

A - Proceedings of the Court of First Instance in 1998

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

I. Proceedings of the Court of First Instance

1. The number of cases brought before the Court of First Instance in 1998, 215,¹ is close to the figure in 1995 and 1996 (244 and 220 new cases respectively). 1997, during which 624 new cases were registered, was characterised by several series of similar cases (in particular customs agents seeking compensation for the harm suffered as a result of the completion of the internal market provided for by the Single European Act, officials seeking reconsideration of their classification in grade at the time of their recruitment and new milk quota cases).

The total number of cases concluded increased by 84% over the preceding year, to reach 319 (after joinder, 252 cases were concluded), including 150 cases decided by a judgment. That figure includes, *inter alia*, a group of 17 cases brought in 1994 against a Commission decision finding there to be a breach of the competition rules in the cartonboard sector and imposing penalties in that respect.

The Court of First Instance therefore decided a greater number of cases than were brought before it (as in 1990, 1992, 1994 and 1995). That fact is all the more worthy of note since, in 1998, oral procedures were organised in the voluminous cases involving cartels of undertakings in the polyvinylchloride (so-called "PVC") sector (12 actions), the steel beams sector (11 actions) and the cement sector (41 actions).

The total number of cases pending at the end of the year (1 002 cases) is lower than in 1997. It includes several series of cases, namely 297 cases in which proceedings have been stayed pending a judgment of the Court of Justice on the appeal brought against the judgment of the Court of First Instance dismissing the application by a customs commissioner against the Council and the Commission, 190 milk quota cases and 65 staff cases seeking annulment of decisions of the institutions rejecting requests for reconsideration of a classification in grade².

With the exception of staff cases, the majority of cases pending before the Court of First Instance are actions seeking the annulment of a measure and based on Article 173 of the EC Treaty or Article 33 of the ECSC Treaty. 17.2% of all cases pending concern the Staff Regulations of Officials.

42 judgments were delivered by chambers of five judges (with jurisdiction to hear actions relating to the rules on State aid and trade protection measures) whilst 88 judgments were delivered by chambers of three judges. No case was brought before the plenary court in 1998 and no Advocate General was designated.

The number of applications for interim measures registered in 1998 increased slightly (26 applications, whereas 19 applications had been lodged in 1997; 21 sets of interim proceedings were completed in 1998. Suspension of the operation of the contested measure was ordered on two occasions.

As regards the number of appeals brought against actionable decisions of the Court of First Instance (67 appeals in respect of the 214 actionable decisions against which an appeal was brought or the time-limit for bringing an appeal had expired), it was slightly higher than that of the previous year (35 appeals in respect of 139 actionable decisions). 31.3% of decisions had been the subject of an appeal at 31 December 1998, whilst 25.1% of decisions had been the subject of an appeal at 31 December 1997.

1998 also saw the initiation of proceedings in the first cases concerning the protection of intellectual property rights (trade marks and designs). The first action against a decision of one of the Boards of Appeal of the Office for Harmonisation in the Internal Market was registered on 6 October 1998.

2. The Rules of Procedure of the Court of First Instance had been amended in 1997, in order, *inter alia*, to enable it to dismiss, by way of reasoned order, an action manifestly lacking any legal basis (OJ

¹ The figures below do not include special procedures concerning, in particular, legal aid and taxation of costs.

² Excluding these three series of similar cases, 450 cases were pending at the end of the year.

1997 L 103, p. 6; rectification: OJ 1997 L 351, p. 72). Nine orders made in 1998 dismissed actions as manifestly lacking any legal basis.

3. The proposal for the amendment of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance and the proposal for the amendment of the Rules of Procedure of the Court of First Instance intended to enable it to deliver single judge decisions had been submitted to the Council by the Court of Justice on 7 February 1997. The Commission has given its opinion on the proposals submitted to it. The European Parliament, which was consulted by the Council in accordance with Articles 168a(2) of the EC Treaty, 32d(2) of the ECSC Treaty and 140a(2) of the Euratom Treaty issued a favourable opinion on 8 October 1998 on the proposal for a Council decision amending Decision 88/591. The legislative procedure is therefore following its course.

4. Three members of the Court of First Instance left office in 1998.

Mr Saggio, President of the Court of First Instance until 4 March 1998, was appointed Advocate General at the Court of Justice and the terms of office of Judges Briët and Kalogeropoulos came to an end.

