerns products or services used by final consumers; and, second, that an application to be heard by the Commission during the investigation procedure has been made in writing.

The Court found that the applicant satisfied the first condition — the merger at issue was likely to have effects, at least secondary effects, on consumers — but not the second. In that regard, the Court stated that the steps which third parties are required to undertake in order to be involved in the procedure relating to the examination of the concentration must be taken following the formal notification of the concentration. That makes it possible, in the interest of third parties, to avoid such requests being made by them without the Commission having determined the purpose of the merger control procedure, at the time of notification of the transaction at issue. Furthermore, it means that the Commission does not have to separate systematically, from among the requests received, those which concern transactions attributable only to abstract hypotheses, or even to mere hearsay, from those which concern transactions leading to a notification. In this instance the applicant had requested the Commission to be heard in the examination of the merger two months before it was notified. That, according to the Court, could not make up for the non-renewal of the application or for the lack of any initiative on the applicant's part once the economic transaction envisaged by EDF and Segebel had in fact become a duly notified concentration.

(b) Challengeable nature of a non-referral decision

According to settled case-law, a third party concerned by a merger may be entitled to challenge, before the Court, the decision whereby the Commission granted the referral request submitted by a national competition authority. Conversely, the Court held that interested third parties do not have *locus standi* to challenge a decision refusing to refer whereby the Commission rejects the referral request submitted by a national authority. The procedural rights and the judicial protection that European Union law accords to those third parties are not in any way jeopardised by the non-referral decision. Quite to the contrary, that decision ensures for third parties concerned by a concentration with a Community dimension, first, that that concentration will be assessed by the Commission in the light of European Union law and, second, that the Court will be the judicial body having jurisdiction to deal with any action against the Commission's decision to terminate the procedure.

State aid

1. Admissibility

The judgments delivered this year provide further clarification of the concepts of 'act producing mandatory legal effects' and 'interest in bringing proceedings'.

In Case T-421/07 *Deutsche Post* v *Commission* (judgment of 8 December 2011, not yet published), the Court declared inadmissible the action brought by Deutsche Post against the Commission's decision to initiate the formal investigation procedure with regard to the aid granted to Deutsche Post by the Federal Republic of Germany. The Court held that the contested decision, which had been preceded by a first decision to initiate the formal investigation in 1999, did not constitute a contestable act.

According to the Court, a Commission decision to initiate the formal procedure, an act that is preparatory in nature to the final decision, produces independent legal effects and therefore constitutes a contestable act not only where the applicant disputes the classification of the aid as new aid but also where it disputes the actual classification of the measure in issue as State aid within the meaning of Article 87(1) EC.

In this case, however, the Court held that the contestable act, consisting of a second decision to initiate the formal procedure, did not constitute a challengeable act in that it did not produce independent legal effects by comparison with the first decision to initiate the procedure. The contested act concerned the same measures as those which had already formed the subject-matter of the earlier decision to initiate the procedure. In addition, the Commission had already mentioned the fact that the measures at issue could fall within the scope of the prohibition of Article 87(1) EC and that the independent legal effects relating to the contested act had therefore already been produced following that decision to open the procedure. The Court also observed that when the contested act was adopted the formal investigation procedure initiated in 1999 with respect to the measures at issue had not yet been closed and that the contested act had not altered either the legal scope of the measures or the applicant's legal situation.

In Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others* v *Commission* (judgment of 24 March 2011, not yet published, under appeal), the classification of a capital contribution as State aid was challenged before the Court in two actions brought against the Commission's decision declaring the aid provided by the Federal Republic of Germany to Leipzig-Halle airport compatible with the common market, the first by the public shareholders of the undertakings managing the airport (Case T-443/08) and the second by the two undertakings operating the airport (Case T-455/08).

The Court declared the action brought by the public shareholders in Case T-443/08 inadmissible on the ground of lack of interest in acting. By way of preliminary observation, the Court recalled that an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in seeing the contested decision annulled. That interest must be vested and present and is evaluated on the date on which the action is brought. The Court also observed that the mere fact that a Commission decision declares aid compatible with the common market and thus, in principle, does not have an adverse effect on the undertakings receiving the aid does not dispense the Community judicature from examining whether the Commission's finding has binding legal effects such as to affect the interests of those undertakings.

In the first place, the Court held that the fact that the decision did not correspond to the position put forward by applicants during the administrative procedure did not in itself produce binding legal effect such as to affect their interests and could not therefore in itself form a basis for their interest in bringing proceedings. The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible for granting the aid. The undertakings that receive aid and the local authorities within that State which grant the aid are considered, in the same way as competitors of the recipients of the aid, only to be 'interested parties' in that procedure. The Court added that such applicants are not in the least deprived of any effective judicial protection against the Commission decision characterising a capital contribution as State aid. Indeed, even if the action for annulment were declared inadmissible, there would be nothing to prevent those applicants from requesting the national courts, in the course of any proceedings before them in which they were called upon to accept the consequences of the alleged nullity of the capital contribution to which they referred, to make a reference for a preliminary ruling under Article 234 EC putting in issue the validity of the Commission decision in so far as it found that the measure in question was State aid.

In the second place, as regards the alleged negative consequences entailed by the classification of the capital contribution as State aid, the Court considered that an applicant cannot rely upon future uncertain circumstances to establish his interest in applying for annulment of the contested act. That fact that an applicant refers to the 'possible' consequences of the alleged nullity of a capital contribution under company law and the law on insolvency and not to consequences which are certain is therefore insufficient for such an interest to be recognised. Furthermore, the Court observed that the applicants, public shareholders of the recipient of the aid, had not demonstrated that they had a legal interest of their own, distinct from that of the recipient, in seeking annulment of the decision. Unless he is able to show a legal interest in bringing proceedings separate from that of an undertaking which he partly controls and which is concerned by a European Union measure, a person cannot defend his interests in relation to that measure other than by exercising his rights as a member of that undertaking.

In Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 *Regione autonoma della Sardegna and Others* v *Commission* (judgment of 20 September 2011, not yet published, under appeal), the Court rejected the plea of inadmissibility raised by the Commission and held that the fact that applicants and the interveners had not brought an action within the specified time-limit against a correction decision having the same object and purpose as a decision to initiate the formal investigation procedure did not prevent them from putting forward pleas in law alleging the illegality of that decision in order to oppose the Commission's final decision.

In effect, a decision closing the formal investigation procedure produces legal effects which are binding on and capable of affecting the interests of the parties concerned, since it concludes the procedure in question and definitively decides whether the measure under review is compatible with the rules applying to State aid. Accordingly, interested parties are always able to contest that decision and must, in that context, be able to challenge the various elements which form the basis for the position definitively adopted by the Commission. The Court added that that right is independent of whether the decision to initiate the formal review procedure may be the subject-matter of an action for annulment. Admittedly, an action may be brought against that initiation decision when it gives rise to definitive legal effects, which is the case where the Commission initiates the formal investigation procedure in respect of a measure which it provisionally classifies as new aid. None the less, the right to contest a decision to initiate the procedure may not diminish the procedural rights of interested parties by preventing them from challenging the final decision and relying in support of their action on defects at any stage of the procedure leading to that decision.

2. Substantive rules

(a) Concept of State aid

In Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission* (judgment of 12 May 2011, not yet published, under appeal), the Court further developed the concept of State resources, in particular the condition that the measures concerned must be attributable to the State.

The Court observed on that point that the fact that the advances had been made by the region and by the municipal authority, and therefore by territorial communities and not by the central authority, was not in itself such as to allow those measures to escape the field of application of Article 107(1) TFEU. The Court stated, moreover, that the fact that the financing of the measures in issue from the region's and the municipal authority's own resources was not of a fiscal or a parafiscal nature could not allow those measures to escape classification as State aid. The decisive test in respect of State resources is public control, and Article 107(1) TFEU encompasses all financial means, whether or not they result from compulsory contributions, by which the public sector may actually support undertakings.

In *Regione autonoma della Sardegna and Others* v *Commission,* the Commission was accused of having incorrectly classified the measures in issue as unlawful new aid, on the ground that it was not notified, rather than as existing aid that had been misused.

The Court observed that where the alteration affects the actual substance of the original scheme, the original scheme is transformed into a new aid scheme. On the other hand, if the alteration is not substantive, only the alteration as such is liable to be classified as new aid. In the present case, the approval decision expressly referred to the condition that the application for aid had to be submitted before work was started on the investment projects. Pointing out that, on the basis of the non-notified measure, the Region of Sardinia had been permitted to grant aid for projects on which work had started before the submission of the applications for aid, the Court considered that the scheme as it had been applied had therefore been altered by comparison with the scheme approved. According to the Court, that alteration could not be regarded as minor or insignificant. Indeed, since, as was clear from the 1998 Guidelines, [10] the Commission regularly made its approval of regional aid schemes subject to the condition that the application for aid must be made before work was started on the projects, it was clear that the removal of that condition was likely to influence the assessment of the compatibility of the aid measure with the common market. The Court concluded that the aid in issue was new aid and not existing aid. That new aid was unlawful, since the alteration of the approved scheme had not been notified to the Commission.

Last, the Court observed that the aid in issue could not be classified as a misuse of aid, as that classification required that the beneficiary would use the aid in contravention of the decision by which

[10] Guidelines of 10 March 1998 on national regional aid (OJ 1998 C 74, p. 9).

it had been approved. However, in the present case, the infringement of the approval decision was attributable not to the beneficiaries of the aid but to the Region of Sardinia.

(b) The Commission's discretion — Examination of an aid scheme — Exempting regulation

In Case T-357/02 RENV *Freistaat Sachsen* v *Commission* (judgment of 14 July 2011, not yet published), the Court rejected the applicant's plea that the Commission had failed to exercise its discretion during the investigation of the aid scheme at issue and had merely applied the criteria provided for in the regulation exempting SMEs. ([11])

The Court observed that the object of the regulation exempting SMEs is to declare compatible with the common market certain aid granted to small and medium-sized enterprises (SMEs) and to exempt States from the obligation to notify that aid. However, that does not mean that no aid in favour of small and medium-sized enterprises can be declared compatible with the common market following an examination by the Commission by reference to the criteria defined in Article 87(3) EC, after notification by a Member State. The Court also stated that, while the Commission can establish general implementing measures which structure the way in which it exercises its discretion under Article 87(3) EC, it cannot wholly deprive itself of that discretion where it examines a specific case, and that is particularly so in relation to cases which it has not expressly referred to, or indeed has not regulated, in those general implementing rules. That discretion is therefore not exhausted by the adoption of such general rules and there is in principle no obstacle to an individual assessment outside the context of those rules, provided, however, that the Commission complies with the higher rules of law, such as the rules of the Treaty and the general principles of European Union law. In this case, the Court found that the Commission had indeed exercised that discretion when examining the compatibility of the measure not only by reference to the criteria defined in the regulation exempting SMEs but also on the basis of Article 87(3) EC.

