

A — Proceedings of the Court of First Instance in 2007

By Mr Marc Jaeger, President of the Court of First Instance

For the Court of First Instance of the European Communities, 2007 was a year of change and transition. Two new Judges, Mr T. Tchipev and Mr V. Ciucă, entered into office at the beginning of the year following the accession of the Republic of Bulgaria and Romania to the European Union. In September 2007 Mr B. Vesterdorf, a Member of the Court of First Instance since it was created in 1989 and its President for more than 10 years, left office and was replaced as Judge by Mr S. Frimodt Nielsen. At the same time, Mr R. García-Valdecasas y Fernández — likewise a Member of the Court since it was set up — Mr J. Pirrung and Mr H. Legal, whose terms of office reached their end, were replaced as Judges by Mr S. Soldevila Fragoso, Mr A. Dittrich and Mr L. Truchot. Finally, the Court in its fresh composition elected Mr M. Jaeger as its new President.

Also, the Court gave its first decisions in its capacity as the judicial body having jurisdiction in respect of appeals against decisions by judicial panels created pursuant to the first subparagraph of Article 220 EC and Article 225a EC, provisions which were inserted by the Treaty of Nice. Despite its name, the Court of First Instance thus has jurisdiction to hear and determine appeals brought against decisions of the European Union Civil Service Tribunal, in accordance with the rules laid down in Articles 9 to 13 of the Annex to the Statute of the Court of Justice. This new type of case has, for the time being, been allocated to an ad hoc chamber, the Appeal Chamber, composed of the President of the Court and, under a system of rotation, four Presidents of Chambers.

The past year was marked by the delivery of two judgments by the Grand Chamber of the Court, in *Microsoft v Commission* ⁽¹⁾ and *API v Commission* ⁽²⁾. These cases, in particular the former, required the 13 Members of this Chamber to assess complex and difficult economic and legal issues.

With regard to statistics, 522 cases were brought in the course of the year, a significant increase compared with 2006 (432). On the other hand, the number of cases decided went down (397 as against 436 in 2006). It should nevertheless be noted that the number of cases decided by a judgment increased (247 as against 227 in 2006), as did the number of applications for interim measures brought to a conclusion (41 as against 24 in 2006). Apart from the substantial resources devoted to dealing with *Microsoft v Commission* and the absence — in contrast to preceding years — of large groups of identical or connected cases, the reduction in the number of cases decided is due, more generally, to the ever-increasing complexity and diversity of actions brought before the Court of First Instance. The fact remains, however, that, because of the imbalance between cases brought and cases decided, the number of cases pending increased, giving rise to the risk that the duration of proceedings will increase.

⁽¹⁾ Judgment of 17 September 2007 in Case T-201/04.

⁽²⁾ Judgment of 12 September 2007 in Case T-36/04.



Conscious of this situation, the Court of First Instance embarked upon detailed consideration of its operation and working methods in order to improve its efficiency. In this context, it has already been considered necessary to alter the way in which the Court is organised, in particular so as to derive greater advantage from the increase in the number of its Members. Thus, since 25 September 2007 the Court has comprised eight Chambers, of three Judges or, where the importance of the case so justifies, five Judges (extended composition).

The following account of the Court's judicial activity is intended to provide a, necessarily selective, overview of the rich case-law and of the complex issues which the Court was called upon to resolve.

I. Proceedings concerning the legality of measures

Admissibility of actions brought under Articles 230 EC and 232 EC

1. Measures against which an action may be brought

Measures against which an action may be brought under Article 230 EC are those producing binding legal effects of such a kind as to affect the applicant's interests by significantly altering his legal position ⁽³⁾.

In *Akzo Nobel Chemicals and Akros Chemicals v Commission* ⁽⁴⁾, the Court held that, where an undertaking relies on legal professional privilege for the purpose of opposing the seizure of a document, the decision whereby the Commission rejects that request produces legal effect for that undertaking and therefore constitutes a measure against which an action may be brought. That decision withholds from the undertaking concerned the protection provided by Community law and is definitive in nature and independent of any final decision that might make a finding of infringement of the competition rules. Furthermore, the Court held that where the Commission, without taking a formal decision, seizes a document which the undertaking concerned claims is confidential, that physical act necessarily entails a tacit decision that must be open to challenge by an action for annulment.

On the other hand, in its order in *Vodafone España and Vodafone Group v Commission* ⁽⁵⁾, the Court dismissed as inadmissible the application lodged against the letter of observations sent by the Commission, under Article 7(3) of Directive 2002/21 ⁽⁶⁾ to the Spanish regulatory authority following the latter's notification of proposed measures concerning undertakings with a joint dominant position on the Spanish mobile communications market. The Court

⁽³⁾ Case 60/81 *IBM v Commission* [1981] ECR 2639.

⁽⁴⁾ Judgment of 17 September 2007 in Joined Cases [T-125/03](#) and [T-253/03](#).

⁽⁵⁾ Order of 12 December 2007 in Case [T-109/06](#).

⁽⁶⁾ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).



rejected any analogy with the procedures applicable in relation to State aid and the control of concentrations. It held that the letter formed part of a consultation procedure and not of a system of authorisation, since the Commission's failure to initiate the stage involving a thorough examination of the measure concerned could not be assimilated to approval of the notified measure.

In *Netherlands v Commission* ⁽⁷⁾, the Netherlands Government had requested the Commission, on the basis of Article 95(4) EC, to adopt a position on the question of the scope of a directive. In that regard, the Court considered that a Member State cannot on the basis of Article 95(4) EC request the Commission to take a decision on the extent of harmonisation under a Community directive and/or on the compatibility of national legislation with such a directive. Since, according to that same provision, it is solely for the Member State concerned to take the decision to notify in order to obtain an authorisation by way of derogation and since, furthermore, no provision of the directive confers on the Commission the power to decide on its interpretation, a position adopted by the Commission on the scope of the harmonisation measure at issue constitutes a mere opinion, which is not binding upon the competent national authorities and cannot form the subject matter of an action.

In its order in *Commune de Champagne and Others v Council and Commission* ⁽⁸⁾, the Court declared inadmissible the action whereby a number of natural and legal persons sought annulment of the Council decision approving the international agreement between the European Community and the Swiss Confederation on trade in agricultural products. The Court emphasised that a unilateral act of the Community cannot create rights and obligations outside the Community territory defined in Article 299 EC. Only the international agreement, which is not amenable to appeal, is capable of producing legal effects on Swiss territory, in accordance with the specific rules of that State and once it has been ratified according to the procedures applicable in that State. Thus, the contested decision had no legal effect on Swiss territory and was therefore not capable of altering the legal position of the applicants on that territory.

Last, in *Italy v Commission* ⁽⁹⁾ the Italian Republic sought annulment of a letter from the Commission requiring production of certain information as a precondition for entitlement to submit certain requests for payment which Italy had made in the context of Community Structural Funds. The Court held that the Italian Republic's argument that the letter in issue imposed a penalty on it because the payments requested were not made until the relevant information had been received amounted, in substance, to a complaint of prolonged failure to act on the part of the Commission. If that failure to act was unlawful, on the ground that it was contrary to the provisions governing Structural Funds, the Italian Republic ought, in order to challenge it, to have brought an action for failure to act under Article 232 EC and not an action for annulment.

⁽⁷⁾ Judgment of 8 November 2007 in Case [T-234/04](#).

⁽⁸⁾ Order of 3 July 2007 in Case [T-212/02](#).

⁽⁹⁾ Judgment of 12 December 2007 in Case [T-308/05](#).



2. Standing to bring proceedings — Individual concern

According to settled case-law, natural or legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed ⁽¹⁰⁾.

In its order in *Galileo Lebensmittel v Commission* ⁽¹¹⁾ the Court held that, for the purpose of recognising standing to bring proceedings, the fact that the applicant belonged to a restricted group must be combined with a specific duty on the part of the Commission to protect that group. More specifically, the decisive factor in identifying the persons individually concerned by a measure of general application consists in the specific protection to which they are entitled under Community law.

The case of *Regione Autonoma Friuli-Venezia Giulia* ⁽¹²⁾, where the applicant sought annulment of a provision of a regulation which limited the right to use the name 'Tocai friulano', provided the opportunity for the Court to shed light on the circumstances in which an applicant could base his standing to bring proceedings on the principles laid down by the Court of Justice in its judgment in *Codorníu v Council* ⁽¹³⁾. The Court of First Instance held that in this case the applicant, unlike the undertaking *Codorníu*, was not prevented by a measure of general application from using an intellectual property right which it had registered and used in the traditional matter for a long period before the measure in question was adopted. The name 'Tocai friulano' is not a geographical indication as such forming part of intellectual property rights and enjoying protection on that basis.

The Court also stated that the general interest which a region, as the competent entity for economic and social matters on its territory, might have in securing a favourable outcome for the economic prosperity of that territory is not sufficient for it to be regarded as being individually concerned. Furthermore, the legislative and regulatory prerogatives that may be held by a legal person governed by the public law of a Member State other than the State are not of such a kind as to confer that person an individual interest in seeking annulment of a provision of Community law which has no effect on the extent of its powers, since, in principle, the person holding such prerogatives does not exercise them in his own interest.

Last, in *Alrosa v Commission* ⁽¹⁴⁾ the applicant sought annulment of the decision whereby the Commission had made binding the commitments given by De Beers, an undertaking in a dominant position, to limit and then cease its purchases of rough diamonds from the

⁽¹⁰⁾ Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107.

⁽¹¹⁾ Order of 28 August 2007 in Case [T-46/06](#) (on appeal, Case C-483/07 P).

⁽¹²⁾ Order of 12 March 2007 in Case [T-417/04](#) *Regione Autonoma Friuli-Venezia Giulia v Commission*.

⁽¹³⁾ Case C-309/89 [1994] ECR I-1853.

⁽¹⁴⁾ Judgment of 11 July 2007 in Case [T-170/06](#).



applicant. The Court examined of its own motion the admissibility of the action and held that the applicant was individually concerned by that decision, in so far as the decision had been adopted at the conclusion of proceedings in which the applicant had participated to a decisive extent, had been aimed at bringing to an end the long-standing trading relationship between the applicant and De Beers and had been liable to have an appreciable effect on the applicant's competitive position on the market for the supply and production of rough diamonds.

3. Interest in bringing proceedings

In *Pergan Hilfsstoffe für industrielle Prozesse v Commission* ⁽¹⁵⁾ the applicant challenged the decision of the Commission's hearing officer rejecting its request for confidential treatment for certain passages in a Commission decision ('the peroxides decision'), which contained references to the applicant's role in a number of cartels on certain markets for organic peroxides. However, as the proceedings against the applicant were time-barred, the Commission had made no reference in the operative part of the 'peroxides decision' to its participation in the infringement. The Court rejected the Commission's plea that the applicant, which had not challenged the peroxides decision, had no interest in bringing an action against the decision of the hearing officer. It held, on the contrary, that the annulment of that decision was capable of conferring an advantage on the applicant in that the Commission should take account of the applicant's legitimate interest in the information at issue not being disclosed. Furthermore, the mere fact that the information had already been published did not deprive the applicant of an interest in bringing an action, since its continued disclosure on the Commission's Internet site continued to harm the applicant's reputation, which is a vested and present interest.

In *Ufex and Others v Commission* ⁽¹⁶⁾ the applicants challenged the Commission decision rejecting their complaint. Their interest in bringing an action was challenged on the ground that, according to the interveners in support of the Commission, even if the contested measure were annulled, the Commission would be unable to establish the infringement complained of, since the excessive duration of the entire administrative procedure would have constituted a breach of the interveners' rights. In that regard, the Court held that the interest in bringing an action of an applicant who had brought an action for annulment of a Commission decision rejecting the complaint whereby it denounced conduct capable of constituting an abuse of a dominant position could be denied only in exceptional circumstances, notably where it could be established beyond doubt that the Commission was not in a position to adopt a decision making a finding of infringement attributable to the dominant undertaking in question.

⁽¹⁵⁾ Judgment of 12 October 2007 in Case T-474/04.

⁽¹⁶⁾ Judgment of 12 September 2007 in Case T-60/05.



4. Admissibility in matters of State aid

(a) Concept of interested party

A number of decisions adopted in 2007 gave the Court the opportunity to explain the application of the case-law ⁽¹⁷⁾ to the effect that a 'party concerned' within the meaning of Article 88(2) EC has capacity to bring an action for annulment of a decision adopted at the conclusion of the stage of the preliminary examination of aid referred to in Article 88(3) EC in order to protect its procedural rights.