(c) Concept of serious difficulties

In Case T-30/03 RENV *3F* v *Commission* (judgment of 27 September 2011, not yet published, under appeal), the applicant sought annulment of the Commission's decision not to raise objections against the Danish tax regime in issue. The Court dismissed the action on the ground that the applicant had not shown that the Commission had been confronted with serious difficulties of assessment and should have initiated the formal investigation procedure.

According to the Court, the formal investigation procedure is obligatory where the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The notion of serious difficulties is an objective one, and whether or not such difficulties exist requires investigation of both the circumstances in which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market. It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment. The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of

([11]) Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 [EC] and 88 [EC] to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33).

consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision.

For the purpose of establishing the existence of serous difficulties reference was made, in particular, to the length of the preliminary investigation procedure. In that regard, the Court stated that, although the Commission is not required to carry out a preliminary investigation within a specific period where the State measures have not been notified, as in the case in point, it is none the less required to conduct a diligent and impartial examination of the complaints received concerning the non-notified State measures and cannot prolong the preliminary investigation indefinitely. Whether or not the duration of the preliminary investigation procedure is reasonable must be determined in relation to the particular circumstances of each case.

In the present case, the Court considered that although a preliminary examination that had lasted more than four years might be considered, as a whole, to have exceeded the time normally required for a preliminary examination, that duration was justified to a large extent by the circumstances and context of the procedure. The Court took account, in particular, of the fact that the tax regime in issue had been the subject of legislative amendment which had given rise to numerous discussions and exchanges of correspondence between the Member State and the Commission. Furthermore, while the duration of the preliminary examination may constitute an indication of the existence of serious difficulties, it does not of itself suffice to show the existence of such difficulties. It is only if it is reinforced by other factors that the passage of time, even if that time considerably exceeds the time usually required for a preliminary examination, may lead to the conclusion that the Commission encountered serous difficulties of assessment necessitating initiation of the formal examination procedure.

(d) Concept of economic activity

In *Freistaat Sachsen and Others* v *Commission,* the Court was required to rule on whether the construction of airport infrastructure, when that infrastructure was made available to managers of infrastructures, constituted an economic activity.

In the context of competition law, the concept of ‘undertaking’ covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity. In that regard, the Court found, first, that the management of airport infrastructure is an economic activity, in particular where the undertaking provides airport services for money coming from airport taxes, which must be regarded as remuneration for the provision of services by the concession holder of the airport. The Court also stated that the fact that an undertaking manages a regional airport and not an international airport does not alter the economic nature of its activity inasmuch as that activity consists in providing services for remuneration in the regional airport market. The operation of a runway is part of the economic activity of the managing undertaking, particularly where it is commercially exploited. Second, the Court held that, for the purposes of examining the economic nature of the undertaking’s activity in the context of the public financing of the development of a runway, there is no need to dissociate the activity of building or enlarging infrastructure from the subsequent use to which it is put and that the nature of the development activity must be determined according to whether or not the subsequent use of the infrastructure built amounts to an economic activity. The landing and take-off runways are essential elements for the economic activities engaged in by an airport operator. The construction of landing and take-off runways thus permits an airport to engage in its principal economic activity or, in the case of the construction of an additional runway or the extension of an existing runway, to develop that activity.

(e) Private investor in a market economy test

In *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission,* the Court held that the Commission had, as it was required to do, carried out an analysis designed to ensure that the recipient of the aid could not have obtained a loan in similar conditions on the credit market. The Court observed that, in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking received an economic advantage which it would not have obtained under normal market circumstances. For that purpose, it is relevant to apply the test based on the possibilities which the recipient undertaking has to obtain the sums in question in similar conditions on the capital market. In particular, it is appropriate to ask whether a private investor would have carried out the transaction in question in the same conditions. In this case, the Court observed that the Commission had relied on the finding that, owing to its financial situation, the company Arbel Fauvet Rail could not have obtained funds on the credit market on terms as advantageous as those obtained from the applicants, as the advances in issue had been made without any security guaranteeing repayment, while the interest rates applied corresponded to normal secured loans. In addition, the Court emphasised that the fact that a borrower can obtain short-term credit does not provide a reliable indication of its ability to obtain a longer-term loan, repayment of which will depend on its capacity to survive.

In Case T-1/08 *Buczek Automotive* v *Commission* (judgment of 17 May 2011, not yet published, under appeal), the Court held that the Commission's application of the test of the hypothetical private creditor was contrary to Article 87(1) EC and that the Commission had therefore failed to establish properly the existence of State aid.

The Court observed that when a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. It was therefore for the Commission to determine, for each public body in question, having regard inter alia to the abovementioned factors, whether the debt remissions granted by them were manifestly more generous than the remission that would have been granted by a hypothetical private creditor in a situation comparable vis-à-vis the undertaking concerned to that of the public body in question and seeking to recover the sums owed to it.

In the present case, the Commission had therefore been required to establish whether, taking those factors into account, a private creditor would have opted for the legal procedure for the recovery of debts over insolvency proceedings, as the public bodies had. The Court found, however, that the Commission did not have at the time the contested decision was adopted specific evidence enabling it to conclude that a private creditor would have opted for the insolvency procedure and would not have pursued the legal procedure for recovery of the debts. The Court observed that, with regard to the benefit that a hypothetical private creditor could have hoped to obtain in the context of insolvency proceedings, the Commission had merely asserted that 'careful examination of the advantage derived from rescheduling the debt would have shown that the potential recovery would not have exceeded the safe return inherent in the firm's liquidation', without, however, identifying in the contested decision the material evidence on which it based that assertion. In particular, the Commission had failed to state in the contested decision whether it had had in its possession, in support of that assertion, analyses comparing the benefit which would have been obtained by the hypothetical private creditor following insolvency proceedings — taking into account inter alia the costs incurred in the context of such proceedings — by comparison with the benefit obtained from the legal procedure for the recovery of the debts. The contested decision likewise failed to state whether the Commission had had in its possession studies or analyses comparing the duration of insolvency proceedings with that of the legal procedure for the recovery of the debts.

3. Procedural rules

(a) Obligation to state reasons

In *Buczek Automotive* v *Commission,* the Court held that the Commission had not given sufficient reasons for its decision concerning the conditions relating to the effect on trade between Member States and the distortion or threatened distortion of competition.

The Court observed that the Commission is not under a duty to carry out an economic analysis of the actual situation on the relevant market, of the applicant's market share, of the position of competing undertakings or of trade flows between Member States in the goods and services in question, once it has explained how the aid at issue distorts competition and affects trade between Member States. None the less, even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the grounds of its decision.

In this case, the Court found that the Commission, in the contested decision, had merely reproduced the wording of Article 87(1) EC and had not explained, even succinctly, the facts and legal considerations taken into account in the assessment of those conditions. Nor did the contested decision contain the slightest evidence capable of demonstrating that the aid in question was liable to affect trade between Member States and to distort or threaten to distort competition, not even in the description of the circumstances in which that aid had been granted.

In *Freistaat Sachsen and Others* v *Commission*, the Court annulled for breach of the obligation to state reasons Article 1 of the Commission's decision inasmuch as it fixed at EUR 350 million the amount of State aid that the Federal Republic of Germany intended to granted to Leipzig-Halle airport.

The Court held that, although the Commission accepted that certain costs connected with the capital contribution fell within the public policy remit and could therefore not be regarded as State aid, it had none the less considered, in Article 1 of the decision concerned, that the entire capital contribution constituted State aid.

Although no provision of European Union law requires the Commission to fix the precise amount of aid to be reimbursed, where the Commission decides to state the amount of State aid — even where the aid is declared compatible with the common market — it is under a duty to state the correct amount of the aid. In this case, the Court observed that the amount of the aid referred to in Article 1 of the decision concerned seemed to be incorrect, since the amounts falling within the public policy remit did not constitute State aid and thus had to be deducted from the total amount of the capital contribution.

(b) Rights of the defence

In *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis* v *Commission*, the Court referred to the settled case-law according to which the interested parties cannot rely on rights of defence as such, but have only the right to be heard and to be involved in the procedure to a sufficient extent, taking the circumstances of the case into account. Although it cannot be precluded that a local authority may have a status that renders it sufficiently independent vis-à-vis the central government of a Member State to play a fundamental role in defining the political and economic environment in which undertakings operate, the Court emphasised that the role of interested parties other than the Member State concerned is limited to acting as a source of information for the Commission in the procedure for the review of the State aid. They cannot thus claim the right to participate in an *inter partes* discussion with the Commission.

(c) Protection of legitimate expectations

In *Regione autonoma della Sardegna and Others* v *Commission,* the Court rejected the complaint alleging breach of the principle of protection of legitimate expectations, observing that protection of legitimate expectations could not be relied upon by a person who had committed a manifest infringement of the rules in force. That was the case here, in so far as the Region of Sardinia had introduced an aid scheme which was unlawful on the ground that it had not been notified to the Commission. That breach was considered to be manifest, since both the 1998 Guidelines and the approval decision ([12]) made explicit reference to the condition that the application must be submitted before work is started.

As regards the legitimate expectation which the recipients based on the existence of an earlier approval decision, the Court observed that a legitimate expectation in the lawfulness of State aid can, in principle, save in exceptional circumstances, be relied upon only where that aid was granted in a manner compatible with the procedure laid down in Article 88 EC, which a diligent operator should normally be able to determine. In this case, the Court observed that the approval decision had clearly stated that the Commission's approval related only to aid for projects started after the submission of the application for aid. The recipients of the disputed aid, which did not comply with that condition, could therefore not, in principle, rely on a legitimate expectation in the lawfulness of the aid. Although the case-law does not preclude the possibility that, in order to challenge its repayment, recipients of aid may, in the procedure for the recovery of the aid, plead exceptional circumstances, they can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, which alone are competent to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

Community trade mark

Decisions relating to the application of Regulation No 40/94, replaced by Regulation No 207/2009, ([13]) continued to represent in 2011 a significant number of the cases dealt with by the Court (240 cases disposed of, 219 cases lodged). It is therefore possible only to give a brief outline of those decisions.

([12]) Commission Decision SG(98) D/9547 approving the aid scheme 'N 272/98 — Italy — Aid in favour of the hotel industry'.