By its order in *SID v Commission* ⁽¹⁸⁾ the Court held that a seafarers' union which had lodged a complaint in respect of certain tax measures applicable to seafarers employed on board vessels on the Danish international register was not a party concerned. Neither the seafarers' union nor its members were competitors of the beneficiaries of the measures in issue. Although bodies representing the employees of the undertakings in receipt of aid might, as parties concerned, submit comments to the Commission on considerations of a social nature, the fact remained that in this case any social aspects derived from the establishment of the register in question and not from the fiscal measures in issue, which alone were examined by the Commission with a view to assessing their compatibility with the common market. The social aspects relating to that register therefore had only an indirect link with the contested decision.

In *Fachvereinigung Mineralfaserindustrie v Commission* ⁽¹⁹⁾ the Court, after finding that the members of the applicant were parties concerned with standing to act in defence of their procedural rights and that the applicant effectively raised a plea alleging that the Commission ought to have initiated the formal investigation procedure provided for in Article 88(2) EC because it was facing serious problems as regards the compatibility of the aid with the common market, declared the action admissible and added that although the further substantive arguments raised were inadmissible as such, the arguments developed must nonetheless be examined for the purpose of determining whether the Commission was actually facing serious problems.

The same problem formed the subject matter in an action for failure to act under Article 232 EC, of *Asklepios Kliniken* ⁽²⁰⁾, where a German company specialising in hospital management had brought an action for a declaration that the Commission had unlawfully failed to adopt a position on the complaint denouncing the existence of the State aid alleged to have been granted by the German authorities to hospitals in the public sector. The Court recalled that Articles 230 EC and 232 EC prescribe one and the same remedy. Consequently, just as the fourth paragraph of Article 230 EC allows individuals to bring an action for annulment against a Community measure which is of direct and individual concern to them, the third paragraph of Article 232 EC also entitles

⁽¹⁷⁾ Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737.

⁽¹⁸⁾ Order of 23 April 2007 in Case T-30/03 (on appeal, Case C-319/07 P).

⁽¹⁹⁾ Judgment of 20 September 2007 in Case T-375/03.

⁽²⁰⁾ Judgment of 11 July 2007 in Case T-167/04 *Asklepios Kliniken v Commission*.



them to bring an action for failure to act against an institution which has failed to adopt a measure which would have concerned them in the same way ⁽²¹⁾.

(b) Aid regimes

In *Salvat père & fils and Others v Commission* ⁽²²⁾ the Commission had adopted a decision characterising as State aid incompatible with the common market certain measures taken by the French authorities to finance a sectoral aid scheme for wine-growers producing low-quality wine. The Commission had thus ordered the French Republic to recover the unlawfully paid aid from the recipients.

Relying on the case-law of the Court of Justice that the actual recipient of individual aid granted under a general aid scheme and recovery of which is ordered by the Commission is individually concerned by that decision ⁽²³⁾, the Court observed that the fact that the contested decision does not identify the undertakings that benefit from the aid in question, applies to situations determined objectively and has legal effects with respect to a category of persons envisaged generally and in the abstract does not mean that the action is inadmissible. The Court pointed out, on the contrary, that the amounts granted differed according to the undertakings and were therefore differentiated according to the individual characteristics of each of them, and found that one of the applicants was the actual beneficiary of individual aid granted under the sectoral aid scheme in question, recovery of which the Commission had ordered. Consequently, that applicant was directly and individually concerned by that part of the contested decision.

5. Proceedings relating to greenhouse gas emissions

In 2007 there was a new type of proceedings in the form of actions brought by individuals against measures taken by the Commission and addressed to Member States in the context of the greenhouse gas emissions allowance trading scheme established by Directive 2003/87 ⁽²⁴⁾. That directive created a system of allowance trading in order to promote the reduction of such emissions, which must be subject to the allocation of allowances authorising the operator holding such an allowance to emit a certain quantity of greenhouse gases; those allowances are allocated in accordance with national allocation plans ('NAPs') notified to the Commission.

None of the applications against the Commission's decisions brought by the undertakings which had been allocated allowances was considered admissible, on different grounds according to the type of decision contested.

⁽²¹⁾ Case 15/70 *Chevalley v Commission* [1970] ECR 975 and Case T-395/04 *Air One v Commission* [2006] ECR II-1343.

⁽²²⁾ Judgment of 20 September 2007 in Case T-136/05. On that point, see also judgment of 12 September 2007 in Joined Cases T-239/04 and T-323/04 *Italy and Brandt Italia v Commission*.

⁽²³⁾ Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855.

⁽²⁴⁾ 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).



(a) Decisions not to raise objections to the notified NAP

In its order in *EnBW Energies Baden-Württemberg v Commission* ⁽²⁵⁾ the Court gave a textual, contextual and teleological interpretation of Directive 2003/87 and held that that directive confers on the Commission only a limited power of rejection and allows it even to waive the use of that power, since, inter alia, where the Commission does not raise express objections within the time-limit laid down in the directive, the notified NAP becomes definitive and can be implemented by the Member State. The Court concluded that, where the decision includes an explicit acceptance of certain aspects of a NAP, it cannot be regarded as even implicit authorisation of the NAP in its entirety, so that the applicant does not have an *interest in bringing proceedings* against the other aspects of the NAP ⁽²⁶⁾.

On the basis of similar reasoning, the Court held, in its order in *US Steel Košice v Commission* ⁽²⁷⁾, that the Commission decision not to raise any objections to the Slovak NAP did not have the effect of granting a rights-creating authorisation because, by their nature, the Slovak measures notified in that context did not require such authorisation. In those circumstances, the contested decision could not produce binding legal effects such as to affect the applicant's interests and therefore did not constitute a measure against which an action could be brought.

Last, by order in *Cemex UK Cement v Commission* ⁽²⁸⁾ the Court held that an action for annulment of the Commission decision raising no objections to the allocation to the applicant by the NAP of an individual allowance which it considered insufficient and contrary to the directive was inadmissible on the ground that the applicant was not individually concerned, as only the United Kingdom was responsible for the implementation of the NAP and for the allocation of specific allowances to individual installations.

(b) Decisions finding the NAP incompatible

In its order in *Fels-Werke and Others v Commission* ⁽²⁹⁾ the Court considered that the applicants were not individually concerned by the Commission decision declaring incompatible an allocation method introduced during the preceding NAP that was favourable to new installations. That decision affected the applicants in the same way as

⁽²⁵⁾ Order of 30 April 2007 in Case T-387/04.

⁽²⁶⁾ The same German NAP for the period 2005–07 formed the subject matter of the judgment of 7 November 2007 in Case T-374/04 *Germany v Commission*. By that judgment, the Commission's decision was annulled on the ground of an error of law in so far as it had declared incompatible with Directive 2003/87 the possibility for ex post facto adjustments provided for in the NAP which allowed the German authorities to reduce the number of allowances allocated to a given installation and to transfer the allowances withdrawn to a reserve when the operator replaced an old installation by a new installation with a lower production capacity. The Court held that no provision of Directive 2003/87 prohibits a subsequent amendment of the number of allowances allocated individually, as the Member State has a margin of discretion when it makes downward corrections.

⁽²⁷⁾ Order of 1 October 2007 in Case T-489/04.

⁽²⁸⁾ Order of 6 November 2007 in Case T-13/07.

⁽²⁹⁾ Order of 11 September 2007 in Case T-28/07 (on appeal, Case C-503/07 P).



all other operators of installations in the same situation. The mere existence of the right arising under the German scheme relating to the previous allocation period, which was potentially called in question by the decision, was not capable of differentiating the holder of the right when the same right was granted, in application of a general and abstract rule, to a multitude of operators determined objectively.

The case of *US Steel Košice v Commission* ⁽³⁰⁾ was an action for annulment of a Commission decision declaring certain aspects of the Slovak NAP for the period 2008–12 incompatible with Directive 2003/87 ⁽³¹⁾ and requiring a reduction in the total quantity of allowances provided for. The Court considered that neither Directive 2003/87 nor the contested decision resulted in an automatic reallocation of the total number of allowances between individual installations which would be reflected by specific percentages of allowances allocated to the applicant and to other installations. Thus the applicant was not directly concerned by the contested decision, since any reduction in its individual allowance would be the consequence of the Slovak Government's exercise of its discretion and that Government was not required to reduce the applicant's individual allowances but only not to exceed the limits of the total quantity of allowances to be allocated.

Last, in its order in *Drax Power and Others v Commission* ⁽³²⁾ the Court held that the Commission decision rejecting the proposal of the United Kingdom of Great Britain and Northern Ireland to amend its provisional NAP with a view to increasing the total definitive quantity of allowances to be allocated did not directly affect the applicant.

Competition rules applicable to undertakings

1. Points raised on the scope of Article 81 EC

(a) Application of Article 81(3) EC

On an action contesting the legality of an exemption decision adopted under Regulation No 17 ⁽³³⁾, which imposed burdens on the beneficiary of the exemption, the Court held in *Duales System Deutschland v Commission* ⁽³⁴⁾ that a commitment put forward during the administrative procedure to address the concerns voiced by the Commission has the effect of clarifying the content of the agreements notified for the purposes of obtaining negative clearance or an exemption under Article 81 EC, by showing the Commission the way in

⁽³⁰⁾ Order of 1 October 2007 in Case [T-27/07](#) (on appeal, Case C-6/08 P).

⁽³¹⁾ 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).

⁽³²⁾ Order of 25 June 2007 in Case [T-130/06](#).

⁽³³⁾ Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).

⁽³⁴⁾ Judgment of 24 May 2007 in Case [T-289/01](#).



which that undertaking intends to act in the future. Accordingly, the Commission is entitled to adopt its decision in the light of that commitment and it is not the task of the Court to examine the legality in the light of a right which the undertaking had waived during the administrative procedure.

The Court found, moreover, that in a case where installations/facilities belonging to the contractual partners of an undertaking which represents the essential part of demand form a bottleneck for its competitors, the Commission may impose on that undertaking, as a burden constituting a condition of an exemption, shared use of the facilities between that undertaking and its competitors, since, in the absence of such use, those competitors would be deprived of any real opportunity of entering and remaining on the relevant market.

(b) Single infringement

In *BASF and UCB v Commission* ⁽³⁵⁾ the Court held that the concept of 'single objective' that characterises a single and continuous infringement cannot be determined by a general reference to the distortion of competition in the relevant product market, since an impact on competition constitutes a consubstantial element of any conduct covered by Article 81 EC. Such a definition is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81 EC would have to be systematically characterised as constituent elements of a single infringement.

As regards the cartels at issue, the Court found that the global arrangements and the European arrangements were not applied at the same time, pursued different objectives and were implemented by dissimilar methods and that the Commission had not demonstrated that the European producers intended to adhere to the global arrangements in order subsequently to divide the European Economic Area market. Accordingly, the global arrangements and the European arrangements constituted two separate infringements. Since the infringement consisting in participation in the global market was time-barred, the Court annulled the contested decision in so far as it imposed a fine on the applicants on account of their participation in that cartel.

(c) Fines

It follows from *Prym and Prym Consumer v Commission* ⁽³⁶⁾ that the obligation to define the relevant market in a decision adopted pursuant to Article 81 EC applies to the Commission only when, in such a definition, it is not possible to determine whether the cartel is capable of affecting trade between Member States and has an anti-competitive object or effect. Where the agreement has as its object the division of the product markets and the geographic market the Commission is under no obligation to define the market for the purposes of the application of Article 81 EC. Nonetheless, where the

⁽³⁵⁾ Judgments of 12 December 2007 in Case [T-101/05](#) *BASF and UCB v Commission* and Case [T-111/05](#) *UCB v Commission*.

⁽³⁶⁾ Judgment of 12 September 2007 in Case [T-30/05](#) (on appeal, Case C-534/07 P).



operative part of a decision does not merely make a finding of infringement, but also imposes a fine, the findings of fact relating to the relevant market are relevant. According to the guidelines on setting fines ⁽³⁷⁾, the assessment of the gravity of the infringement must take account of its actual impact on the market, where this can be measured, and also of the effective actual economic capacity of offenders to cause significant damage to other operators. The assessment of those factors requires a determination of the size of the markets and of the market shares held by the undertakings concerned.

However, as the infringement had as its object the sharing of the product markets and the geographic market, which is characterised as 'very serious' by the guidelines, the Court considered that the absence of reasoning relating to market definition could not, in this case, lead to the cancellation or reduction of the fine, it being noted that the Commission had chosen the minimum starting amount provided for in the guidelines for such an infringement.

In *Bolloré and Others v Commission* ⁽³⁸⁾ the Court exercised its unlimited jurisdiction in two aspects. In the first place, observing that whilst the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme is not material to the establishment of the existence of the infringement, such a factor must be taken into consideration when the gravity of the infringement is assessed and if and when the fine is determined, the Court reduced by 15 % the final amount of the fine imposed on one of the undertakings, on the ground that the Commission had failed to demonstrate that that undertaking's non-participation in the market-sharing practices had not been taken into account in respect of all the parameters which led to the determination of the final amount of the fine imposed on it. In the second place, when reducing the fine for cooperation, the Court considered that even if, unlike the undertaking AWA, the undertaking Mougeot had provided documents dating back to the material time and if, on certain points, its statements were more detailed, the information given by AWA related to a longer period and covered a wider geographical area, and held that the cooperation provided by those two undertakings was of similar quality. Consequently, the Court granted AWA the same reduction as had been given to Mougeot.

Likewise, in *BASF and UCB v Commission* the Court, after finding that the infringement consisting in the applicants' participation in the global arrangements was time-barred, recalculated the amount of the fines which the Commission had imposed on them. In BASF's case, the Court stated that where an undertaking makes available to the Commission information concerning actions for which it could not have been required to pay a fine, that does not amount to cooperation falling within the scope of the 1996 Leniency Notice ⁽³⁹⁾. Since the main evidence provided by BASF by way of cooperation related to the global arrangements, and since the infringement relating to those arrangements had been held to be time-barred, the Court considered that BASF could no longer benefit from the reduction of 10 % which it had been granted under that head.

⁽³⁷⁾ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

⁽³⁸⁾ Judgment of 26 April 2007 in Joined Cases [T-109/02](#), [T-118/02](#), [T-122/02](#), [T-125/02](#), [T-126/02](#), [T-128/02](#), [T-129/02](#), [T-132/02](#) and [T-136/02](#) *Bolloré and Others v Commission* (on appeal, Case C-322/07 P).

⁽³⁹⁾ Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).



As the Court had considered that, owing to the nature of the infringement, the starting amount of the fine relating to the European arrangements must remain the same as that fixed for all the arrangements, the fact that BASF had obtained a declaration that one of the two types of conduct in which it was found to have engaged could not attract a penalty because it was time-barred did not have the effect of reducing the amount of its fine. In effect, in spite of the reduction obtained by virtue of that time-bar, the final amount arrived at the the Court was EUR 35.024 million, or EUR 54 000 more than the amount of the fine imposed on BASF by the Commission.

In *Coats Holdings and Coats v Commission* ⁽⁴⁰⁾ the Court considered that the applicant's role was essentially limited to facilitating the entry into force of the framework agreement of the cartel. As its role was therefore closer to that of a mediator than to that of a full member of the cartel, the Court considered it appropriate to reduce the amount of the fine by 20 % in order to take account of those attenuating circumstances.

(d) Imputability of the unlawful conduct

In *Akzo Nobel and Others v Commission* ⁽⁴¹⁾ the Court emphasised that it was not because of a relationship between the parent company in instigating the infringement or, a fortiori, because the parent company was involved in the infringement, but because they constituted a single undertaking for the purposes of Article 81 EC that the Commission was able to address the decision imposing fines to the parent company of a group of companies.

In the specific case of a parent company holding all of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary. It is for the parent company to rebut that presumption by placing before the Court any evidence relating to the organisational, economic and legal links between its subsidiary and itself in order to demonstrate that they do not constitute a single economic entity.

2. Points raised on the scope of Article 82 EC

(a) *Microsoft v Commission*

The Court's activity this year was marked by the case giving rise to the judgment in *Microsoft v Commission* ⁽⁴²⁾, delivered by the Grand Chamber, which dismissed the essential part of the action for annulment of the Commission's decision ⁽⁴³⁾.

⁽⁴⁰⁾ Judgment of 12 September 2007 in Case [T-36/05](#) (on appeal, Case C-468/07 P).

⁽⁴¹⁾ Judgment of 12 December 2007 in Case [T-112/05](#).

⁽⁴²⁾ Judgment of 17 September 2007 in Case [T-201/04](#).

⁽⁴³⁾ Commission Decision 2007/53/EC of 24 May 2004 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 — Microsoft) (OJ 2007 L 32, p. 23).



In addition to imposing a fine of more than EUR 497 million, the Commission ordered Microsoft to bring the abuses found to an end, first, by disclosing the necessary interoperability information to the undertakings wishing to develop and distribute workgroup server operating systems and, second, by offering for sale a version of the Windows PC operating system without Windows Media Player. In order to assist the Commission in its task of monitoring compliance with those remedies, the decision provided for a monitoring mechanism which included the appointment of an independent monitoring trustee.

The Court rejected all of the applicant's claims concerning the abuses of a dominant position found by the Commission and also the remedies and the fine imposed, but, on the contrary, annulled the provisions of the decision relating to the monitoring trustee.

As regards, in the first place, the abuse consisting in the refusal to provide the interoperability information, the Court rejected all the arguments whereby Microsoft sought to challenge the concept and the degree of interoperability taken into account by the Commission and also the coherence of the remedy imposed. The Court then considered the question of intellectual property rights or business secrets covering Microsoft's communications protocols or the specifications for those protocols. Referring to the case-law of the Court of Justice ⁽⁴⁴⁾, the Court observed that it is only in exceptional circumstances that the exercise of the exclusive right by the holder of the property right could give rise to such an abuse, namely when, first, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; second, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; third, the refusal prevents the appearance of a new product for which there is potential consumer demand; and, last, the refusal is not objectively justified.

In considering whether those circumstances were present in this case, the Court held that the Commission had not made a manifest error by considering, first, that, in order to be able to compete viably with Windows workgroup server operating systems, competing operating systems had to be able to interoperate with the Windows domain architecture on an equal footing with those Windows systems; second, that market developments showed a risk that competition would be eliminated on the workgroup server operating systems market; and, third, that Microsoft's refusal limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC and that, accordingly, the circumstance relating to the appearance of a new product was present in this case. Last, the Court observed that Microsoft had neither demonstrated the existence of any objective justification whatsoever for its refusal to disclose the interoperability information in issue, nor sufficiently established that the disclosure of that information would have a significant negative impact on its incentives to innovate.

As regards, in the second place, the abuse associated with the tying of the Windows PC operating system and Windows Media Player, the Court considered that the Commission's analysis of the constituent elements of the tying was consistent with

⁽⁴⁴⁾ Case 238/87 *Volvo* [1988] ECR 6211; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission, Magill*, [1995] ECR I-743; Case C-7/97 *Bronner* [1998] ECR I-7791; and Case C-418/01 *IMS Health* [2004] ECR I-5039.



both Article 82 EC and the case-law ⁽⁴⁵⁾; the Court recalled that those elements are as follows: first, the tying product and the tied product are two separate products; second, the undertaking concerned has a dominant position on the market for the tying product; third, the undertaking does not give consumers the choice of obtaining the tying product without the tied product; and, fourth, the practice in question restricts competition.

As regards, in the third place, the monitoring mechanism consisting in the designation of an independent trustee, the Court held that the decision had no legal basis in Regulation No 17 ⁽⁴⁶⁾ and exceeded the Commission's powers of investigation and enforcement. The Court considered that by establishing such a mechanism, which conferred on the trustee, without limitation in time, the powers of access, independently of the Commission, to Microsoft's assistance, information, documents, premises and staff, and to the source codes of its relevant products, and which entitled the trustee also to act on his own initiative and upon application by third parties, the Commission had gone beyond the situation in which it designates its own external expert to advise it during an investigation and had delegated powers which it alone could exercise. The Commission had also exceeded its powers by making Microsoft responsible for the costs associated with the trustee, when no provision of Regulation No 17 empowered it to require undertakings to bear the costs which the Commission itself incurred in monitoring the execution of remedies.

As for the fine, the Court observed, in particular, that the obligation to state reasons did not involve either indicating the figures relating to the amount of fines or distinguishing, in fixing the starting amount of the fine, between the different abuses found.

(b) Decisions rejecting complaints

In *Ufex and Others v Commission* the Court observed that, while the Commission, in the exercise of its discretion, may decide not to follow up a complaint for lack of Community interest ⁽⁴⁷⁾, it cannot do so on the sole basis that such practices have ceased, without having ascertained that anti-competitive effects are not ongoing and that, where appropriate, the gravity of the alleged effects on competition or their ongoing effects were not such as to confer a Community interest on that complaint. Even where no anti-competitive effects persist, the Commission is still required to take the duration and the gravity of the alleged infringements into account.

Furthermore, as regards the examination of a complaint falling within the shared competence of the Commission and the national authorities, the Court made clear that

⁽⁴⁵⁾ See, inter alia, Case T-30/89 *Hilti v Commission* [1991] ECR II-1439 and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755.

⁽⁴⁶⁾ Cited above.

⁽⁴⁷⁾ On the concept of Community interest, see also judgments of 3 July 2007 in Case T-458/04 *Au lys de France v Commission* and of 12 July 2007 in Case T-229/05 *AEPI v Commission* (on appeal, Case C-425/07 P).



neither a subjective attitude on the part of the national authorities or the national courts to the effect that the Commission is better placed to deal with the matter nor the fact that the Commission cooperated with a national authority is capable of creating exclusive competence on the part of the Commission or of anticipating the Commission's decision as to the existence of a Community interest. Nor is the Commission under any obligation to give priority to a case where a national court has stayed proceedings pending a decision on the Commission's part.

(c) Application of Article 82 EC to cross-subsidies

In *Ufex and Others v Commission* the Court held that the grant by an undertaking in a dominant position of cross-subsidies originating in the sector in which it has a statutory monopoly to the activity of its subsidiary, which is open to competition, does not as such constitute an abuse of a dominant position, irrespective of the policies pursued in the reserved sector and in the sector open to competition. In effect, the mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas. However, the acquisition of a holding, and by analogy the grant of cross-subsidies, may raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market. Consequently, under-invoicing by an undertaking in a dominant position for the provision of services to its subsidiary does not necessarily constitute a barrier for competitors where the subsidiary uses those subsidies in order to derive significant profits or to pay high dividends. The same applies concerning the fact that the subsidiary aligns its prices to those of its competitors and derives very significant profits, provided that such conduct has no impact on the customer's choice of supplier.

(d) Abuse of a dominant position

The Court held in *Duales System Deutschland v Commission (Der Grüne Punkt)* ⁽⁴⁸⁾ that the conduct of an undertaking which manages a system for the collection and recycling of packaging extending over the whole territory, which consists in requiring undertakings which use its system to pay a fee for all the packaging marketed in Germany and bearing its logo, where those undertakings demonstrate that they did not use that system for part or all of that packaging, constitutes an abuse of a dominant position. However, that does not preclude the possibility of that undertaking, where it is shown that the packaging bearing its logo has been collected and recycled by another system, levying an appropriate fee solely for the use of the trade mark. The placing of the logo corresponds to a service in that it informs the consumer that the system is available.

⁽⁴⁸⁾ Judgment of 24 May 2007 in Case T-151/01 (on appeal, Case C-385/07 P).



(e) Predatory pricing

Relying on *AKZO v Commission* ⁽⁴⁹⁾, the Court recalled in *France Télécom v Commission* ⁽⁵⁰⁾ that there are two different methods of analysis when it is necessary to ascertain whether an undertaking has charged predatory prices. Prices lower than the average variable costs charged by an undertaking holding a dominant position are regarded as abusive in themselves, because the only interest that the undertaking may have in charging such prices is to eliminate its competitors, whereas prices lower than average total costs but above the average variable costs are abusive when they are fixed in the context of a plan designed to eliminate a competitor. That intention to eliminate must be established on the basis of solid and consistent indicia, although there is no requirement to demonstrate the actual effects of the practices in question.

In that regard, the receipts and costs subsequent to the infringement cannot be taken into account for the purpose of evaluating the rate of cover of the costs during the period under consideration. In effect, Article 82 EC is aimed at the position held, on the common market, by the undertaking concerned at the time when it committed the infringement. However, it is not necessary to establish, by way of additional proof, that the undertaking concerned had a genuine prospect of recovering its losses.

The Court further held that it cannot be asserted that the right of a dominant undertaking to align its prices on those of its competitors is absolute, in particular where this right would in effect justify the use of predatory pricing prohibited under the Treaty. Although an undertaking in a dominant position cannot be deprived of the right to protect its own commercial interests if they are attacked and must be allowed, in so far as is reasonable, to react accordingly, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.

(f) Commitments given by the undertaking in a dominant position

In *Alrosa v Commission* the Court ruled for the first time on the legality of a decision making binding the commitments offered by an undertaking in a dominant position and on the effects of that decision on third parties.

The Court held that the effect of such a decision is to bring to an end the proceedings to establish and penalise an infringement of the competition rules. Accordingly, it cannot be considered to be a mere acceptance on the Commission's part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement, as regards which the Commission exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to prove the infringement. By making a particular type of conduct of an operator in relation to third parties binding, a

⁽⁴⁹⁾ Case C-62/86 [1991] ECR I-3359.