([13]) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

1. Absolute grounds for refusal

The year 2011 was marked in particular by the first two cases involving the application of Article 7(1)(f) of Regulation No 207/2009. The Court dismissed two actions brought against refusals to register Community trade marks deemed to be contrary to public policy and to accepted principles of morality. First of all, in Case T-232/10 *Couture Tech* v *OHIM* (*Representation of the Soviet coat of arms*) (judgment of 20 September 2011, not yet published), the Court stated that signs likely to be perceived by the relevant public as being contrary to public policy or to accepted principles of morality are not the same in all Member States, inter alia for linguistic, historic, social and cultural reasons. It concluded from this that it is necessary to take account not only of the circumstances common to all Member States of the European Union, but also of the particular circumstances of individual Member States which are likely to influence the perception of the relevant public within those States. The Court observed that factors arising from national law (in this case Hungarian) are not applicable by reason of their normative value and are not, therefore, rules by which the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) is bound. None the less, those factors are evidence of facts which make possible an assessment of how certain categories of signs are perceived by the relevant public in the Member State concerned.

Having noted that the Hungarian Criminal Code bans certain uses of 'symbols of despotism', including the hammer and sickle and the five-point red star, that ban also covering the use of those signs as trade marks, the Court stated, inter alia, that the semantic content of the coat of arms of the former USSR has not been diffused or transformed to the point where it would no longer be perceived as a political symbol. The Court therefore took the view that the Board of Appeal was right to find that the use of the mark applied for as a trade mark would be perceived by a substantial section of the relevant public in Hungary as being contrary to public policy or to accepted principles of morality within the meaning of Article 7(1)(f) of Regulation No 207/2009.

Next, in Case T-526/09 *PAKI Logistics* v *OHIM* (*PAKI)* (judgment of 5 October 2011, not published), the sign PAKI was at issue. The Board of Appeal had refused registration of that sign on the ground that it is perceived by the English-speaking public of the European Union as a racist term, and is a degrading and insulting name for a Pakistani or, more generally, persons from the Indian subcontinent, particularly those living in the United Kingdom. In that context, the Court stated that, although Article 7(1)(f) of Regulation No 207/2009 is aimed, first and foremost, at any sign whose use is prohibited by a provision of European Union or national law, even in the absence of such a prohibition, its registration as a Community trade mark is precluded by the absolute ground for refusal laid down by that provision if it is deeply offensive. The existence of that ground for refusal must be assessed on the basis of the criteria of a reasonable person with average sensitivity and tolerance thresholds. Moreover, the relevant public cannot be limited to the public at whom the goods and services in respect of which registration is sought are directly targeted. Account must be taken of the fact that signs covered by that ground for refusal will shock not only the public at whom the goods and services designated by the sign are targeted, but also other persons who, although not concerned by those goods and services, will be faced with that sign in an incidental manner in their daily lives. Rejecting the various arguments of the applicant that the term 'paki' is not unequivocal and discriminatory in all circumstances, the Court concluded that the Board of Appeal was right to find that that term is regarded as a racist insult by the English-speaking public of the European Union and that, consequently, its registration is precluded by public policy and accepted principles of morality.

Moreover, in Case T-258/09 *i-content* v *OHIM* (*BETWIN*) (judgment of 6 July 2011, not yet published), the Court annulled the contested decision on the ground that the Board of Appeal had failed to provide to the requisite legal standard a statement of reasons in respect of the descriptive character and the absence of distinctive character of the mark applied for in respect of certain services covered in the application for registration. The Court recalled, in that regard, that the option for the Board of Appeal to use general reasoning for a series of goods or services can extend only to goods or services which have a sufficiently direct and specific link to each other to the extent that they form such a sufficiently homogenous category as to enable all the factual and legal considerations constituting the grounds of the decision in question, first, to explain adequately the reasoning followed by the Board of Appeal for each of the goods and services belonging to that category and, second, to be applied without distinction to each of the goods or services concerned. In the case in point, the contested decision provided only a few indicators as to how the various grounds of refusal were linked to the very numerous services covered by the mark applied for. Similarly, the Court observed that the statement of reasons for the absence of distinctive character of the mark applied for is limited to the reference that, as a description 'whose meaning anyone would understand without specialised knowledge and without undertaking any analysis', the mark applied for, which is also devoid of any distinctive character, is barred from registration pursuant to Article 7(1)(b) of Regulation No 207/2009. The Court also stated that the Board of Appeal found merely that the term 'betwin' conveyed simply the idea of a general incitement to participate in certain bets or games, or to obtain economic advantages in the form of winnings, without specifying the possible link with a particular supplier and that, accordingly, the sign in question did not enable the consumer concerned to conceive of it as a reference to a particular commercial source of the services in connection with the possibility of bets and winnings and to perceive it as the individual sign of a particular supplier in that sector. In those circumstances, the Court held that, for services other than those directly connected with betting and prize competitions, it was required to raise of its own motion a failure to state the grounds. It is not possible to understand how that global reasoning of the Board of Appeal could apply to all the other heterogeneous services which are the subject of the trade mark application, some of which have no connection with bets and winnings.

With respect to the sign TDI, the Court was also called upon, in Case T-318/09 *Audi and Volkswagen* v *OHIM* (*TDI*) (judgment of 6 July 2011, not yet published, under appeal), to dismiss the action brought against the decision of the Board of Appeal according to which the sign TDI, consisting of the first letters of the words contained in the expressions 'turbo direct injection' or 'turbo diesel injection', was descriptive throughout the European Union.

In the first place, the Court stated that the word sign TDI — whose registration as a Community trade mark was sought in respect of 'vehicles and constructive parts thereof' — may serve to designate the essential characteristics of the goods and services covered by the trade mark application. It is the quality of vehicles which is designated by that word sign, given that being equipped with a 'turbo diesel injection' or 'turbo direct injection' engine is the essential characteristic of a vehicle. As regards constructive parts for vehicles, the word sign TDI designates the type of goods. The Court therefore held that the sign TDI is descriptive of the goods concerned in the entire European Union. In the second place, the Court rejected the argument that, for the purposes of demonstrating acquisition of distinctive character through use, first, the acceptance of the mark does not have to be proved in all the Member States and, second, the principles applicable to the reputation of a mark must be applied, so that it is sufficient to show that the mark has been accepted in a substantial part of the territory of the European Union. The Court took the view that it is in all the Member States of the European Union in which the mark applied for did not, *ab initio*, have distinctive character that it must have become distinctive through use. In that regard, the Court stated inter alia that, in the light of the object of Article 9(1)(c) of Regulation No 207/2009 — which seeks to protect the legitimate interests of proprietors whose marks have, on account of their commercial and advertising efforts, acquired a reputation — the method used to determine the relevant territory when applying that provision cannot be applied with respect to the acquisition of distinctive character through use.

Furthermore, in Case T-341/09 *Consejo Regulador de la Denominación de Origen Txakoli de Álava and Others* v *OHIM* (*TXAKOLI*) (judgment of 17 May 2011, not yet published), the Court was called upon to interpret Article 66(2) of Regulation No 207/2009, relating to Community collective marks, which provides for an exception to Article 7(1)(c) of Regulation No 207/2009. According to Article 66(2) of Regulation No 207/2009, signs or indications which — although descriptive — may serve to designate the geographical origin of the goods or services may constitute Community collective marks. In the case in point, the applicants maintained that the word 'txakoli' constitutes an indication which may serve to designate the geographical provenance of goods and services for which registration is sought, since it is another traditional term protected by the wine regulation which is reserved for wines with designations of origin for which the applicants were the regulatory boards.

The Court held, in that regard, that that word is considered by the applicable regulation only as an indication of the characteristic of wines and not as an indication of their geographical provenance, despite the alleged link existing between the word 'txakoli' and the Basque Country. Article 66 of Regulation No 207/2009 must not be interpreted broadly. That would amount to encroaching on the powers of the authorities intervening in the area of designations of origin or geographical indications. Moreover, the exclusivity of the word 'txakoli' conferred by other provisions of European Union law cannot automatically imply the registration of a sign at issue as a Community mark. Such registration confers specific rights on its proprietor, which do not arise from other rules such as those coming under agricultural policy.

Lastly, the Court stated that the refusal to register the mark applied for does not affect the exclusive right which, so far, the applicants have, to use the words in question in accordance with the wine regulation, and does not result in authorising the use of that word for operators other than those who benefit from that right under that regulation, or in preventing the applicants from requiring that that regulation be respected.

Finally, in Case T-508/08 *Bang & Olufsen* v *OHIM* (*Representation of a loudspeaker*) (judgment of 6 October 2011, not yet published), the Court rejected the action brought against the decision of the Board of Appeal — which was itself hearing the case following the General Court's annulment of a previous decision — ([14]) which had refused registration of a Community trade mark consisting of a three-dimensional sign in the shape of a loudspeaker, since the sign consisted exclusively of the shape which gave substantial value to the goods within the meaning of Article 7(1)(e)(iii) of Regulation No 40/94.

In the case in point, the Court was faced with the question whether the Board of Appeal had erred in law by proceeding, after concluding that a further absolute ground for refusal could apply in the circumstances of the case — since the first examination, which had led to the annulling judgment of the Court, related only to Article 7(1)(b) of Regulation No 40/94, that is to say the requirement of distinctiveness — to examine the sign under the absolute ground for refusal deriving from Article 7(1)(e)(iii) of that regulation.

The Court replied in the negative and stated that, even if a sign, the object of an application for a Community trade mark, were to be considered by the Court, contrary to the decision reached by OHIM, not to be covered by one of the absolute grounds for refusal referred to in Article 7(1) of Regulation No 40/94, the annulment by the Court of the OHIM decision refusing registration of that mark would necessarily lead OHIM, which is required to give due effect to the grounds and operative part of the Court's judgment, to reopen the procedure for the examination of the

([14]) Case T-460/05 *Bang & Olufsen* v *OHIM (Shape of a loudspeaker)* [2007] ECR II-4207.

mark in question and to reject it where it considers that the sign in question is covered by another absolute ground for refusal referred to in that provision. Pursuant to Article 74(1) of Regulation No 40/94, when considering the absolute grounds for refusal, OHIM is required to examine of its own motion the relevant facts which may lead it to apply an absolute ground for refusal. Moreover, a sign caught by Article 7(1)(e) of Regulation No 40/94 can never acquire distinctive character for the purposes of Article 7(3) of the regulation through the use made of it, although that possibility exists, according to that last provision, for signs covered by the grounds for refusal provided for in Article 7(1)(b) to (d) of Regulation No 40/94.