⁽⁵⁰⁾ Judgment of 30 January 2007 in Case [T-340/03](#) (on appeal, Case C-202/07 P).



decision adopted under Article 9 of Regulation No 1/2003 ⁽⁵¹⁾ may indirectly have legal effects *erga omnes* which the undertaking concerned would not have been in a position to create on its own. According to the Court, the Commission is thus their sole author, since it makes binding the commitments offered by the undertaking concerned and assumes sole responsibility for them. Although the Commission has a margin of discretion in the choice offered to it by Regulation No 1/2003 and may make the commitments proposed by the undertakings concerned binding through the adoption of a decision under Article 9 of that regulation or may follow the procedure laid down in Article 7(1), which requires that an infringement be established, it must nonetheless observe the principle of proportionality.

In this case, the Court concluded that, in the case of a Commission decision requiring that an end be put to a long-standing commercial relationship between two undertakings party to an agreement that might constitute an abuse of a dominant position, the close connection between the two sets of proceedings initiated by the Commission, on the basis of Articles 81 EC and 82 EC, and also the fact that the decision expressly mentions the undertaking that is a party to the contract without being addressed to it should have led to that undertaking being accorded, as regards the proceedings taken as a whole, the rights given to an 'undertaking concerned' within the meaning of Regulation No 1/2003, although, strictly speaking, it did not fall to be so classified in the proceedings relating to Article 82 EC. Consequently, that undertaking had a right to be heard on the individual commitments which the Commission envisaged making binding and was entitled to have the opportunity to exercise that right in full.

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

In *Sun Chemical Group and Others v Commission* ⁽⁵²⁾ the Court emphasised that the guidelines on the assessment of horizontal mergers ⁽⁵³⁾ do not require an examination in every case of all the factors which they mention, since the Commission enjoys a discretion enabling it to take account or not to take account of certain factors and is not required to provide specific reasons concerning the assessment of a number of aspects of the concentration which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration.

In the exercise of its review, the Court is not limited merely to establishing whether or not the Commission took into account elements mentioned in the guidelines as relevant to the assessment of the impact of a concentration, but must also consider whether any possible omissions on the part of the Commission are capable of calling into question its finding.

⁽⁵¹⁾ 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).

⁽⁵²⁾ Judgment of 9 July 2007 in Case [T-282/06](#).

⁽⁵³⁾ Guidelines on the assessment of horizontal mergers under the Council regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5).



Furthermore, when examining the Commission's analysis relating to the existence of excess capacity on the market, the Court concluded that it is not necessary, in order for the customers of an entity resulting from a concentration to be in a position to discourage any anti-competitive conduct on the entity's part, that they should be able to transfer all their orders to other suppliers. In fact, the possibility for them to transfer a substantial part of their requirements to other suppliers may be regarded as a threat liable to cause sufficient losses to deter that entity from pursuing such a strategy.

4. Proceedings for the elimination of anti-competitive practices

(a) Allocation of powers

Regulation No 1/2003 seeks in particular to give the national competition authorities a greater role in the application of the competition rules and, to that end, establishes a network of public authorities which apply those rules in close cooperation. In that regard, the Court, in the judgments in *France Télécom v Commission* cited above, makes clear that Regulation No 1/2003 nonetheless maintains the Commission's preponderant role in seeking out infringements. Although Article 11(1) of that regulation lays down a general rule to the effect that the Commission and the national authorities are required to cooperate closely, it does not require the Commission to refrain from making an inspection in a case which is being dealt with by a national competition authority in parallel. Nor can it be inferred from that provision that where a national competition authority has begun an investigation into particular facts the Commission is immediately prevented from taking action in the case or taking a preliminary interest therein. On the contrary, it follows from the requirement of collaboration between the Commission and the national authorities that the national authorities may, at least in the preliminary stages such as investigations, work in parallel.

Furthermore, Article 11(6) of Regulation No 1/2003 provides, subject only to consulting the national authority concerned, that the Commission retains the option of initiating proceedings with a view to adopting a decision even where that authority is already dealing with the case. A fortiori, Regulation No 1/2003 cannot be interpreted as prohibiting, in such a case, the Commission from deciding to carry out an inspection, a step that is merely preliminary to dealing with the substance of the case and does not have the effect of formally initiating proceedings.

(b) Confidentiality of communications between lawyers and clients

In *Akzo Nobel Chemicals and Akcros Chemicals v Commission* the Court ruled on the scope of the principle, asserted by the Court of Justice in *AM & S v Commission* ⁽⁵⁴⁾, that the Commission must exercise the powers of investigation conferred on it in order to uncover infringements of competition law while respecting, subject to certain conditions, the confidentiality of communications between lawyers and their clients.

⁽⁵⁴⁾ Case 155/79 [1982] ECR 1575.



As regards the procedure to be followed during an inspection, the Court held that an undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at documents for which it claims confidentiality, provided that the undertaking considers that such a cursory look is impossible without revealing the content of the documents and that it gives appropriate reasons. If the Commission considers that the material presented by the undertaking is not of such a nature as to prove that the documents in question are confidential, its officials may place a copy of the document in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. The Court considered that this procedure enables risk of a breach of the principle of protection of confidentiality of communications between lawyers and clients to be avoided while at the same time enabling the Commission to retain a certain control over the documents and avoiding the risk that the documents will subsequently disappear or be manipulated.

As regards the types of documents protected, the Court established that an undertaking's internal documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent to a lawyer, may nonetheless be covered by legal professional privilege, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in the exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection. The Court added that the fact that a document was drawn up in connection with a competition law compliance programme is not sufficient in itself for that document to be protected. The scope of such programmes is often such that they encompass duties and cover information going beyond the exercise of the rights of the defence.

In addition, the Court asserted that, even though it is true that specific recognition of the role of in-house lawyers and the protection of the confidentiality of communications with such lawyers is relatively more common today than when the judgment in *AM & S* was delivered, it is nonetheless impossible to identify tendencies which are uniform or have clearly majority support in that regard in the laws of the Member States. The choice made by the Court of Justice in that judgment not to include among protected communications those between undertakings and lawyers bound by a relationship of employment to those undertakings must be maintained.

(c) Principle of proportionality

The judgment in *CB v Commission* ⁽⁵⁵⁾ is informative as to the conditions in which the Commission may, by decision, order inspections to which the undertakings or associations of undertakings concerned are required, under Article 14(3) of Regulation No 17 (and in future under Article 20(4) of Regulation No 1/2003), to submit.

The applicant, an economic interest group governed by French law set up by the main French credit establishments in order to achieve interoperability between their bank

⁽⁵⁵⁾ Judgment of 12 July 2007 in Case [T-266/03](#).



card payment systems, claimed that the decision ordering an inspection which was binding on it infringed the principle of proportionality since such an inspection did not constitute the necessary and appropriate means of obtaining the information sought by the Commission. The Court rejected that plea, observing that the choice to be made by the Commission between the various means of obtaining information available to it does not depend on circumstances such as the particular gravity of the situation, extreme urgency or the need for absolute discretion, but on the need for an appropriate investigation, having regard to the particular characteristics of each case. The Court observed that the purpose of the contested decision adopted in this case was to obtain information on the presumed intention of certain large French banks to exclude potential entrants from the French market for the issue of bank payment cards and also the exchange of confidential business information that the Commission considered it would be able to find at the applicant's premises. In the light of the nature of the information sought and the role played by those banks in the structure of the group, the Court held that the Commission's choice did not infringe the principle of proportionality, since it was difficult to imagine how the Commission could have come into possession of that information other than by means of a decision ordering an inspection.

(d) Publication of Commission decisions and the presumption of innocence

In *Pergan Hilfsstoffe für industrielle Prozesse v Commission* the Court developed the principles laid down in *Bank Austria Creditanstalt v Commission* ⁽⁵⁶⁾ concerning the Commission's power to publish its decisions and respect for professional secrecy, and stated that those concepts must be interpreted in the light of the principle of the presumption of innocence.

In reliance on that principle, the applicant claimed that publication of the 'peroxides decision' was unlawful, since it contained findings relating to alleged offending conduct on its part. In that regard, the Court observed that, even though, according to *Bank Austria Creditanstalt v Commission*, the interest of an undertaking in the non-disclosure of the anti-competitive conduct of which it is accused by the Commission does not merit any particular protection, the application of that case-law presupposes that the infringement found is mentioned in the operative part of the decision, which is an essential requirement if the undertaking is to be able to mount a legal challenge against the decision. As the 'peroxides decision' did not satisfy that condition in the applicant's case, the Court held that the findings with respect to the applicant were not established in law and could not be disclosed. Such a situation is contrary to the principle of the presumption of innocence and infringes the principle of professional secrecy which requires that respect for the reputation and dignity of the applicant be ensured.

⁽⁵⁶⁾ Case T-198/03 [2006] ECR II-1429.



State aid

1. Substantive rules

(a) Constituent elements of State aid

The problem of the classification of measures as State aid formed the subject matter of a number of judgments delivered by the Court of First Instance in 2007. These include, in particular, the judgment in *Olympiaki Aeroporia Ypiresies v Commission* ⁽⁵⁷⁾, in which the Court annulled in part a Commission decision ordering, inter alia, recovery of State aid consisting in the Hellenic Republic's toleration of non-payment of value added tax ('VAT') on fuel and spare parts for aeroplanes. The Court considered that the Commission had failed to examine whether such a default in payment conferred a real economic advantage permitting it to be classified as State aid. As VAT is in principle neutral as regards the competitive situation, in that it may be either immediately deducted as input tax or recovered within a short time, the only advantage from which the applicant could have benefited would have consisted in a cash-flow advantage arising from the temporary disbursement of the input tax. The Court observed that, in this case, the failure to pay the VAT did not suffice, in principle, to support the assumption that the applicant had benefited from an advantage for the purposes of Article 87 EC.

In *Bouygues and Bouygues Télécom v Commission* ⁽⁵⁸⁾ the Court upheld the Commission's decision in which it found that there was no State aid owing to the absence of a selective advantage granted to certain operators by a national measure reducing the fees payable by them for UMTS (Universal Mobile Telecommunications System) licences for the purpose of aligning the terms on which all those licences were awarded. The resulting loss incurred by State resources was not sufficient to prove the existence of State aid because it was inevitable on account of the general scheme of the system, as the Community framework for telecommunications services is based on equal treatment of operators in the award of licences and the determination of fees. The Court emphasised, moreover, that the potential advantage deriving from the fact that licences were awarded to the first operators at an earlier date did not confer a benefit on those operators owing to the delay in launching the UMTS network.

(b) Obligation to state reasons

In *Ireland and Others v Commission* ⁽⁵⁹⁾ the Court annulled the Commission's decision concerning the exemption from customs duty of mineral oil used as fuel for the production of aluminium in certain areas of Ireland, France and Italy, raising of its own motion a failure to state reasons concerning the non-classification of that measure as 'existing aid' fixed by

⁽⁵⁷⁾ Judgment of 12 September 2007 in Case T-68/03.

⁽⁵⁸⁾ Judgment of 4 July 2007 in Case T-475/04 (on appeal, Case C-431/07 P).

⁽⁵⁹⁾ Judgment of 12 December 2007 in Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06.



Regulation No 659/99 ⁽⁶⁰⁾. According to Article 1(b)(v) of that regulation, aid is deemed to be existing aid where it can be established that at the time it was put into effect it did not constitute aid but that it subsequently became aid owing to the evolution of the common market even without having been altered by the Member State concerned. The Court observed that, in accordance with the Community provisions governing excise duties, the exemptions in question had been authorised and extended by a number of decisions of the Council adopted on a proposal from the Commission. In those circumstances, the Court held that when the Commission omitted to consider the aid in issue to be existing aid under the abovementioned provision of Regulation No 659/1999, it was not entitled merely to assert that that provision was not applicable in this case.

The judgment in *Salvat père et fils and Others v Commission* refines the Court's case-law on the requirement to state reasons for the Commission decisions adopted with respect to various measures which it regards as constituting State aid in application of Article 87 EC. In that judgment, the Court held that the fact that a Commission decision has carried out a global examination of the conditions for the application of Article 87 EC cannot be regarded as in itself contrary to the obligation to state reasons, particularly when the measures concerned formed part of the same action plan.

In *Département du Loiret v Commission* ⁽⁶¹⁾ the Court found, on the other hand, that the statement of reasons for a Commission decision declaring incompatible with the common market State aid unlawfully paid to an undertaking in the form of the conveyance of developed land at a preferential price was insufficient. The Court observed that that decision did not contain the necessary information on the method used to calculate the aid to be recovered, in particular as regards the application of a rate of compound interest intended to arrive at the present-day value of initial subsidy.

(c) Recovery

Under the case-law brought together and enshrined in Article 13(1) of Regulation No 659/1999, the Commission is authorised to adopt a decision on the basis of the information available to it when dealing with a Member State which fails to comply with its duty of cooperation and fails to provide it with the information which it has requested for the purpose of examining the compatibility of aid with the common market. In *MTU Friedrichshafen v Commission* ⁽⁶²⁾ the Court held that, while Article 13(1) of Regulation No 659/1999 allows the Commission, after it has observed the procedural requirements laid down therein, to take a decision finding that the aid is incompatible on the basis of the information available and, if appropriate, order the Member State to recover the aid from the beneficiary, it does not allow the Commission to impose on a particular undertaking an obligation to repay, even jointly and severally, a fixed part of the amount

⁽⁶⁰⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 CE] (OJ 1999 L 83, p. 1).

⁽⁶¹⁾ Judgment of 29 March 2007 in Case [T-369/00](#) (on appeal, Case C-295/07 P).

⁽⁶²⁾ Judgment of 12 September 2007 in Case [T-196/02](#) (on appeal, Case C-520/07 P).



of the aid declared to be incompatible and paid unlawfully where the transfer of State resources from which that undertaking is alleged to have benefited is hypothetical.

The Court recalled in *Scott v Commission* ⁽⁶³⁾ that the objective of recovery of unlawful aid is not to impose a penalty not provided for by Community law but to ensure that its recipient forfeits the advantage which it had enjoyed over its competitors on the market and to restore the situation existing prior to the payment of the aid. The Commission cannot therefore either, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received or, in order to mark its disapproval of the serious character of the illegality, order recovery of an amount in excess of that value.

(d) Temporal application of the legal framework

In *Freistaat Sachsen v Commission* ⁽⁶⁴⁾ the Court heard an action for annulment of a Commission decision on an aid scheme established by the authorities of the *Land* of Saxony for small and medium-sized undertakings. The Court accepted the applicant's argument that the Commission should have examined the aid scheme concerned on the basis of the provisions in force at the time of notification and not on the basis of those which entered into force after that time. The Court also observed that the initial notification of the aid, made before the entry into force of the later rules, was complete and emphasised that the application of a new rule on the compatibility of the State aid to aid notified before its entry into force is permissible only if it clearly follows from the terms, objectives or general scheme of the new rules that they are intended to apply retroactively and, if necessary, if the legitimate expectations of those concerned are duly respected.

2. Procedural rules

In *Scott v Commission* the Court stated that, although the procedure for review of State aid governed by Article 88 EC accords no special role to the recipient of the aid and the latter does not have the status of a party to that procedure, the Commission may, under its obligation to conduct a diligent and impartial examination of the case, be required, in certain circumstances, to take into account the observations submitted by the recipient of aid after the expiry of the time granted to the interested parties by the decision to initiate the formal examination procedure.

In that judgment, the Court also referred to its case-law to the effect that the legality of a Commission decision concerning State aid must be assessed in the light of the information available to the Commission when the decision was adopted, so that the applicant cannot rely on factual arguments which were not known to the Commission and which were not notified to it during that formal examination procedure. The Court stated that it does not follow from that case-law that proof submitted by the recipient of aid in an action for annulment may not be taken into account in order to appreciate the legality of the decision

⁽⁶³⁾ Judgment of 29 March 2007 in Case [T-366/00](#) (on appeal, Case C-290/07 P).

⁽⁶⁴⁾ Judgment of 3 May 2007 in Case [T-357/02](#) (on appeal, Case C-334/07 P).



where that proof had been properly submitted to the Commission during the administrative procedure prior to the adoption of the contested decision if the Commission had excluded it for reasons which cannot be justified.

In *Tirrenia di Navigazione and Others v Commission* ⁽⁶⁵⁾ the applicants sought annulment of the Commission's decision to initiate the formal investigation procedure concerning State aid granted to Italian navigation undertakings. As the main substantive points had already been settled by the Court of Justice in a related case ⁽⁶⁶⁾, the Court of First Instance observed that it must ascertain whether the solution reached by the Court of Justice could be transposed to the present case, since the arguments put forward by the applicants differed from those to which the Court of Justice had already responded and since the applicants before the Court of First Instance had not had the opportunity to express their views before the Court of Justice, as there was no provision for intervention before that Court by individuals in such a case.

Relying on the case-law of the Court of Justice concerning the scope of the prohibition on ruling *ultra petita* ⁽⁶⁷⁾, moreover, the Court held that, in the event that the defendant institution should fail to raise a legal consideration, invocation of which would have established the legality of the contested decision, it is for the Community judicature to take such a legal consideration into account in order to preclude the annulment of a lawful act. Consequently, the Court relied of its own motion on the consideration that interested third parties cannot secure annulment of the decision on the basis of matters which were not raised before the Commission by the national authorities at the preliminary investigation procedure stage and dismissed the action.

Expiry of the ECSC Treaty

A number of judgments ⁽⁶⁸⁾ delivered in 2007 clarified the consequences of the expiry of the ECSC Treaty for the power of the Commission to make findings of infringement of the competition rules in the sectors previously governed by that Treaty.

The Court observed that the succession of the legal framework of the EC Treaty to that of the ECSC Treaty is part of the unity and continuity of the Community legal order and its objectives, which requires that the European Community ensures compliance with the rights and obligations which arose under the ECSC Treaty. Thus, the pursuit of the aim of undistorted competition in the sectors which initially fell within the common market in coal and steel is not suspended by the fact that the ECSC Treaty has expired, since that objective is also pursued in the context of the EC Treaty. In other words, the sectors which

⁽⁶⁵⁾ Judgment of 20 June 2007 in Case [T-246/99](#).

⁽⁶⁶⁾ Case C-400/99 *Italy v Commission* [2001] ECR I-7303 and [2005] ECR I-3657.

⁽⁶⁷⁾ Order of 13 June 2006 in Case C-172/05 P *Mancini v Commission*.

⁽⁶⁸⁾ Judgments of 12 September 2007 in Case [T-25/04 González y Díez v Commission](#) and of 25 October 2007 in Joined Cases [T-27/03](#), [T-46/03](#), [T-58/03](#), [T-79/03](#), [T-80/03](#), [T-97/03](#) and [T-98/03 SP and Others v Commission](#). The points dealt with in the latter judgment also form the subject matter of the judgments of the same date in Case [T-45/03 Feralpi Siderurgica v Commission](#) and Case [T-94/03 Ferriere Nord v Commission](#).



previously came under the ECSC Treaty — a *lex specialis* — automatically came, as from 24 July 2002, within the scope of the EC Treaty — the *lex generalis*.

The Court made clear, however, that within each Treaty framework, the institutions are competent to exercise only those powers which that Treaty conferred on them. By contrast, the principles governing the succession of legal rules may lead to the application of substantive provisions which are no longer in force at the time of the adoption of a measure by a Community institution.

It was in application of those principles that the Court, in *SP and Others v Commission*, annulled the decision which the Commission had adopted, after the expiry of the ECSC Treaty, on the basis of Article 65(4) and (5) CS and not the corresponding provisions of Regulation No 17 ⁽⁶⁹⁾, to establish an infringement of Article 65(1) CS by a number of Italian manufacturers of reinforcing bars and imposing a fine on the undertakings concerned.

On the other hand, in *González y Díez v Commission* the Court held that the Commission had been entitled, after the expiry of the ECSC Treaty, to adopt a decision relating to State aid granted in spheres coming within the scope of that Treaty in reliance on Article 88(2) EC with respect to situations which had come into existence before the expiry of the ECSC Treaty. However, as regards the substantive rules, the Court concluded that the Commission was not entitled to examine the aid in issue under a regulation adopted within the framework of the EC Treaty.

Community trade mark

Decisions given in the context of Regulation No 40/94 ⁽⁷⁰⁾ again accounted in 2007 for a large number (128) of the cases disposed of, and now amount to 32 % of the total.

1. Absolute grounds for refusal of registration

The Court annulled decisions of the Boards of Appeal in three of the total of 68 judgments disposing of cases concerning absolute grounds for refusal of registration ⁽⁷¹⁾. In the first judgment, *Kustom Musical Amplification v OHIM (Shape of a guitar)*, the Court held that there had been an infringement of the right to be heard and the duty to state reasons because the websites which enabled the Office for Harmonization in the Internal Market ('OHIM') to find that the mark applied for should be rejected could not be accessed from the links that OHIM had sent to the trade mark applicant before adopting its decision.

⁽⁶⁹⁾ Cited above.

⁽⁷⁰⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

⁽⁷¹⁾ Judgments of 7 February 2007 in Case [T-317/05 Kustom Musical Amplification v OHIM \(Shape of a guitar\)](#); of 13 June 2007 in Case [T-441/05 IVG Immobilien v OHIM \(I\)](#); and of 10 October 2007 in Case [T-460/05 Bang & Olufsen v OHIM \(Shape of a loudspeaker\)](#).



In *IVG Immobilien v OHIM (I)*, the Court criticised the inadequacy of the analysis which led OHIM to refuse registration, in respect of several financial and property services, of a figurative sign formed by the letter 'I'. The Court held, in particular, that instead of relying on the finding that the sign at issue was ordinary, OHIM ought to have addressed the question of whether that sign was in fact capable of distinguishing, in the minds of the target public, the services supplied by the trade mark applicant from those of its competitors.

Lastly, in *Bang & Olufsen v OHIM (Shape of a loudspeaker)*, the Court held that, in view, especially, of the particularly careful examination which consumers undertake when buying goods of a durable and technological nature, the shape of a loudspeaker can be registered as a three-dimensional trade mark, regard being had also to the aesthetic result of the whole. It further stated that, even if the existence of specific or original characteristics does not constitute an essential condition for registration, the fact remains that their presence may confer the required degree of distinctiveness on a trade mark which would not otherwise have it.

By contrast, in *Neumann v OHIM (Shape of a microphone head grill)* ⁽⁷²⁾, the Court upheld OHIM's refusal to register the shape of a microphone head grill as a Community trade mark. Although the average consumer of the relevant products is likely to be attentive to their different technical or aesthetic details, that does not automatically imply that he may perceive them as having the role of a trade mark. Further, no distinctive character can arise from the fact that competing undertakings have been forced to give up producing or marketing products with an analogous shape.

2. Relative grounds for refusal of registration

(a) Complementary nature of the goods

In *El Corte Inglés v OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* ⁽⁷³⁾, the Court annulled the decision of OHIM which had found that there is no similarity between clothing, footwear and hats, on the one hand, and leather goods such as handbags, purses and wallets, on the other. The assessment of whether those goods are complementary must take account of the fact that they may have a common aesthetic function and contribute jointly to the external image of consumers. The perception of the connections between the goods at issue must therefore be assessed in the light of any requirement of coordination of the various components of that external image when the goods are designed and purchased. That perception may lead consumers to believe that the same undertaking is responsible for the production of those goods.

On this same point, it was held in two other judgments that the degree of complementarity between wine glasses, carafes and decanters, on the one hand, and wine, on the other, is not sufficient for a finding of similarity between the goods at issue and that the obvious

⁽⁷²⁾ Judgment of 12 September 2007 in Case [T-358/04](#).

⁽⁷³⁾ Judgment of 11 July 2007 in Case [T-443/05](#).



difference between perfumery goods and leather goods cannot be called into question by considerations connected with their possible aesthetic complementarity ⁽⁷⁴⁾.

(b) Opposition based on signs other than earlier trade marks

Article 8(4) of Regulation No 40/94 allows for opposition proceedings to be brought against the registration of a Community trade mark on the basis of a sign other than an earlier trade mark. In the dispute between the Czech company Budějovický Budvar and the American company Anheuser-Busch concerning the Community trade marks BUDWEISER and BUD, the Court clarified the scope of the rights conferred by that provision ⁽⁷⁵⁾. It was held that Budějovický Budvar, which had previously registered appellations of origin for beer in France under the Lisbon Agreement for the Protection of Appellations of Origin, could not rely on that agreement in order to oppose Anheuser-Busch's applications in relation to identical or similar goods. Although French law extends the protection provided for in the Lisbon Agreement to cases in which the goods are not similar, it nonetheless requires that use by third parties of the signs at issue be likely to misappropriate or weaken the reputation, in France, of the appellations of origin in question, which Budějovický Budvar had failed to demonstrate.

(c) Reputation of the earlier trade mark

According to Article 8(5) of Regulation No 40/94, the proprietor of an earlier trade mark with a reputation is entitled to file an opposition against an application for registration of a similar or identical mark even if that mark relates only to goods or services different from those by covered by the earlier trade mark.