Consequently, if the examination of a sign under Article 7(1)(e) of Regulation No 40/94 leads to the conclusion that one of the criteria mentioned in that provision is met, this results in a release from examination of the sign under Article 7(3) of the regulation, since registration of the sign in such circumstances is clearly impossible. That release explains the advantage of undertaking a prior examination of the sign under Article 7(1)(e) of Regulation No 40/94 where several of the absolute grounds for refusal provided for in paragraph 1 may apply, although such a release may not be interpreted as implying that there is an obligation to examine that sign first under Article 7(1)(e) of Regulation No 40/94.

2. Relative grounds for refusal

In Case T-10/09 *Formula One Licensing* v *OHIM — Global Sports Media* (*F1-LIVE*) (judgment of 17 February 2011, not yet published, under appeal), the Court found that there was no likelihood of confusion between the mark F1-LIVE designating goods or services relating to the field of Formula 1 (namely magazines, books and publications, the reservation of tickets and arranging competitions on the Internet) and the marks F1 and F1 Formula 1 of Formula One Licensing BV, on account of the descriptive character attributed by the public to the 'F1' element and of the low level of similarity between the signs.

The relevant public will perceive the combination of the letter 'F' and the numeral '1' as an abbreviation of 'Formula One', which is the commonly used designation of a category of racing car and, by extension, of races involving such cars. Moreover, the relevant public may perceive the 'F1' element in the earlier Community figurative trade mark F1 Formula 1 as the trade mark used by the proprietor of that mark in relation to its commercial activities in the field of Formula 1 motor racing. Thus, the relevant public will not perceive the 'F1' element in the mark applied for as a distinctive element, but as an element with a descriptive function. Accordingly, the 'F1' element, in ordinary typeset, has only a weak distinctive character in relation to the goods and services covered and the reputation of the Community figurative mark used in the European Union is essentially linked to the logotype F1 of the F1 Formula 1 mark.

As regards, specifically, the word marks F1, consumers will not connect the 'F1' element in the mark applied for with the proprietor of the earlier marks, because the only sign that they have learned to associate with that proprietor is the F1 Formula 1 logotype, and not the sign F1 in standard typeset. Consumers will regard the sign 'F1' in ordinary typeset as an abbreviation of 'Formula 1', that is to say, as a description.

Given the lack of visual similarity and only limited phonetic and conceptual similarities, the relevant public will not confuse the mark applied for with the figurative mark F1 Formula 1. In that connection, the fact that the public attributes a generic meaning to the sign F1 means that it will understand that the mark applied for concerns Formula 1, but, because of its totally different layout, the public will not make a connection between that mark applied for and the activities of the proprietor of the earlier mark.

3. Procedural questions

In Case T-222/09 *Ineos Healthcare* v *OHIM — Teva Pharmaceutical Industries (ALPHAREN)* (judgment of 9 February 2011, not yet published), the Court clarified its case-law on the examination by the Board of Appeal of facts which are well known.

Under Article 74 of Regulation No 40/94, in proceedings relating to relative grounds for refusal of registration, OHIM's examination is restricted to the facts, evidence and arguments provided by the parties and the relief sought. According to the Court, that provision relates, in particular, to the factual basis of decisions of OHIM, that is, the facts and evidence on which those decisions may be validly based. Thus, the Board of Appeal, when hearing an appeal against a decision terminating opposition proceedings, may base its decision only on the facts and evidence which the parties have presented. However, the restriction of the factual basis of the examination by the Board of Appeal does not preclude it from taking into consideration, in addition to the facts expressly put forward by the parties to the opposition proceedings, facts which are well known, that is, which are likely to be known by anyone or which may be learnt from generally accessible sources.

In the case in point, the Court stated that, although it was taken from the results of Internet research carried out by the Board of Appeal, the description of the pharmaceutical preparations and their therapeutic indications on which the Board of Appeal based its assessment of the similarity of certain goods could not, having regard to the highly technical of those goods, be regarded as information constituting well-known facts. Given that, without the use of the information in question, the contested decision would have been substantially different, the Court partially annulled that decision.

In Case T-145/08 *Atlas Transport* v *OHIM — Atlas Air (ATLAS)* (judgment of 16 May 2011, not yet published, under appeal), the Court was able to clarify, first, the applicable requirements as regards the obligation to set out the grounds of an appeal before the Board of Appeal and, second, the review carried out by the Court of the Board of Appeal's decision relating to the suspension of invalidity proceedings.

In the first place, the Court observed that the notice of appeal must be filed in writing at OHIM within two months after the date of notification of the decision and that within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed. The Court concluded from this that an appellant wishing to bring an appeal before the Board of Appeal is required, within the prescribed time-limit, to file with OHIM a written statement setting out the grounds for its appeal, failing which his appeal is to be dismissed as inadmissible, and that those grounds involve more than an indication of the decision appealed and of the fact that the appellant wishes it to be amended or annulled by the Board of Appeal. Further, it follows from a literal reading of the word 'grounds' that the appellant before the Board of Appeal must set out in a statement the reasons for his appeal. It is not for the Board of Appeal to determine, by means of inferences, what are the grounds on which the appeal of which it is seised is based. Accordingly, where the appellant lodges a statement, he must set out, in writing and sufficiently clearly, what matters of fact and/or of law support his request. In the case in point, in light of the absence of clear and intelligible grounds set out in the appellant's letters, and given that the statement of grounds before the Board of Appeal must, inter alia, enable a potential intervener, unassisted by a lawyer, to assess whether it would be appropriate for it to respond to the arguments contained in the appeal, the Court held that the appeal before the Board of Appeal failed to satisfy the requirements of Article 59 of Regulation No 40/94.

In the second place, the Court recalled that the possibility of suspension of the procedure before the Board of Appeal in opposition proceedings constitutes the expression of the principle generally recognised in Member States relating to the possibility for a decision-making authority to suspend proceedings of which it is seised where that is appropriate in the circumstances. Application by analogy of that possibility is justified in the context of invalidity proceedings, since both opposition proceedings and proceedings based on relative grounds for invalidity are designed to assess the likelihood of confusion between two marks, and the possibility of suspending proceedings contributes to the effectiveness of those proceedings. Accordingly, the Board of Appeal has the power to suspend invalidity proceedings where this is appropriate in the circumstances. The Court also held that the discretion of the Board of Appeal whether or not to suspend proceedings is broad. That discretion does not however take the Board of Appeal's assessment outside the scope of judicial review; that review is limited to ensuring that there is no manifest error of assessment or misuse of powers. In particular, the Court specified that, in that context, the Board of Appeal must comply with the general principles governing procedural fairness within a community governed by the rule of law by taking into account not only the interests of the party whose Community mark is contested, but also those of the other parties.

In addition, in Case T-36/09 *dm-droguerie markt* v *OHIM — Distribuciones Mylar (dm)* (judgment of 9 September 2011, not yet published), ([15]) the Court held that, where OHIM becomes aware of a linguistic error, error of transcription or obvious mistake in a decision, it must correct spelling mistakes or grammatical errors, errors of transcription or errors which are so obvious that nothing but the wording as corrected could have been intended. Furthermore, the jurisdiction of the Opposition Divisions to give a fresh decision in proceedings in which they have already adopted and notified a decision bringing those proceedings to an end cannot go beyond the situations envisaged in Article 42 of Regulation No 207/2009 (revocation, correction of clerical errors and review proceedings). In the case in point, since the amendments made consisted not only in completing an unfinished sentence the meaning of which was incomprehensible but also in eliminating an internal contradiction in the grounds and a contradiction between the grounds and the operative part, the Court concluded that the correction to the original version of the Opposition Division's decision concerned the very substance of that decision and in consequence could not be construed as the correction of a clerical error. In view of the gravity and blatancy of that irregularity, the Court annulled the decision of the Board of Appeal in so far as the Board failed to find that the amended version of the Opposition Division's decision was non-existent and in so far, therefore, as it did not declare that measure null and void.

Lastly, in Case T-504/09 *Völkl* v *OHIM — Marker Völkl (VÖLKL)* (judgment of 14 December 2011, not yet published), the Court held that, where an appeal before the Board of Appeal concerned only part of the goods or services covered by an application for registration or by the opposition, that appeal entitled the Board to carry out a new examination of the substance of the opposition, but only so far as concerns those goods or services, since the application for registration and the opposition were not brought before it as regards the other goods or services covered. Consequently, by annulling paragraph 2 of the operative part of the decision of the Opposition Division relating

([15]) See also, as regards Community designs, Case T-53/10 *Reisenthel* v *OHIM — Dynamic Promotion (Hampers, crates and baskets)* (judgment of 18 October 2011, not yet published), in which it was held that a breach of the rights of the defence stemming from the fact that a decision was adopted before expiry of the period of time granted to the applicant to submit its observations does not amount to an obvious error within the meaning of Article 39 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs (OJ 2002 L 341, p. 28). Such a breach amounts to an error affecting the procedure which leads to the adoption of the decision and, therefore, is capable of vitiating the substance of that decision.

to the other goods, the Board of Appeal exceeded the limits of its jurisdiction as defined in Article 64(1) of Regulation No 207/2009. [16]

4. Proof of genuine use of the mark

In Case T-108/08 *Zino Davidoff* v *OHIM — Kleinakis kai SIA (GOOD LIFE)* (judgment of 15 July 2011, not yet published), the opponent had inter alia based proof of genuine use of the earlier mark on a decision of the Greek Administrative Trade Marks Committee. The Court stated, in that context, that, whilst it is, in principle, permissible for OHIM to base its decision on a national decision as a piece of evidence, it must none the less examine with all the required care and in a diligent manner whether that piece of evidence is such as to show the genuine use of an earlier mark. In this case, a diligent examination of the Greek decision would have revealed that it only briefly refers to the documents submitted and the arguments raised by the parties during the procedure that led to its adoption. Furthermore, those documents were not put in the file before OHIM and were therefore not available to the Board of Appeal. The Board of Appeal was not therefore in a position to understand the reasoning, including the assessment of the evidence, or to identify the evidence on which the Greek decision finding a genuine use of the earlier mark was based. Thus, by adopting the conclusion of the Greek authorities, without further examining whether the Greek decision was based on conclusive evidence, the Board of Appeal acted in breach of Article 74(1) of Regulation No 40/94 and the duty of diligence.

5. Community designs

In Case T-68/10 *Sphere Time* v *OHIM — Punch (Watch attached to a lanyard)* (judgment of 14 June 2011, not yet published), the Court submitted the application, in the context of invalidity proceedings, of Article 7(2) of Regulation No 6/2002, which makes it possible not to take into consideration a disclosure if a design for which protection is claimed has been made available to the public by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title during the 12-month period preceding the date of filing of the application or the date of priority, on the condition that the owner of the design that is the subject of the application for invalidity establishes that it is either the creator of the design upon which that application is based or the successor in title to that creator.

In the same judgment, the Court expanded on the concept of 'informed user', by clarifying its earlier case-law [17] and by stating that, with respect to promotional items, that concept includes, firstly, a professional who acquires them in order to distribute them to the final users and, secondly, those final users themselves. The Court concluded from this that the fact that one of the two groups of informed users perceives the designs at issue as producing the same overall impression is sufficient for a finding that the contested design lacks individual character. Lastly, the Court

[16] It should be noted that, in that judgment, the Court also stated that, for the purposes of determining whether an applicant is entitled to challenge a decision of the Board of Appeal before the Court, the view must be taken that a decision of a Board of Appeal of OHIM does not uphold, for the purposes of Article 65(4) of Regulation No 207/2009, the claims of a party, where, after having rejected an application the admission of which would have ended the proceedings before OHIM in a manner favourable to the party which made it, the Board remits the case to the lower department for further prosecution, irrespective of the fact that that re-examination could give rise to a decision favourable to that party. That possibility is not sufficient to regard that situation as similar to that in which the Board of Appeal grants an application on the basis of some of the pleas or arguments submitted in support thereof and rejects or does not examine the remainder of the pleas or arguments raised in the application.

[17] Case T-153/08 *Shenzhen Taiden* v *OHIM Bosch Security Systems (Communications Equipment)* [2010] ECR II-2517.

stated that, in the context of the specific assessment of the overall impression, the graphic representation of the prior designs should not be examined in isolation and exclusively: instead all the elements presented should be subject to a global assessment allowing the overall impression produced by the design at issue to be determined in a sufficiently precise and certain manner. In relation, in particular, to a design that has been used, without having been registered, it may be the case that there is no graphic representation of the design showing its relevant details, comparable to the application for registration. According to the Court, it is therefore unreasonable to require the applicant for invalidity to provide such a representation in all cases.

Access to documents of the institutions

The year 2011 was a significant year from the point of view of the case-law on access to documents. In total, 23 cases were disposed of and dealt with varied aspects in that field.

1. Interest in bringing proceedings

In Case T-233/09 *Access Info Europe* v *Council* (judgment of 22 March 2011, not yet published, under appeal), the Court held that the disclosure of the full version of the requested document on the Internet site of a third party — which had not complied with the rules applicable to public access to Council documents — did not support the conclusion that the applicant did not have, or no longer had, an interest in applying for annulment of the Council decision refusing it full access to that document. An applicant retains inter alia an interest in seeking the annulment of an act of an institution in order to prevent its alleged unlawfulness from recurring in the future. However, that interest can exist only if the alleged unlawfulness is liable to recur in the future independently of the circumstances which have given rise to the action brought by the applicant. That is the case of an action for annulment against a Council decision refusing full access to a document, where, first, the applicant's allegation of unlawfulness is based on an interpretation of one of the exceptions provided for in Regulation No 1049/2001 ([18]) that the Council is very likely to rely on again at the time of a new request and, second, the applicant — as an association seeking to promote openness within the European Union — is likely to submit, in future, similar requests for access to the same type of document.

2. Definition of documents

In Case T-436/09 *Dufour* v *ECB* (judgment of 26 October 2011, not yet published), the Court was called upon to clarify the meaning of a 'document' as set out in Article 3(a) of Decision 2004/258 ([19]) of the European Central Bank (ECB) on public access to its documents, in the context of a request for access to a database.

In that regard, the Court inferred from the wording of Article 3(a) of Decision 2004/258 that the concept of a document is to be understood as stored content, which is capable of being reproduced or consulted after it has been produced, and that the manner in which the content is stored is not relevant. Moreover, the Court specified that a database is characterised by the existence of content of whatever nature and by a fixed base in which that content is stocked. The Court inferred from this that all the data contained in the database constituted a document within the meaning

([18]) 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).

([19]) Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42).

of Article 3(a) of Decision 2004/258. The Court added that, since the sets of data were independent of one another, the ECB was required to carry out a specific and individual examination and to authorise partial access to documents which could be broken down individually by means of the research tools available to the ECB for that database, on condition that those data did not fall within the exceptions laid down in Article 4 of Decision 2004/258.

3. Exception relating to protection of the decision-making process

In *Access Info Europe* v *Council*, the Court annulled the Council's decision, and held that the Council had not established that the disclosure of the identity of those who had made proposals in a document relating to a proposal for a regulation on public access to documents would seriously undermine the ongoing decision-making process. Having stated that the public has a right of access to all the documents whose disclosure it seeks, the Court recalled that an even wider access must be authorised where the Council is acting in its legislative capacity in order to enable citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights. In the case in point, the Court held that the risk that disclosure of the identity of those who made the proposals set out in the document in question would reduce the room for manoeuvre of Member States' delegations during a legislative procedure to alter their position and would seriously compromise the chances of finding a compromise does not amount to a sufficiently serious and reasonably foreseeable risk.

In Case T-471/08 *Toland* v *Parliament* (judgment of 7 June 2011, not yet published), the Court annulled the decision of the European Parliament by which it had refused to grant access to an audit report concerning the parliamentary assistance allowance drawn up by its internal audit service on the ground, inter alia, that its disclosure would seriously undermine its decision-making process. Although the Court acknowledged that the audit report concerned was indeed a document drawn up by the institution for internal use and that it concerned an issue on which the institution had not yet taken any decision, it held that the institution failed to establish to the requisite legal standard that disclosure of that document would specifically and actually undermine its decision-making process and would have a substantial impact on that process. The contested decision did not contain any tangible element which would allow the conclusion to be drawn that that risk that the decision-making process would be undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical. The Court added, in that regard, that neither the fact that the use by the Members of Parliament of the financial resources made available to them is a sensitive matter followed with great interest by the media nor the alleged complexity of the decision-making process could constitute in themselves an objective reason sufficient to justify the concern that the decision-making process would be seriously undermined.

4. Exception relating to protection of the purpose of inspections, investigations and audits

In Case T-29/08 *LPN* v *Commission* (judgment of 9 September 2011, not yet published, under appeal), the Court recalled that, although an institution must, as a rule, carry out a specific and individual examination of the content of each document requested in order to determine to what extent an exception to the right of access is applicable and whether partial access may be granted, it is possible to derogate from that obligation where, because of the particular circumstances of the case, it is obvious that access must be refused or granted. In such a case, it is in principle permissible for the institution to base its refusal decision on general presumptions applying to certain categories of documents.

In that regard, the Court held that, where an applicant does not have the right to consult the documents of the Commission's administrative file in infringement proceedings, the existence of a general presumption that disclosure of the documents of the administrative file would, in principle, undermine the protection of the purpose of investigations must be acknowledged, by analogy with the situation of interested persons under the procedure for reviewing State aid. It is therefore sufficient for the Commission to ascertain whether that general presumption must apply to all the documents concerned, and there is no need to carry out a prior specific and individual examination of the content of each of those documents. Where the infringement proceedings are ongoing, the Commission must necessarily proceed on the basis that that general presumption applies to all the documents concerned. That presumption does not however exclude the right for interested parties to show that a given document whose disclosure is requested is not covered by that presumption or that there is a higher public interest justifying disclosure of the document in question under Article 4(2) of Regulation No 1049/2001.

Moreover, in Case T-437/08 *CDC Hydrogene Peroxide* v *Commission* (judgment of 15 December 2011, not yet published), the applicant contested the Commission's decision refusing it access to the table of contents of the case-file relating to the participation of nine undertakings in a cartel on the hydrogen peroxide market. The Commission justified its refusal by invoking, inter alia, the need to protect the effectiveness of its cartel policy and, in particular, its leniency programme. The Court annulled the Commission's decision since it failed to show that disclosure of the document in question was likely specifically and actually to undermine the protected interests.

As regards the exception relating to the protection of commercial interests, the Court held that the interest of a company which took part in a cartel in avoiding damages actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.

With respect to the exception relating to the protection of the purpose of Commission investigations, the Court held that the investigation in a given case is closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts, because it is at that moment that the institution in question itself considers that the procedure has been completed. Moreover, the Court rejected the Commission's argument that the exception based on the concept of the purpose of the investigation activities is independent of any specific procedure and may be relied on, in a general way, to refuse disclosure of any document likely to undermine the Commission's cartel policy and, in particular, its leniency programme. Such a broad interpretation of the concept of investigation activities is incompatible with the principle that the exceptions laid down in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly. The Court stressed that nothing in Regulation No 1049/2001 leads to the supposition that European Union competition policy should enjoy, in the application of that regulation, treatment different from other European Union policies and that there is thus no reason to interpret the concept of the purpose of the investigation activities differently in the context of competition policy. Lastly, the Court observed that the leniency and cooperation programmes whose effectiveness the Commission is seeking to protect are not the only means of ensuring compliance with European Union competition law. Actions for damages before the national courts can also make a significant contribution to the maintenance of effective competition in the European Union.

5. Reliance on exceptions by the Member State which is the author of the act

Case T-362/08 *IFAW Internationaler Tierschutz-Fonds* v *Commission* (judgment of 13 January 2011, not yet published, under appeal) addressed the issue of the review carried out by the European

Union judicature on the application of a substantive exception relied upon by a Member State in the framework of Article 4(5) of Regulation No 1049/2001. That provision authorises a Member State to request the institution to which an application to disclose a document originating from that Member State has been made not to disclose that document without its prior agreement. ([20])

The Court stated that, where the decision of an institution refusing access to a document originating in a Member State corresponds to the latter's request pursuant to Article 4(5) of Regulation No 1049/2001, it is within the jurisdiction of the European Union judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. It follows that, because of the application of Article 4(5) of Regulation No 1049/2001, the review carried out by the European Union judicature is not limited to a *prime facie* review. The application of that provision does not prevent a complete review being carried out of the Commission's refusal decision, which must, in particular, respect the obligation to give reasons and be based on the substantive assessment made by the Member State concerned of the applicability of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001. In the context of the application of Article 4(5) of Regulation No 1049/2001, Member States none the less enjoy a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2002 could undermine the public interest. The assessment of the question whether disclosure of a document undermines the interest protected by those substantive exceptions can be among the political responsibilities of that Member State. In such a case, the Member State must enjoy a broad discretion, in the same manner as the institution. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers.