In *Sigla v OHIM — Elleni Holding (VIPS)* ⁽⁷⁶⁾, it was necessary to establish whether the reputation of the word mark VIPS, covering in particular a fast food chain, could prevent the registration of that same mark inter alia for computer programming services intended for hotels or restaurants. The Court stated that the risk that the mark applied for would take unfair advantage of the repute or the distinctive character of the earlier trade mark continues to exist where the consumer, without necessarily confusing the commercial origin of the product or service in question, is attracted by the mark applied for itself and will buy the product or service covered by it on the ground that it bears that mark, which is identical or similar to an earlier mark with a reputation. That assessment is therefore

⁽⁷⁴⁾ Judgment of 11 July 2007 in Case [T-263/03](#) *Mülhens v OHIM — Conceria Toska (TOSKA)*. The same analysis can be found in the judgments of 11 July 2007 in Case [T-28/04](#) *Mülhens v OHIM — Cara (TOSKA LEATHER)* and in Case [T-150/04](#) *Mülhens v OHIM — Minoronzoni (TOSCA BLU)*.

⁽⁷⁵⁾ Judgments of 12 June 2007 in Joined Cases [T-57/04](#) and [T-71/04](#) *Budějovický Budvar and Anheuser-Busch v OHIM (AB GENUINE Budweiser KING OF BEERS)*; in Joined Cases [T-53/04](#) to [T-56/04](#), [T-58/04](#) and [T-59/04](#) *Budějovický Budvar v OHIM — Anheuser-Busch (BUDWEISER)*; and in Joined Cases [T-60/04](#) to [T-64/04](#) *Budějovický Budvar v OHIM — Anheuser-Busch (BUD)*.

⁽⁷⁶⁾ Judgment of 22 March 2007 in Case [T-215/03](#).



different from the assessment of a likelihood of confusion as regards the commercial origin of the goods or services at issue. Since the necessary conditions were not fulfilled, the Court rejected the opponent's plea.

By contrast, in *Aktieselskabet af 21. November 2001 v OHIM — TDK Kabushiki Kaisha (TDK)* ⁽⁷⁷⁾, the Court held that the fact that the earlier mark TDK, designating apparatus for recording sound or images, had an enhanced distinctive character because of its reputation enabled its proprietor to oppose successfully the registration of the same mark for sports clothing. Since the earlier mark was used for sponsorship activities, particularly in the sporting field, there was a future risk, which was not hypothetical, that the mark applied for could take unfair advantage of the reputation of the earlier mark. Furthermore, the judgment in *Antartica v OHIM — Nasdaq Stock Market (nasdaq)* ⁽⁷⁸⁾ stated that evidence of that risk may be established, in particular, on the basis of logical deductions resulting from an analysis of the probabilities and by taking account of the usual practices in the relevant commercial sector as well as all the other circumstances of the case.

3. Invalidity proceedings

Under Article 51 et seq. of Regulation No 40/94, it is possible to make applications to OHIM for declarations of invalidity in respect of Community trade marks which have already been registered. In two of the three actions in this area examined during 2007, the Court delivered a judgment annulling a decision of the Boards of Appeal ⁽⁷⁹⁾ and it recalled, in one of those judgments (*La Perla v OHIM — Worldgem Brands (NIMEI LA PERLA MODERN CLASSIC)*), that the application of Article 8(5) of Regulation No 40/94 does not require the existence of a likelihood of confusion.

In the second judgment annulling a decision of a Board of Appeal (*Consorzio per la tutela del formaggio Grana Padano v OHIM — Biraghi (GRANA BIRAGHI)*), the question arose whether the protection that Regulation No 2081/92 ⁽⁸⁰⁾ confers on the protected designation of origin ('PDO') 'grana padano' justified the annulment of the trade mark GRANA BIRAGHI. Having noted that the application of Regulation No 40/94 must not affect the protection granted to PDOs, the Court held that OHIM is bound to refuse, or to declare invalid, any mark which uses a registered name in respect of products not covered by the registration or which misuses, imitates or evokes a PDO. To that end, OHIM must carry out a detailed analysis and verify whether the mark applied for contains only a generic constituent part of a PDO. That verification must be based on legal, economic, technical, historical, cultural and social evidence, on the relevant national and Community legislation and on the perception which the average consumer has of

⁽⁷⁷⁾ Judgment of 6 February 2007 in Case [T-477/04](#) (on appeal, Case C-197/07 P).

⁽⁷⁸⁾ Judgment of 10 May 2007 in Case [T-47/06](#) (on appeal, Case C-320/07 P).

⁽⁷⁹⁾ Judgments of 16 May 2007 in Case [T-137/05](#) *La Perla v OHIM — Worldgem Brands (NIMEI LA PERLA MODERN CLASSIC)* and of 12 September 2007 in Case [T-291/03](#) *Consorzio per la tutela del formaggio Grana Padano v OHIM — Biraghi (GRANA BIRAGHI)*.

⁽⁸⁰⁾ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).



the name (possibly identified through surveys). In this case, the Court held that the Board of Appeal had erred in finding that the name 'grana' was generic and that the existence of the PDO 'grana padano' did not preclude the registration of the mark GRANA BIRAGHI.

4. Formal and procedural issues

(a) Procedure before the Opposition Division

The Court held that an opposition which confined itself to stating that it was based on a likelihood of confusion complied with the formal requirements, that statement being sufficient for OHIM and the trade mark applicant to know on what ground the opposition was based ⁽⁸¹⁾. It also stated that the date of reception by OHIM of an incomplete fax of a notice of opposition is taken into account for the purposes of assessing whether the period for filing an opposition has been observed where the opponent, on its own initiative, diligently transmits a complete version of that notice to OHIM ⁽⁸²⁾.

As regards the examination of the substance of oppositions, the Court stated that an Opposition Division must carry out that examination even where the introductory notice stating the grounds on which the opposition is based contains merely the reference 'Likelihood of confusion' and the explanation of grounds of the opposition cannot be taken into account, since it was submitted in a language other than the language of the opposition. The fact that the explanation of grounds was not translated does not lead to the rejection of the opposition as unfounded. However, the examination must take account only of the information contained in the trade mark application, in the registration of the earlier mark and in the part of the notice of opposition drafted in the language of the opposition ⁽⁸³⁾. Moreover, the Court stated that the Opposition Division is not required to set a period for the party concerned to remedy that irregularity. That division is therefore entitled to refuse to take into account evidence which the opponent did not submit in due time in the appropriate language ⁽⁸⁴⁾.

(b) Continuity in terms of functions

In 2007 the Court annulled three decisions of Boards of Appeal which refused to take into account facts and evidence that the parties had not submitted in due time before the

⁽⁸¹⁾ Judgment of 16 January 2007 in Case [T-53/05 Calavo Growers v OHIM — Calvo Sanz \(Calvo\)](#).

⁽⁸²⁾ Judgment of 15 May 2007 in Joined Cases [T-239/05](#), [T-240/05](#) to [T-247/05](#), [T-255/05](#), [T-274/05](#) and [T-280/05 Black & Decker v OHIM — Atlas Copco \(Three-dimensional representation of a yellow and black electric power tool and Others\)](#).

⁽⁸³⁾ Judgment in *Calvo*, see footnote 81.

⁽⁸⁴⁾ Judgment of 11 July 2007 in Case [T-192/04 Flex Equipos de Descanso v OHIM — Leggett & Platt \(LURA-FLEX\)](#).



Opposition Division ⁽⁸⁵⁾. Following the recent case-law of the Court of Justice ⁽⁸⁶⁾, the Court held that, whilst it is true that a party does not have an unconditional right to have examined by the Board of Appeal facts and evidence which it presents late, the fact remains that, unless otherwise specified, the Board of Appeal has a discretion as to whether or not such information must be taken into account in the decision which it is called upon to give. Accordingly, any decision in this respect must be properly reasoned and must assess, first, whether the material which has been produced late is, on the face of it, likely to be relevant to the outcome of the opposition and, second, whether the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account. Furthermore, in another case ⁽⁸⁷⁾, the Court, having held that the applicable provisions did not leave the Board of Appeal any discretion, confirmed that the board had been right to refuse to take account of the evidence of the genuine use of the earlier mark that the opponent had produced late before the Opposition Division.

As regards the obligation to state reasons, the Court stated that, where a Board of Appeal has confirmed the decision of the Opposition Division in its entirety, that decision and the reasoning on which it is based form part of the context in which the Board of Appeal adopted its decision ⁽⁸⁸⁾.

In addition, the Court stated that, where a Board of Appeal considers that the relative ground for refusal adopted by the Opposition Division is unfounded, it is required to adjudicate on any other grounds put forward before that division, even if the latter rejected those grounds or did not examine them ⁽⁸⁹⁾.

Furthermore, the Court considered that the fact that the party who seeks the annulment of a decision of the Board of Appeal upholding an opposition against the registration of the mark applied for did not dispute, before the Board of Appeal, the similarity of the conflicting marks could not in any way divest OHIM of the power to adjudicate on whether those marks were similar or identical. Likewise, therefore, that fact cannot deprive that party of the right to challenge, in the factual and legal context of the dispute before the Board of Appeal, the findings of that body on this point ⁽⁹⁰⁾.

⁽⁸⁵⁾ Judgments in *LURA-FLEX*, see footnote 84; of 4 October 2007 in Case [T-481/04](#) *Advance Magazine Publishers v OHIM — Capela & Irmãos (VOGUE)*; and of 6 November 2007 in Case [T-407/05](#) *SAEME v OHIM — Racke (REVIAN's)*.

⁽⁸⁶⁾ Case C-29/05 P *OHIM v Kaul* [2007] ECR I-2213.

⁽⁸⁷⁾ Judgment of 12 December 2007 in Case [T-86/05](#) *K & L Ruppert Stiftung v OHIM — Lopes de Almeida Cunha and Others (CORPO livre)*.

⁽⁸⁸⁾ Judgment of 21 November 2007 in Case [T-111/06](#) *Wesergold Getränkeindustrie v OHIM — Lidl Stiftung (VITAL FIT)*.

⁽⁸⁹⁾ Judgment in *VIPS*, see footnote 76.

⁽⁹⁰⁾ Judgment of 18 October 2007 in Case [T-425/03](#) *AMS v OHIM — American Medical Systems (AMS Advanced Medical Services)* (on appeal, Case C-565/07 P).



(c) Relationship between absolute grounds for refusal and relative grounds for refusal

In *Ekabe International v OHIM — Ebro Puleva (OMEGA3)* ⁽⁹¹⁾, the Court held that, if, in the context of opposition proceedings, OHIM concludes that the dominant element common to both marks is devoid of distinctive character, it must reopen the procedure for the examination of the mark applied for and find that such an absolute ground for refusal precludes the registration of that mark. In this instance, the action was accordingly dismissed on the ground that the applicant had no interest in the annulment of a decision rejecting its application for registration on the basis of a relative ground for refusal when that annulment could result only in the adoption by OHIM of another decision rejecting the application for registration, on the basis this time of an absolute ground for refusal.

(d) Option of restricting the list of goods referred to in the trade mark application

The case-law according to which an applicant is entitled to restrict the list of goods referred to in his trade mark application, provided that that restriction may be interpreted as meaning that the applicant no longer seeks the annulment of the decision refusing registration to the extent that that decision covers the goods which the applicant has henceforth excluded ⁽⁹²⁾, was developed in 2007, the Court refusing, in two instances, to take account of the restrictions put forward. First, the restriction of a trade mark application initially covering microphones to only 'studio microphones and their parts' was held to be capable of changing the subject matter of the proceedings, given that the relevant public had changed in relation to that taken into account by the Board of Appeal ⁽⁹³⁾. Second, a restriction which does not involve the withdrawal of one or more goods from the list, but the alteration of the intended purposes of all the goods on that list, was deemed to be capable of affecting the examination of the Community trade mark carried out by OHIM ⁽⁹⁴⁾.

Access to documents

In the three judgments delivered in 2007 concerning Regulation No 1049/2001 ⁽⁹⁵⁾, the Court explained the scope of certain exceptions to the principle of transparency provided for in that regulation in order to protect, first, the public interest in the context of international relations and the financial, monetary or economic policy of the Community; second, the privacy and integrity of the individual; third, court proceedings and, fourth, the purpose of investigations.

⁽⁹¹⁾ Judgment of 18 October 2007 in Case [T-28/05](#).

⁽⁹²⁾ Judgment in Case T-194/01 *Unilever v OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 13.

⁽⁹³⁾ Judgment in *Shape of a microphone head grill*, see footnote 72.

⁽⁹⁴⁾ Judgment of 20 November 2007 in Case [T-458/05](#) *Tegometall International v OHIM — Wuppermann (TEK)*.

⁽⁹⁵⁾ 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). Judgments of 25 April 2007 in Case [T-264/02](#) *WWF European Policy Programme v Council*; of 12 September 2007 in Case [T-36/04](#) *API v Commission* (on appeal, Case C-514/07 P); and of 8 November 2007 in Case [T-194/04](#) *Bavarian Lager v Commission*.



As regards the first of those exceptions, provided for in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001, the judgment in *WWF European Policy Programme v Council* established that the Council was entitled to refuse the applicant access to an interinstitutional note concerning questions relating to the Ministerial Conference which the World Trade Organisation had held in Cancun in September 2003. It was held that disclosure of that note would have entailed a reasonably foreseeable and not purely hypothetical risk of affecting the room for negotiation of the Community and its Member States.

In *Bavarian Lager v Commission* the Court defined the scope of the exception to the right of access to documents designed to protect privacy and the integrity of the individual (Article 4(1)(b) of Regulation No 1049/2001). The Court clarified the relationship between Regulation No 1049/2001, which is designed to ensure the greatest possible transparency of the decision-making process of the public authorities, and Regulation No 45/2001 ⁽⁹⁶⁾, which is designed to ensure the protection of the private life of individuals in the handling of personal data. On the question of whether the Commission was entitled not to communicate to an undertaking a minute containing the names of the participants in a meeting held some years earlier in the context of proceedings for failure to fulfil obligations, the Court acknowledged that the disclosure of those personal data is indeed 'processing of data' within the meaning of Regulation No 45/2001, but added that that processing is lawful, as it is imposed by the requirement to respect the legal obligation to disclose established by Regulation No 1049/2001.

Furthermore, as Regulation No 1049/2001 provides that a person requesting access to a document is not required to justify his request, the Court held that the need to prove the necessity of the disclosure of the data required by Regulation No 45/2001 does not apply. The protection of personal data is nonetheless guaranteed by the fact that Regulation No 1049/2001 provides that access to a document may be refused where its disclosure would undermine the protection of the privacy and the integrity of the individuals concerned. After observing that there was no reason in principle to exclude professional or business activities from the concept of 'private life', the Court asserted that disclosure of the names of the participants in a meeting held by the Commission did not affect the private life of the persons in question, as the position which they had expressed at the meeting was that of the bodies which they represented and not their own. In those circumstances, disclosure of the names of the participants did not require the prior consent of the persons concerned.

As regards the exception to the principle of transparency designed to protect court proceedings (second indent of Article 4(2) of Regulation No 1049/2001), the judgment in *API v Commission* developed the case-law on the right of access to the procedural documents which the institutions lodge with the Community Courts.

On an action by the Association de la presse internationale against the Commission's decision refusing access to certain documents relating to a number of cases which had

⁽⁹⁶⁾ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).



been heard before the Court of Justice or the Court of First Instance, the latter Court observed that the Commission was required to carry out a concrete examination of the content of each document to which access was requested. It was therefore not entitled to consider, in the abstract, that all the pleadings lodged in the cases to which it was a party were automatically and globally covered by the exception in issue. The possibility of not carrying out an examination of the content of the documents requested is permissible only where it is clear that the exception relied on applies to their entire content. In that regard, the Court observed that, as the Commission must be in a position to defend itself against all external pressure, it may, up to the time of the hearing, refuse to disclose its pleadings without first being required to carry out a concrete assessment of the content of those pleadings. Once the hearing has been held, on the other hand, the Commission is under an obligation to carry out a concrete assessment of each document requested.

As regards refusal of access to the pleadings in a case which has already been closed, the Court considered that the exception regarding the protection of court proceedings cannot be relied upon, in so far as the content of pleadings might well have already been reproduced in the report for the hearing, debated at a hearing and reproduced in the judgment.

The Court also ruled on the scope of the exception to the principle of transparency designed to protect the purpose of investigations (third indent of Article 4(2) of Regulation No 1049/2001), and held that that exception did not authorise the Commission to refuse public access to the documents relating to proceedings to fulfil obligations up to the time when the Member State concerned complies with the judgment finding that it has infringed Community law.

Further information concerning the same exception was provided in *Bavarian Lager v Commission*. The Court held that, even if the need to preserve the anonymity of persons providing the Commission with information on possible infringements of Community law constitutes a legitimate objective capable of justifying the refusal to grant complete, or even partial, access to certain documents, the Commission is not entitled to rule in the abstract on the effect which disclosure of the data requested might have on its investigative activity. On the contrary, it must show that the purpose of those activities would have been actually and specifically jeopardised by the disclosure of a document requested several years after the closure of the proceedings for failure to fulfil obligations in the context of which it was prepared.

Common agricultural policy

By its judgment in *Hungary v Commission* ⁽⁹⁷⁾, delivered in accordance with the accelerated procedure, the Court annulled Regulation No 1572/2006 ⁽⁹⁸⁾ introducing a new quality

⁽⁹⁷⁾ Judgment of 15 November 2007 in Case [T-310/06](#).

⁽⁹⁸⁾ Commission Regulation (EC) No 1572/2006 of 18 October 2006 amending Regulation (EC) No 824/2000 establishing procedures for the taking-over of cereals by intervention agencies and laying down methods of analysis for determining the quality of cereals (OJ 2006 L 290, p. 29).



criterion, namely the specific weight criterion, which had to be satisfied by maize in order to be eligible for intervention with the competent national agencies, which buy, at a fixed price, the maize offered to them and harvested in the Community, provided that the offers comply with specific conditions, notably as regards their quality and quantity. The introduction of the specific weight criterion was justified, according to that regulation, in light of the new situation of the intervention scheme together in particular with the long-term storage of certain cereals and its effects on product quality.

The Court observed, in the first place, that by introducing a new criterion relating to the specific weight of maize 12 days before the regulation became applicable, that is to say, at a time when the producers had already sown the seeds and when they could no longer influence the specific weight of the crop, the contested provisions had produced effects on the investments made by the producers concerned in that they had made fundamental changes to the conditions for offering maize for intervention. As the new specific weight criterion had not been notified to the farmers concerned in good time, the Commission had breached their legitimate expectations.

In the second place, moreover, the Court noted that, according to the actual words of the regulation, the upgrading of the pre-existing quality criteria was necessary for the purpose of making intervention products less fragile in terms of deterioration and subsequent use. On the other hand, the regulation did not state clearly and expressly to what extent the introduction of the criterion of specific weight for maize was also intended to upgrade the quality criteria for maize. The Court observed that the Commission's argument that the specific weight was of relevance in evaluating the quality of maize in so far as it had an impact on the nutritional value of maize was not only unsupported by any evidence but was contradicted by the material provided to the Court by the Commission itself, and, observing that it is not for the Court to assume the role of the parties in adducing evidence, held that it could not but declare that there had been a manifest error of assessment.

II. Actions for damages

Jurisdiction of the Court

The Court made three orders ⁽⁹⁹⁾ in 2007 further explaining the scope of its jurisdiction in actions for damages.

The fact that the combined provisions of Articles 235 EC and 288 EC give the Community judicature exclusive jurisdiction to hear actions seeking compensation for damage attributable to the Community does not mean that Community judicature is absolved from scrutinising the true nature of actions brought before them on the sole ground that the alleged wrongdoing is attributable to the Community institutions. Thus, in its order in *Sinara Handel v Council and Commission* the Court considered that it has no jurisdiction to

⁽⁹⁹⁾ Orders of 5 February 2007 in Case [T-91/05 *Sinara Handel v Council and Commission*](#) and in *Commune de Champagne and Others v Council and Commission*, and of 5 September 2007 in Case [T-295/05 *Document Security Systems v ECB*](#).



hear a claim for compensation for loss of profit corresponding to the amount of anti-dumping duties, net of tax, paid during the period in question. That damage must, in reality, be regarded as arising exclusively from the payment of the sum owed in respect of the anti-dumping duties imposed, with the result that the action is, in fact, a claim for repayment of the duties. However, the national courts alone have jurisdiction to deal with such a claim.

In the order in *Document Security Systems v ECB* the Court found it appropriate to provide further detail of its jurisdiction to adjudicate on the liability of the Community where the alleged fault consisted in a breach of a rule of national law.

The applicant, which claimed to be the proprietor of a European patent, validated in nine Member States, relating to security features designed to protect banknotes against counterfeiting, contended that the European Central Bank ('the ECB') had infringed the rights conferred by the patent. The applicant requested the Court to declare that the ECB had infringed the rights conferred by the patent and order it to pay damages and interest for its infringement of those rights. The Court observed that, according to the Convention on the Grant of European Patents, the European patent is to have the same legal effect as a national patent in each State and that any infringement of a European patent is to be dealt with by national law. The Court inferred that the applicant's action amounted to a claim that the ECB had infringed nine national patents, which was a matter not for the Community judicature but for the national authorities.

While the claim for damages did admittedly come within the jurisdiction of the Court, the application was nonetheless dismissed as lacking any foundation in law, since the infringement in question had not been established by the national courts. The Court further observed that the limitation period applicable to the action could begin to run only when the national courts had ascertained the existence of a patent infringement.

Last, in its order in *Commune de Champagne and Others v Council and Commission* the Court stated that the sole cause of the allegedly harmful effects produced by an international agreement between the Community and the Swiss Confederation in respect of applicants in Switzerland was the fact that the Swiss Confederation, in deciding in its absolute discretion to sign and ratify the agreement, had agreed to be bound by it and had undertaken to take the steps necessary to ensure the performance of the obligations arising from it. It followed that any damage which the applicants might suffer in the territory of Switzerland as a result of the steps taken by the Swiss authorities in implementation of the agreement could not be regarded as attributable to the Community and that the Court therefore did not have jurisdiction to hear and determine an action for compensation for that damage.

Substantive conditions

According to established case-law in relation to the liability of the Community for damage caused to an individual by a breach of Community law for which a Community institution or organ is responsible, a right to reparation is conferred where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must



be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties ⁽¹⁰⁰⁾.

1. Concept of a rule conferring rights on individuals

In *Cytimo v Commission* ⁽¹⁰¹⁾ the Court held that on the occasion of negotiations for a contract between the Community public authority and a tenderer in a public tendering procedure, the principle of respect for the principle of good faith and the prohibition of misuse of rights are rules which confer rights on individuals. Furthermore, while it follows from the first paragraph of Article 101 of Regulation No 1605/2002 ⁽¹⁰²⁾ that the awarding authority has a wide discretion to decline to conclude the contract and, accordingly, to discontinue the pre-contractual negotiations, the Commission had nonetheless committed a sufficiently serious breach of the principle of good faith and had misused the right conferred on it by that regulation to decline to award the public contract by pursuing for a period of two months pre-contractual negotiations which it knew were bound to fail. The Court thus considered that by failing to advise the applicant immediately of its decision not to award the contract the Commission had caused it to lose a serious opportunity to lease the property to a third party for a period of two months.

As regards the rules infringed by the Commission in the context of the economic analyses which it carries out for the purpose of the control of concentrations, the Court held in *Schneider Electric v Commission* ⁽¹⁰³⁾ that while certain principles and certain rules with which the competitive analysis is required to comply are indeed in the nature of rules intended to confer rights on individuals, not all the norms which the Commission is required to respect in its economic assessments can be automatically held to have such a nature. The Court nonetheless did not rule in this case on the nature of the rule which was alleged to have been infringed, but merely found that that infringement could not in itself give rise to the damage alleged to have been sustained.

As regards the infringement of the right of the defence in that the Commission had not informed the applicant in the statement of objections that unless it submitted certain corrective measures it had no prospect of obtaining a decision declaring the transaction compatible, the Court, recalling the essential role of the statement of objections, considered that it was necessary to take into account both the importance of the financial interests involved and the industrial implications of a concentration having a Community dimension and also of the considerable scope of the investigatory powers which the Commission has at its disposal when regulating competition. The Court concluded that the applicant was alleging infringement of a rule intended to confer rights on individuals.

⁽¹⁰⁰⁾ Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029.

⁽¹⁰¹⁾ Judgment of 8 May 2007 in Case [T-271/04](#).

⁽¹⁰²⁾ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

⁽¹⁰³⁾ Judgment of 11 July 2007 in Case [T-351/03](#).



In *Fédération des industries condimentaires de France and Others v Commission* ⁽¹⁰⁴⁾, on the other hand, the Court considered that, as norms attributing powers, Articles 211 EC and 133 EC are institutional in nature and therefore are not rules of law conferring rights on individuals.

2. Sufficiently serious breach

The concept of a sufficiently serious breach of a rule conferring rights on individuals was significantly developed in the field of the control of concentrations in *Schneider Electric v Commission*.

As the Court, in an initial judgment ⁽¹⁰⁵⁾, had annulled the Commission decision declaring the concentration between Schneider and Legrand incompatible with the common market, Schneider brought an action for damages, seeking compensation for the harm sustained on account of the illegalities vitiating that decision.