Common foreign and security policy — Restrictive measures

In 2011, a record number of cases (90) involving restrictive measures was brought. The judgments of the Court were marked by the speed with which they were delivered and by their affirmation of the requirements relating to the obligation to provide a statement of reasons for decisions imposing such measures.

Thus, in Case T-86/11 *Bamba* v *Council* (judgment of 8 June 2011, not yet published, under appeal) — resolved under the expedited procedure, in a chamber in extended composition and in a period of less than four months after the action was brought — a case was brought before the Court concerning the lawfulness of the restrictive measures taken against Ms Nadiany Bamba, the second wife of Mr Laurent Gbagbo, former President of Côte d'Ivoire. Those measures were taken against the backdrop of the presidential election which took place in Côte d'Ivoire in autumn

([20]) A similar issue was dealt with in Case T-250/08 *Batchelor* v *Commission* (judgment of 24 May 2011, not yet published). The Court recalled therein that the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 is intended to protect certain types of documents drawn up in the course of a procedure, the disclosure of which, even after that procedure has terminated, may undermine the decision-making process of the institution concerned. Such documents must contain 'opinions for internal use as part of deliberations and preliminary consultations within the institution concerned'. Documents sent to an institution by an external person or body, in order to be the subject of an exchange of views with the institution concerned, do not fall within the scope of that category.

2010, as a result of which the United Nations (UN) certified the victory of Mr Alassane Ouattara. The European Union also recognised the victory of Mr Ouattara and called on the Ivorian leaders, both civilian and military, to place themselves under the authority of the democratically elected President, and confirmed the determination of the European Union to take targeted restrictive measures against those who obstructed observance of the sovereign will expressed by the Ivorian people. In that regard, the Court pointed out that the effectiveness of judicial review implies that the European Union authority in question must communicate the grounds of the restrictive measures imposed, so far as possible, either at the time of their adoption or, at the very least, as swiftly as possible after that adoption, in order to enable the addressees thereof, within the periods prescribed, to exercise their right to bring an action. Where the party concerned is not afforded the opportunity to be heard before the adoption of an initial act imposing such measures, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned to make effective use of the legal remedies available to it to challenge the lawfulness of that act. As a rule, the statement of reasons for an act of the Council imposing such restrictive measures must refer not only to the statutory conditions of application of that act, but also to the actual and specific reasons why the Council considers, in the exercise of its discretion, that such measures must be adopted in respect of the party concerned. Since the Council enjoys such discretion with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds, it cannot be required to state with greater precision in what way freezing a person's funds may in concrete terms contribute to combating obstruction of the process of peace and national reconciliation or to produce evidence to show that the person concerned might use his funds to make such an obstruction in the future.

In the case in point, the Court stated that the Council merely set out vague and general considerations as justification for Ms Bamba's inclusion on the contested list. In particular, the indication that she is the director of the Cyclone group which publishes the newspaper *Le Temps* does not constitute a circumstance such as to provide a specific and concrete statement of reasons for the contested acts against her. In the absence of concrete evidence, that indication does not make it possible to understand in what way Ms Bamba was involved in obstruction of the peace and reconciliation processes through public incitement to hatred and violence and through participation in disinformation campaigns in connection with the 2010 presidential election.

In those circumstances, the Court held that the statement of reasons in the contested acts did not enable Ms Bamba to challenge their validity before it. The Court noted that that statement did not place it in a position to exercise its review of the merits of the contested acts and it therefore annulled the contested acts, although their effects were maintained until expiry of the appeal period before the Court of Justice, that is to say two months and 10 days from notification of the judgment, or, in the event of an appeal being lodged, after dismissal of that appeal, by application of Article 280 TFEU and the second paragraph of Article 264 TFEU.

In the context of the campaign against nuclear proliferation, it should also be noted that, in Case T-562/10 *HTTS* v *Council* (judgment of 7 December 2011, not yet published, delivered under the procedure by default), the Court annulled the regulation imposing restrictive measures on the applicant, and held that that the reasons provided by the Council were at first sight contradictory and did not make it possible to ascertain whether the applicant's name was placed on the list because of the continuance of the circumstances relied on in the previous regulation, namely the links between the applicant and the company HDSL, or the new circumstances, namely the direct links between the applicant and the company IRISL. In any event, neither the regulation nor the Council's letter of reply to the application for review made by the applicant makes it possible to assess the reasons why the Council considered that the matters set out by the applicant concerning the nature of its activities and its autonomy in regard to HDSL and IRISL were not capable of altering its position with regard to the continuance of restrictive measures concerning it. Similarly, the Council did not specify the nature of the control allegedly exercised over the applicant by IRISL or the activities which the applicant carries out on behalf of IRISL. The Court annulled the contested regulation in so far as it concerns the applicant for infringement of the obligation to state reasons. So as not to do serious and irreparable harm to the effectiveness of the restrictive measures imposed by the contested regulation, and to ensure that the applicant could not engage in conduct intended to circumvent the effect of later restrictive measures, the Court none the less decided to maintain the effects of that regulation for a period of no more than two months from the date of delivery of the judgment.

Environment — Scheme for greenhouse gas emission allowance trading

Case T-369/07 *Latvia* v *Commission* (judgment of 22 March 2011, not yet published, under appeal) concerned the Commission's decision declaring incompatible with the scheme for greenhouse gas emission allowance trading, set up by Directive 2003/87, [21] an aspect of the proposed amendment of the national allocation plan ('the NAP') of emission allowances for the Republic of Latvia for the period from 2008 to 2012. That amended NAP, notified by the Republic of Latvia, was in response to a first Commission decision by which the Commission had declared an aspect of the initial NAP incompatible with Directive 2003/87 and had made the approval of the NAP subject to the condition that amendments be made to it with a view to reducing the total quantity of allowances to be granted. The decision relating to the amended NAP had however been adopted after expiry of the time-limit laid down in Article 9(3) of Directive 2003/87, which provides that, within three months of notification of a national allocation plan by a Member State, the Commission may reject that plan, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III to that directive.

In order to ascertain whether the Commission could validly adopt the contested decision after expiry of that time-limit, the Court observed that, if within three months following the Member State's notification of its NAP, the Commission opts not to exercise that power, the Member State may, in principle, implement the NAP without any requirement of approval by the Commission. Thus, the procedure for reviewing NAPs need not necessarily culminate in a formal decision. By contrast, the Court stated that the Commission may decide to use its decision-making powers where the Member State refrains from amending its NAP or refuses to do so before the expiry of the three-month time-limit, despite the objections raised. If the Commission does not take such a rejection decision, the notified NAP becomes definitive and there is a presumption of legality allowing the Member State to implement it.

As regards amendments which, as in the case in point, are introduced during a subsequent phase of the review procedure, the Court observed that they are aimed specifically at addressing the objections initially expressed by the Commission. Accordingly, the acceptance of those amendments by the Commission is merely the corollary of the objections initially expressed by it and not the expression of a general power of authorisation. Moreover, the Commission does not have to accept the amendments made to the NAP by way of formal decision.

[21] 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), as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18).

Moreover, the Court observed that the purpose of the procedure under Article 9(3) of Directive 2003/87 is to provide legal certainty for the Member States and, in particular, to permit them to be sure, within a short time, how they may allocate emission allowances and manage the trading scheme on the basis of their NAP during the period in question. There is a legitimate interest in ensuring that, during the entire period of its validity, the NAP does not risk being contested by the Commission. Those considerations apply to any NAP, irrespective of whether it is the version as initially notified or as revised and subsequently notified, especially as the Commission's review has already been preceded by a first review stage.

Consequently, the concept of notification within the meaning of Article 9(3) of Directive 2003/87 encompasses both initial notifications and subsequent notifications of different versions of an NAP, with the result that each of those notifications triggers a new three-month time-limit. In the case in point, the Court annulled the contested decision, since it was adopted after the expiry of that time-limit, following which the revised NAP became definitive.

Public health

In Case T-257/07 *France* v *Commission* (judgment of 9 September 2011, not yet published, under appeal), the applicant sought the annulment of the regulation by which the Commission had amended Regulation No 999/2001, ([22]) in so far as it authorised measures for monitoring and eradicating which are less restrictive than those previously provided for in respect of sheep and goat herds. In that context, the Court stated that it falls to the institutions responsible for the political choice of fixing the appropriate level of protection to determine the level of risk deemed unacceptable for society. It is incumbent on those institutions to determine the critical threshold of the probability of adverse effects on public health, safety and the environment and of the gravity of those potential effects which, in their view, appear no longer to be acceptable for society and which, once exceeded, require preventive measures to be taken despite the continuing scientific uncertainty. When determining the level of risk deemed unacceptable for society, the institutions are bound by their obligation to ensure a high level of protection but are not permitted to adopt a purely hypothetical approach to the risk and to be guided by a 'zero risk' approach in their decisions. The Court stated also that management of the risk covers all action taken by an institution which must deal with a risk in order to reduce it to an acceptable level for society in the light of the institution's obligation to ensure a high level of protection of public health, safety and the environment.

The Court went on to state that it is for the competent authority to review within a reasonable period the interim measures adopted since, where new information alters the perception of a risk or shows that that risk can be circumscribed by less restrictive measures than existing measures, the institutions must ensure that rules are adjusted to take account of new data. Thus, where new knowledge or new scientific discoveries justify relaxation of a preventive measure, they alter the specific content of the public authorities' obligation to maintain a constant high level of protection of human health. If such factors alter the initial assessment of the risks, the lawfulness of the adoption of less restrictive preventive measures must be assessed by reference to those factors and not according to the factors which determined the assessment of the risks when the initial preventive measures were adopted. It is only where that new level of risk exceeds the level of risk deemed

([22]) Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ 2001 L 147, p. 1).

acceptable for society that the Court must find that there has been a breach of the precautionary principle.

Television broadcasting

In Case T-385/07 *FIFA* v *Commission* (judgment of 17 February 2011, not yet published, under appeal) and Case T-55/08 *UEFA* v *Commission* (judgment of 17 February 2011, not yet published, under appeal), actions for annulment were brought before the Court by FIFA and UEFA against Commission decisions by which the Commission considered compatible with European Union law the lists, drawn up by the Kingdom of Belgium and the United Kingdom of Great Britain and Northern Ireland, of the events regarded as being of major importance for society within the meaning of Article 3a(1) of Directive 89/552. ([23]) Those lists contained inter alia, for Belgium, all the matches of the finals of the football World Cup and, for the United Kingdom, all the matches of the final stage of the European Football Championship (EURO). Those lists had been sent to the Commission pursuant to Directive 89/552, which permits Member States to prohibit the broadcasting on an exclusive basis of events that they consider to be of major importance for their society, where such broadcasting would deprive a significant section of the public the possibility of following certain events on free television.