The Court acknowledged that an inhibiting effect on the Commission, contrary to the general Community interest, might arise if the concept of a serious breach were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution with the task of overseeing the application of the competition rules, which are complex and subject to a considerable degree of discretion. The Court proceeded to balance the interests involved and stated that a sufficiently serious breach could not be constituted by failure to fulfil a legal obligation which can be explained by the objective constraints to which the institution and its officials are subject. On the other hand, there may be such a breach in the case of conduct which takes the form of an act manifestly contrary to the rule of law and seriously detrimental to the interests of third parties and which cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, is objectively subject.

As regards the defects in the economic analysis, the Court emphasised that it is necessary to take into account the fact that such an analysis generally involves, as regards both the facts and the reasoning employed, complex intellectual propositions into which certain inadequacies may creep, in view of the time constraints to which the institution is subject. Accordingly, the gravity of a documentary or logical inadequacy does not always constitute a sufficient circumstance to give rise to Community liability.

As regards the breach of the rights of the defence, the Court held that there had been a manifest and serious infringement in so far as the Commission had omitted, in the statement of objections, a reference to a matter that was essential in its consequences and in the operative part of the incompatibility decision. That breach of the rights of the defence was neither justified nor accounted for by the particular constraints to which the Commission staff were objectively subject.

⁽¹⁰⁴⁾ Judgment of 11 July 2007 in Case [T-90/03](#).

⁽¹⁰⁵⁾ Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071.



3. Causal link and contributory damage

The Court stated in *Schneider Electric v Commission* that the method used to analyse the causal link must be based on a comparison between the situation arising for the third party concerned from the wrongful measure and the situation which would have arisen if the institution's conduct had been in conformity with the legal rule. Where the unlawful circumstance is associated with a decision whose effect is to withhold authorisation, it cannot be presumed that, in the absence of the defect identified, the applicant would necessarily have been granted the authorisation.

In this case, the Court observed that, although it did not have a vested right to recognition of the compatibility of the transaction, the applicant might nonetheless have had a meaningful chance of securing a favourable decision, since it could not be ruled out that, as a result of its divestiture proposals, it might have been in a position to require the Commission to find, on penalty of committing an error of assessment by not doing so, that the transaction was compatible with the common market. The Court considered, however, that the assessment of the changes to the economic parameters which would necessarily have accompanied any compatibility decision was too uncertain to be a basis for a useful comparison with the situation resulting from the incompatibility decision. Accordingly, the materialisation of opportunity is linked to parameters that were too uncertain to be the subject of any convincing quantification, so that there was no sufficiently close causal link between the unlawful act committed and the loss of any opportunity of obtaining a decision finding that the concentration was compatible.

On the other hand, the Court considered that there was such a link between the wrongful act committed and two types of damage, namely: first, the costs incurred by the undertaking in participating in the resumed investigation of the transaction after the judgment annulling the decision and, second, the reduction of the transfer price which the applicant had to grant to the purchaser of the assets in Legrand in order to secure an agreement that the date on which the disposal was to take effect would be deferred for such time as might be necessary to ensure that the proceedings pending before the Community judicature would not become devoid of purpose before reaching their conclusion. On the latter aspect, the Court stated that it was because the incompatibility decision was vitiated by two irregularities which the applicant could perceive as manifest irregularities that the applicant found itself constrained to defer the effective completion of the sale of Legrand and to offer to sell to the purchaser at a lower price than it would have obtained in the event of a firm sale in the absence of an incompatibility decision which, from the outset, appeared to be tainted by two manifest irregularities.

Last, this judgment illustrates the impact of the applicant's conduct on the determination of remediable damage, in accordance with the case-law to the effect that where an applicant has contributed to its own loss it cannot claim compensation for the part of the loss for which it is responsible ⁽¹⁰⁶⁾. On that basis, the Court, noting that in view of the extent of the merger carried out and of the appreciable increase in economic strength which it entailed for the only two main players present on the relevant market, the applicant

⁽¹⁰⁶⁾ Case 145/83 *Adams v Commission* [1985] ECR 3539.



could not have been unaware that the merger at the very least entailed the risk of creating or strengthening a dominant position in a substantial part of the common market and that, accordingly, it would be prohibited by the Commission, ordered the Commission to make good only two thirds of the loss suffered by the applicant as a result of the reduction in the price of the transfer of Legrand.

III. Appeals

The Civil Service Tribunal commenced its judicial activities on 12 December 2005 and thus far 37 appeals have been lodged with the Court of First Instance, including 27 in 2007. During that year it closed seven of those cases ⁽¹⁰⁷⁾, one by a judgment setting aside the decision under appeal.

In that judgment, delivered in *Parliament v Eistrup*, the Court set aside the order ⁽¹⁰⁸⁾ whereby the Civil Service Tribunal had dismissed the objection of inadmissibility raised by Parliament on the ground that the application initiating the proceedings bore, instead of the signature in writing of the lawyer instructed by the applicant, only a stamp reproducing that signature. The Court held that, as the law on Community judicial procedures currently stands, the signature placed in writing by the lawyer on the original of the application initiating the proceedings is the only way of ensuring that responsibility for the preparation and the content of that document is assumed by a person authorised to represent the applicant before the Community courts ⁽¹⁰⁹⁾.

IV. Applications for interim relief

The Court received 34 applications for interim relief in 2007, representing a significant increase over the number of applications (25) submitted in 2006. In 2006 41 cases were disposed of, as against 24 in 2006, and applications for interim relief were granted on four occasions, namely in the orders in *IMS v Commission*, *Du Pont de Nemours (France) and Others v Commission*, *France v Commission* and *Donnici v Parliament* ⁽¹¹⁰⁾.

⁽¹⁰⁷⁾ Judgments of 23 May 2007 in Case [T-223/06 P](#) *Parliament v Eistrup*; of 5 July 2007 in Case [T-247/06 P](#) *Sanchez Ferriz v Commission*; and of 12 September 2007 in Case [T-20/07 P](#) *Commission v Chatziioannidou*; orders of 12 June 2007 in Case [T-69/07 P](#) *Commission v André*; of 9 July 2007 in Case [T-415/06 P](#) *De Smedt v Commission*; of 12 July 2007 in Case [T-252/06 P](#) *Beau v Commission*; and of 14 December 2007 in Case [T-311/07 P](#) *Nijs v Court of Auditors*.

⁽¹⁰⁸⁾ Order of the Civil Service Tribunal of 13 July 2006 in Case F-102/05 *Eistrup v Parliament*.

⁽¹⁰⁹⁾ On that point, see also the order of 17 January 2007 in Case [T-129/06](#) *Diy-Mar Insaat Sanayi ve Ticaret and Akar v Commission*.

⁽¹¹⁰⁾ Orders of the President of the Court of First Instance of 7 June 2007 in Case [T-346/06 R](#) *IMS v Commission* and of 19 July 2007 in Case [T-31/07 R](#) *Du Pont de Nemours (France) and Others v Commission* and orders of the Court of First Instance of 28 September 2007 in Case [T-257/07 R](#) *France v Commission* (on appeal, Case C-512/07 P (R)) and of 15 November 2007 in Case [T-215/07 R](#) *Donnici v Parliament* (on appeal, Case C-512/07 P (R)). Furthermore, by order of 30 March 2007 in Case [T-366/00 R](#) *Scott v Commission* the President had made an *ex parte* order granting an application for stay of execution of a decision ordering recovery of State aid before declaring, by order of 30 March 2007, that there was no longer any need to adjudicate in the case because the Court of First Instance had on 29 March 2007 annulled the decision contested in the main proceedings.



In *IMS v Commission* the applicant sought a stay of execution of the favourable opinion which the Commission had delivered on a decree which the French authorities had notified to it pursuant to Directive 98/37 ⁽¹¹⁾ and which prohibited the use of certain machines.

The President agreed that there was a prima facie case and observed, in particular, that as the French decree had been annulled by the Council of State and the competent authorities had failed to adopt other measures to the same end, the machine parts produced by the applicant must be regarded as prima facie satisfying the provisions of Directive 98/37. As regards urgency, the President considered that implementation of the contested opinion could jeopardise the existence of the applicant, a small undertaking heavily indebted to the banks whose production was limited and specialised. The President emphasised that there was all the more reason to recognise urgency because the prima facie case was particularly serious. In balancing the various interests involved, the President considered that as the Commission had taken more than five years to deliver its opinion, the stay of execution of that decision was not prejudicial to the health and safety of workers.

The case of *Donnici v Parliament* concerned an application for suspension of the decision of Parliament invalidating the mandate as Member of the European Parliament of Mr Donnici in favour of Mr Occhetto, contrary to the decision of the Consiglio di Stato, which, at last instance, had upheld Mr Donnici's mandate.

The judge hearing the application accepted that there was a prima facie case, since the applicant's argument to the effect that Parliament lacked the power to adopt the contested decision was serious and could not be rejected without a more thorough examination, which was a matter solely for the court dealing with the merits of the case. As regards urgency, it was apparent to the judge hearing the application that, if the contested measure were to be annulled by the court dealing with the merits of the action, the harm sustained by the applicant if execution of the measure were not suspended would be irreparable, since it would be impossible to fulfil his mandate as a Member of the European Parliament. As regards the balance of interests, it was also necessary to have regard to Mr Occhetto's interest in having the contested decision executed, which entailed upholding his mandate. In that situation of equality between the applicant's and Mr Occhetto's interests, the judge hearing the application considered that the decisive factor was, on the one hand, the interest of the Italian Republic in having its election legislation respected by Parliament and, on the other, the solid and serious nature of the pleas relied on to establish the prima facie case. Consequently, the judge granted the stay of execution sought.

In the light of the advance in scientific knowledge in the sphere, the Commission amended the Community rules relating to transmissible spongiform encephalopathies (TSEs) by adopting, in 2007, certain provisions which introduced an element of flexibility into the applicable health control measures. In *France v Commission* the applicant sought

⁽¹¹⁾ Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1).



suspension of those provisions on the ground that they infringed the precautionary principle.

As regards the requirement of a prima facie case, the judge hearing the application considered that it was satisfied in that there was real scientific uncertainty as to the reliability of the tests provided for in the new provisions. The urgency requirement was also considered to be satisfied, in so far as the contested provisions might increase the risk of animals infected by a TSE being released for human consumption. As regards the balancing of the interests involved, the judge observed that the requirements linked with the protection of public health must be considered to outweigh the economic considerations and, consequently, ordered the suspension of execution sought.

In the order in *Du Pont de Nemours (France) and Others v Commission*, concerning the control of plant protection products under Directive 91/414, ⁽¹¹²⁾ the President was called upon to adjudicate on five applications for suspension of decisions whereby the Commission had limited or reduced marketing authorisation for certain products. The application for interim measures relating to restriction on the use of flusilazole was granted.

As regards a prima facie case, it was held that the pleas alleging breach of Directive 91/414 and breach of the precautionary principle were not at first sight wholly unfounded. The condition relating to urgency was also considered to be fulfilled. After considering that there was a serious risk that the applicant would suffer an irreversible loss of market share, which might admittedly be subject to subsequent financial compensation, the President nonetheless considered that, in the circumstances of the case, the gravity of the loss could not be based solely on the accounting value of the business which generated the market shares and on the loss of such value to the whole group of undertakings, but must take account of the fact that the applicants had been present on the market for more than 20 years, that they had benefited from authorisations to put flusilazole on the market for many uses in a number of Member States and that their products enjoyed a reputation on the market that might be significantly damaged by a ban on flusilazole. After then weighing up the various interests at issue, having regard, in particular, to the fact that the applicants merely requested that a situation be preserved that had existed for a number of years and that farmers had an interest in being able to obtain the only product that was effective against certain diseases, the President granted the suspension sought.

On the other hand, in the orders in *Cheminova and Others v Commission* ⁽¹¹³⁾, *FMC Chemical and Others v Commission* ⁽¹¹⁴⁾ and *Dow AgroSciences and Others v Commission* ⁽¹¹⁵⁾, the four applications for suspension of decisions prohibiting the marketing of certain substances

⁽¹¹²⁾ Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant products on the market (OJ 1991 L 230, p. 1).

⁽¹¹³⁾ Order of the President of 4 December 2007 in Case [T-326/07 R](#).

⁽¹¹⁴⁾ Orders of the President of 11 December 2007 in Cases [T-349/07 R](#) and [T-350/07 R](#).

⁽¹¹⁵⁾ Order of the President of 17 December 2007 in Case [T-367/07 R](#).



were rejected for lack of urgency, on the ground that the loss which those decisions might cause for the applicants was not sufficiently serious, since it represented less than 1 % of their turnover. In that regard, the President added that, in reality, that percentage was even lower, since there was no need to take into consideration the loss claimed by the applicants for interim relief which, moreover, did not have standing to bring the main action for annulment, namely the undertakings marketing the product, which were not individually concerned by the contested decision.