The Court held first of all that the reference to the World Cup and to the EURO in recital 18 of Directive 97/36 ([24]) means that, when a Member State includes World Cup and EURO matches in the list it has drawn up, it does not need to include in its notification to the Commission specific grounds concerning their nature as an event of major importance for society. However, any finding by the Commission that the inclusion of the entire World Cup and EURO in a list of events of major importance for the society of a Member State is compatible with European Union law, on the ground that those tournaments are, by their nature, regarded as single events, may be called into question on the basis of specific factors. In particular, it is for the applicants to show that 'non-prime' World Cup matches (namely matches other than the semi-finals, the final and the matches of the national team/one of the national teams of the country concerned and/or 'non-gala' matches of the EURO (namely matches other than the opening match and the final) are not of such importance for the society of that state.

In that context, the Court stated that 'prime' and 'gala' matches as well as matches involving a national team concerned are of major importance for the public of a given Member State and may therefore be included in a national list of events that the public must be able to follow on free television. As regards other World Cup and EURO matches, the Court held that they may be regarded as single events and not as a succession of individual events divided into matches. The Court specified that matches other than 'prime' matches, 'gala' matches and matches involving a national team concerned may have an impact on the participation of those teams in 'prime' and 'gala' matches, which may create a particular interest for the public to follow them. In that regard, the Court noted that it cannot be determined in advance — at the time when national lists are drawn up or when broadcasting rights are acquired — what matches will be absolutely decisive for the later stages of those tournaments or will have an impact on the fate of a given national team. For that reason, the Court held that the fact that certain 'non-prime' or 'non-gala' matches may

([23]) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

([24]) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending [Directive 89/552] (OJ 1997 L 202, p. 60).

influence participation in ‘prime’ or ‘gala’ matches may justify the decision of a Member State to regard all the matches of those tournaments as being of major importance for society. Moreover, the Court established that there was no harmonisation of events that could be regarded as being of major importance for society and observed that the viewing figures concerning ‘non-prime’ and ‘non-gala’ matches from recent tournaments show that those matches have attracted a large number of viewers many of whom are not normally interested in football.

The Court stated lastly that, although the categorisation of the World Cup and the EURO as events of major importance for society may affect the price which FIFA and UEFA will obtain for the grant of the rights to broadcast those tournaments, it does not destroy the commercial value of those rights because it does not oblige those two organisations to sell them on whatever conditions it can obtain. In addition, although such categorisation restricts the freedom to provide services and the freedom of establishment, that restriction is justified, since it is intended to protect the right to information and to ensure wide public access to television broadcasts of events of major importance for society.

Public procurement — Right to an effective remedy

In Case T-461/08 *Evropaïki Dynamiki* v *EIB* (judgment of 20 September 2011, not yet published), the Court, having first found that it had jurisdiction to hear an action brought by an unsuccessful tenderer against a decision taken by the Management Committee of the European Investment Bank (EIB) to award a public contract for the provision of IT services, annulled that decision on the ground, inter alia, that the tendering procedure had failed to satisfy the requirements of full legal protection. First, the contested decision was not notified to the applicant, who became aware of it after it had, in principle, been implemented, since the contract had been signed and had entered into force. In the case in point, it was necessary for the applicant to be in a position to bring an application for suspension of the operation of the decision awarding the contract, even before the signature and entry into force of the contract, in order to render effective its substantive application, which sought review of the impartiality of the tendering procedure and the preservation of its chance of concluding the contract with the EIB at the end of that procedure.

Second, the EIB had failed to provide to the applicant an adequate statement of reasons for the decision awarding the contract before it brought its main action seeking, inter alia, annulment of the decision. In public procurement procedures, the right of an unsuccessful tenderer to an effective remedy against the decision awarding the public contract to another tenderer and the corresponding obligation on the contracting authority to communicate to the unsuccessful tenderer, upon request, the grounds of the decision must be regarded as essential procedural requirements within the meaning of the case-law, in so far as those requirements dictate that safeguards be attached to the award decision so as to enable the impartiality of the tendering procedure which resulted in the decision to be effectively reviewed.

II. Actions for damages

In Case T-88/09 *Idromacchine and Others* v *Commission* (judgment of 8 November 2011, not yet published), the Court addressed the issue of whether the Community’s non-contractual liability is incurred in the event that an institution infringes its obligation to respect professional secrecy by publishing information concerning the applicant in the *Official Journal of the European Union*.

The Court stated, as regards disclosure of information in a Commission State aid decision, that it is necessary to regard as confidential information that an undertaking, which did not receive the aid in question, was not in a position to deliver to its co-contractor goods compliant with the rules in force and with the terms of the contract, since that information was communicated by the Member State concerned to the Commission for the sole purposes of the administrative procedure for the examination of the State aid in question and since it related to the execution of the contractual relations between the companies concerned. Such information was moreover, capable of causing serious harm to the undertaking concerned since it referred to it by name in an unfavourable manner. Moreover, in so far as disclosure of the information was liable to undermine the undertaking's image and reputation, the latter's interest in ensuring that that information was not divulged was objectively worthy of protection.

The Court stated that the assessment as to the confidentiality of a piece of information requires the individual legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the European Union institutions take place as openly as possible. In the case in point, the disclosure of the information was deemed disproportionate in the light of the object of the Commission's decision since it would have been sufficient to refer to the failure to fulfil contractual obligations in very general terms or, if necessary, in more specific terms, and it was not necessary in either of those situations to mention the supplier's name.

Observing that the Commission does not have broad discretion as to the issue whether it is necessary to depart, in a specific case, from the rule of confidentiality, the Court concluded that disclosure of confidential information which undermines the reputation of a company constitutes an infringement of the obligation of professional secrecy laid down in Article 287 EC and is enough to establish that there has been a sufficiently serious breach. The Commission was therefore ordered to pay EUR 20 000 by way of compensation for harm to the applicant's image and reputation.

In Case T-341/07 *Sison* v *Council* (judgment of 23 November 2011 delivered by a chamber in extended composition, not yet published), the Court clarified the conditions under which the European Union's non-contractual liability is breached — in particular the rule relating to whether there has been a sufficiently serious breach of a rule conferring rights on individuals — in the event that the unlawful decision which gives rise to the damage is annulled by the Court on the ground that the national decisions on which the Council relied in order to freeze the applicant's funds did not relate to the instigation of investigations or prosecutions or a conviction for terrorist activity, contrary to the requirements of European Union law.

In that regard, the Court recalled that it is not the purpose of an action for damages to make good damage caused by all unlawfulness. Only a sufficiently serious breach of a rule of law intended to confer rights on individuals can render the European Union liable. The decisive test for a finding that this requirement has been satisfied is whether the institution concerned has manifestly and gravely disregarded the limits of its discretion. None the less, the extent of the discretion enjoyed by the institution concerned, although determinative, is not the only yardstick. Thus, the system of non-contractual liability takes into account, in particular, the complexity of the situations to be regulated and the difficulties in applying or interpreting the texts.

The Court took the view that, although there is no margin of appreciation for the Council when it determines whether the matters of law and of fact, that may be preconditions for the application of a fund-freezing measure, are satisfied, the interpretation and application of European Union law were particularly difficult in the case in point. The Court found that the actual wording of the provisions concerned is particularly confused, as shown by the copious case-law of the General Court in this area. It is only through its consideration of some 10 cases, spread over several years, that the Court has by degrees constructed a rational, consistent framework for the interpretation of those provisions. It was only on the occasion of the judgment annulling the decision that gave rise to the damage that the Court held that a national decision must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and principally, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism. Furthermore, the Court noted the complexity of the legal and factual assessments required in order to settle the case in point. Lastly, the Court stated that the fundamental importance of the objective of general interest consisting in combating threats to international peace and security and the particular constraints imposed by the pursuit of that objective 'by all means' on the European Union institutions concerned, at the urgent request of the United Nations Security Council, are also factors that must necessarily be taken into consideration.

Thus, in the case in point, the Council's infringement of the applicable rules, while clearly established, could, according to the Court, be accounted for by the particular constraints and responsibilities borne by that institution and that constituted an irregularity that an administrative authority exercising ordinary care and diligence could have committed if placed in similar circumstances, so that it could not be concluded that there had been a sufficiently serious breach giving rise to a right to compensation.

III. Appeals

In 2011, 44 appeals were brought against decisions of the Civil Service Tribunal and 29 cases were brought to a close by the Appeal Chamber of the General Court. Four of those cases merit particular attention.

In Case T-80/09 P *Commission* v *Q* (judgment of 12 July 2011, not yet published), the Court held that a finding of illegality is on its own sufficient for regarding as satisfied the first of the three conditions necessary for the Community to incur liability for damage caused to its officials owing to an infringement of European Civil Service law, and it is not necessary to establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. ([25]) Moreover, the Court stated that the admissibility of an action for damages brought by an official pursuant to the second paragraph of Article 24 of the Staff Regulations of Officials of the European Union is conditional on national remedies having been exhausted, provided that they protect the persons concerned effectively and may culminate in compensation for the alleged damage. In that regard, the special liability regime, which is a strict liability regime, established by that provision is based on the duty of the administration to protect the health and safety of its officials and agents against attacks or ill-treatment by third parties or other officials, of which they may be victim in the exercise of their duties, particularly in the form of psychological harassment, within the meaning of Article 12a(3) of the Staff Regulations. Accordingly, the Court held that the Civil Service Tribunal had infringed Articles 90 and 91 of the Staff Regulations, and ordered the Commission to pay compensation for the non-material damage arising from an administrative fault which helped to isolate the applicant within her unit. Lastly, the Court held that the Civil Service Tribunal had infringed Articles 90 and 91 of the Staff Regulations and exceeded the limits of the judicial review, by, in practice, assuming the role of the administration, in that it had ruled on the complaint of psychological harassment raised by the applicant.

([25]) Thereby confirming Case T-143/09 P *Commission* v *Petrilli* (judgment of 16 December 2010, not yet published), which had been the subject of a proposal to review, which was closed by the decision of the Court of Justice of 8 February 2011 in Case C-17/11 RX.

Furthermore, in Case T-361/10 P *Commission* v *Pachtitis* and Case T-6/11 P *Commission* v *Vicente Carbajosa and Others* (judgments of 14 December 2011, not yet published) confirming on that point the judgments delivered by the Civil Service Tribunal, the Court held that the European Personnel Selection Office (EPSO) lacked the power to determine the content of admission tests for a competition. The Court analysed the division of powers between EPSO and the selection board in the light of Annex III to the Staff Regulations and concluded that, although the power to determine the content of admission tests has not been expressly attributed to either EPSO or the selection board, before the establishment of EPSO, the organisation of tests was entrusted only to the selection board of a competition according to settled case-law. Accordingly, because there had been no amendment to the Staff Regulations conferring expressly such a power on EPSO, and because of the essentially organisational nature of the tasks allocated to EPSO by Article 7 to that Annex, the Court held that EPSO did not have the power to determine the content of the pre-selection tests for a competition. As regards the decision establishing EPSO ([26]) and the decision on the organisation and operation of that body, ([27]) the Court held that they have a lower rank than the provisions of the Staff Regulations. Accordingly, by virtue of the principle of legality, although those decisions may sometimes contain formulations which may erroneously suggest that EPSO has the power to determine the content of admission tests, they cannot be interpreted as contravening the Staff Regulations.

Lastly, in Case T-325/09 P *Adjemian and Others* v *Commission* (judgment of 21 September 2011, not yet published), the Court held that the principle prohibiting abuse of rights, pursuant to which nobody may rely abusively on rules of law, is among the general principles of law. It follows that the legislature and the authority empowered to conclude contracts of employment (AECE) are required, when adopting or implementing the rules governing the relationship between the European Communities and their servants, to prevent abuses of law that may result from the use of successive fixed-term contracts, in accordance with the objectives of improving the living and working conditions of workers and of proper social protection for workers, which are referred to in Article 136 EC. Furthermore, the Court held that the main characteristic of contracts of employment as a member of the contract staff is their precariousness in time, which is precisely the purpose of such contracts which is to arrange for occasional staff to perform duties which — by their nature or by virtue of the absence of a holder of the post — are precarious. That system cannot therefore be used by the AECE to assign for long periods duties corresponding to a 'permanent post' to such staff, who would thus be used in an inappropriate manner and be subjected to prolonged uncertainty. Such use would be contrary to the principle prohibiting abuse of rights, when that principle is applied to the use, by the AECE, of successive fixed-term contracts in the civil service. However, such abuse could be remedied and the negative consequences suffered by the interested party eliminated by reclassification of the contract of employment. That reclassification may lead inter alia to the conversion of successive fixed-term contracts into contracts of indefinite duration.

([26]) Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing [EPSO] (OJ 2002 L 197, p. 53).

([27]) Decision 2002/621/EC of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of [EPSO] (OJ 2002 L 197, p. 56).

IV. Applications for interim measures

In 2011, 44 applications for interim measures were brought before the President of the General Court, a slight increase compared with the number of applications (41) made in 2010. In 2011, the judge hearing such applications disposed of 52 cases, as against 38 in 2010. The judge hearing such applications granted two applications for suspension of operation directed against fines which had been imposed on the applicants for their participation in anti-competitive agreements, namely in Case T-392/09 R *1. garantovaná* v *Commission* (order of 2 March 2011, not published), and in Case T-393/10 R *Westfälische Drahtindustrie and Others* v *Commission* (order of 13 April 2011, not yet published). Those two orders afforded the President of the Court the opportunity to clarify the case-law on groups, which led to consideration being taken, in the context of urgency, of the financial resources of the group of companies to which the company which requested the grant of the interim measures belonged.

In *1. garantovaná v Commission*, the applicant, a company active in the financial field, sought exemption from the obligation, imposed by the Commission, to provide a bank guarantee as a condition for the non-immediate recovery of a fine imposed on that company for having exercised decisive influence over the commercial policy of another company, which was participating in a cartel in the sector of calcium carbide and magnesium-based reagents for the steel and gas industries. The President of the Court held that in the case in point, there were exceptional circumstances which justified the suspension of the obligation to provide such a guarantee. The applicant had demonstrated, in addition to a *prima facie* case, that its precarious financial situation was the cause of the refusals of a number of banks to grant the bank guarantee in question. In addition, the evidence put forward by the Commission did not make it possible to call in question the applicant's statement that it was not the subsidiary of a parent company or of a larger group and that it had no majority shareholder. Furthermore, the applicant did not appear to be part of a network the other members of which might have interests in common with it. Moreover, it cannot be alleged that the applicant provoked its poor financial situation by own its conduct. The fact that shortly before its fine was imposed, it invested the bulk of its remaining assets in long-term loans and thus tied up its assets could be reasonably explained by its activity as a capital investor. In that regard, the applicant could not be required to freeze its investments and to cease its economic activity during the administrative procedure undertaken by the Commission. In weighing up the interests at stake, the President of the Court held that the financial interests of the European Union would not necessarily be best served by the immediate initiation of enforcement proceedings in respect of the fine, since it was unlikely that the Commission could in this way obtain the amount of the fine. The President of the Court therefore ordered that the exemption sought be granted, on condition however that the applicant could not sell certain assets without the Commission's prior authorisation, that it pay the Commission the sum equivalent to the provision that it had effected and that it inform the Commission regularly of the development of its assets and investments.

In *Westfälische Drahtindustrie and Others* v *Commission*, three companies belonging to a group active in the industrial steel sector, which had had fines imposed on them for their participation in a cartel on the market for prestressing steel, brought an application for interim measures by which they sought exemption from the obligation to provide bank guarantees. In that regard, the President of the Court recalled that exemption from the obligation to provide a bank guarantee can be granted only if the party applying for such exemption adduces proof that it is objectively impossible for it to provide such guarantee or that such provision would imperil its existence. It was found that the applicants had promptly, repeatedly and seriously sought to obtain a bank guarantee in respect of the fines imposed, but that those efforts had been in vain, since their 14 usual banks, which had been contacted on a number of occasions, had refused them that guarantee after examining their financial situation in detail. The President did not take into consideration the financial means of the shareholder ArcelorMittal, which held a one-third holding in one of the applicant companies. The Court recalled that the case-law on groups has been extended to minority holdings (30 %) — depending on the capital structure of the undertaking concerned — but held that the ArcelorMittal group and the group to which the applicants belonged were competitors on the steel market and pursued different strategic objectives. The Court also rejected the Commission's argument based on the own interest of the usual banks, which were creditors of the applicants, in covering their own demands. According to the President, the interests of a bank as a credit institution which has refused to grant a bank guarantee must be subordinated to those of the Commission only if the case-law on groups of companies is applicable, which was not the case here. The 14 usual banks of the applicants were not part of the applicants' group. Their business relationships with that group were limited to the area of credit, the recovery of debts and interest. To that extent there was no objective identity between the strategic interests of those credit institutions and those of the applicants. Since it was established that there was no possibility of obtaining a bank guarantee, the President regarded as irrelevant the Commission's claims, based on financial documents and economic data, that subsequent to a rejection of the application for interim measures, 'any sensible bank' would in the end provide the applicants with the bank guarantee in question.

Furthermore, the existence of a *prima facie* case was confirmed only in relation to the interim application for fine reduction, which was based inter alia on the plea alleging that account was not taken of the applicants' inability to pay, since the President had taken the view that it could not be ruled out in the case in point that the Court would make use of its unlimited jurisdiction in the area of fines and that it would reduce the fines imposed on the applicants. The President therefore ordered that the exemption requested be granted, on condition however that the applicants pay the Commission the amount corresponding to the reserve that they had built up and instalments according to the payment plan offered.

The other applications for interim measures were rejected, most often for want of urgency. Special mention should be made of the following cases.

In the field of State aid, it is appropriate to mention, by reason of their procedural particularities, the 'Spanish coal' cases (Case T-484/10 R *Gas Natural Fenosa SDG* v *Commission*, Case T-486/10 R *Iberdrola* v *Commission* and Case T-490/10 R *Endesa and Endesa Generación* v *Commission* (orders of 17 February 2011, not published). Those cases stem from a decision of the Kingdom of Spain to set up a financial aid scheme for the production of electricity from indigenous coal. To that effect, the scheme in question obliged several electricity generating stations to supply themselves with indigenous coal and to produce certain volumes of electricity from that coal, in return for compensation from the State for the extra production costs entailed by the purchase of indigenous coal. The Commission having authorised the scheme in question, the three applicant undertakings brought actions for annulment of that authorisation decision and submitted applications for suspension of operation. In the light of the imminent adoption of a decision of the competent Spanish authority obliging the applicants to undertake, within three days, to acquire specific quantities of national coal, the President of the Court ordered, on 3 November 2010, pursuant to Article 105(2) of the Rules of Procedure, that is to say without hearing the opposing parties, the suspension of the contested decision until the adoption of the orders terminating the proceedings for interim relief. Since the Kingdom of Spain had requested that that provisional suspension be revoked and since the applicants had, at a particularly late stage of the proceedings, expressed their intention to abandon their action, the President held that, pending final removal from the register, it was necessary to adjudicate, in the interest of the sound administration of justice, on whether to maintain or to deprive of effect the provisional suspension of the Commission's decision. Whilst acknowledging that there was a *prima facie* case, the Court ruled that there were no circumstances creating urgency such as to justify the grant of the interim measures sought. As regards the balancing of the interests, having recalled the importance of services of general economic interest within the European Union and the wide discretion of the national authorities in delivering, implementing and organising them, the President held that the interest in implementing as quickly as possible the Spanish service of general economic interest and the associated compensation had to prevail over the opposing interests relied on by the applicant undertakings. Consequently, the orders of 3 November 2010 granting the provisional suspension of the contested decision were revoked. Lastly, since the applicant undertakings withdrew their applications for interim relief, the President adopted, on 12 April 2011, three orders removing them from the register, in the context of proceedings for interim relief, in which the Court ordered the applicants on an exceptional basis to pay the costs.

Lastly, in Case T-62/06 RENV-R *Eurallumina* v *Commission* (order of 9 June 2011, not published, paragraphs 29 to 56) and Case T-207/07 R *Eurallumina* v *Commission* (order of 10 June 2011, not published, paragraphs 32 to 59), the President, having set out in detail the various constituent parts of the case-law on groups, held that that case-law is compatible with Article 47 of the Charter of Fundamental Rights of the European Union, ([28]) with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and with the judgments of the European Court of Human Rights, and observed that the concept of a group does not impose a condition that is impossible to satisfy, since it does not prevent a company belonging to a group from demonstrating in particular that its objective interests do not coincide with those of its group or its parent company, that the parent company is prevented by law from providing it with financial support, or that the group as a whole is financially incapable of coming to its aid.

([28]) OJ 2010 C 83, p. 392.