Mr Vesterdorf was elected President of the Court of First Instance from 4 March to 31 August 1998, and subsequently re-elected for the period until 31 August 2001. Judges Meij and Vilaras replaced Mr Briët and Mr Kalogeropoulos respectively.

II. Developments in the case-law

A. The main subject areas of disputes

1. Competition

In the *field of competition law*, 1998 saw in particular the delivery of 17 judgments in the "*Cartonboard*" cases (Case T-295/94 *Buchmann v Commission* [1998] ECR II-813; Case T-304/94 *Europa Carton v Commission* [1998] ECR II-869; Case T-308/94 *Cascades v Commission* [1998] ECR II-923; Case T-309/94 *KNP BT v Commission* [1998] ECR II-1007; Case T-310/94 *Gruber + Weber v Commission* [1998] ECR II-1043; Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129; Case T-317/94 *Weig v Commission* [1998] ECR II-1235; Case T-319/94 *Fiskeby v Commission* [1998] ECR II-1331; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373; Case T-334/94 *Sarrió v Commission* [1998] ECR II-1439; Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571; Case T-338/94 *Finnboard v Commission* [1998] ECR II-1617; Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others v Commission* [1998] ECR II-1727; Case T-347/94 *Mayr-Melnhof v Commission* [1998] ECR II-1751; Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875; Case T-352/94 *MoDo v Commission* [1998] ECR II-1989; and Case T-354/94 *Stora v Commission* [1998] ECR II-2111). The parties presented oral argument at a nine-day hearing which ended on 8 July 1997.

Those cases arose from Commission Decision 94/601/EC of 13 July 1994 in which the Commission held that 19 producers supplying cartonboard in the European Community had infringed Article 85(1) of the EC Treaty (hereinafter "the Treaty") by participating, for a period which varied according to the undertakings concerned but did not extend beyond April 1991, in an agreement and concerted practice originating in mid-1986 whereby they had, *inter alia*, planned and implemented simultaneous and uniform price increases throughout the Community; reached an understanding on maintaining the market shares of the major producers at constant levels, subject to modification from time to time; and, increasingly from early 1990, taken concerted measures to control the supply of the product in the Community in order to ensure the implementation of the concerted price increases. According to the decision, the infringement had taken place within a body known as the "Product Group Paperboard", which comprised several groups or committees, including the "Presidents Working Group", which brought together senior representatives of the main suppliers of cartonboard in the Community, and the "Joint Marketing Committee", which was set up in late 1987.

The total amount of the fines imposed on the undertakings was ECU 131 750 000.

All but two of the companies to which the decision was addressed brought actions for its annulment. One of the 17 companies concerned withdrew its action in the course of the proceedings.

Four Finnish undertakings, which were members of the trade association Finnboard and, as such, held jointly and severally liable for payment of the fine imposed on it, also brought actions against the decision (Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94).

In its judgments, the Court of First Instance held, *inter alia*, that the Commission had, in the majority of the cases, adequately proved the existence of the anti-competitive conduct alleged in the decision. Only in one case, Case T-337/94 *Enso-Gutzeit v Commission*, did it hold that the Commission had not proven that the applicant had participated in the cartel. The decision was therefore annulled in its entirety as regards that applicant.

In the other cases, the Court of First Instance distinguished between undertakings which had participated in the Presidents Working Group, the principal body of the Product Group Paperboard, and those which had not taken part in its meetings. The Court's judgments gave due effect to that distinction.

In the cases in which the applicants had taken part in meetings of the Presidents Working Group (Cascades, Finnboard, KNP, Mayr-Melnhof, MoDo, Sarrió, Stora and Weig), it held that the Commission had proved their participation in the constituent elements of the infringement, that is to say collusion on prices, production stoppages and market shares.

In the other cases, it held, where the plea had been raised by the applicants, that the Commission had not established to the requisite legal standard that the undertakings had participated in collusion on market shares. It therefore annulled Article 1 of the decision in so far as the applicant undertakings had been held responsible for participating in that type of collusion. In doing so, it clearly laid down the conditions under which an undertaking may be held responsible for an overall cartel such as that described in Article 1 of the contested decision.

*Thus, in order to be entitled to hold each addressee of a decision, such as the cartonboard decision, responsible for an overall cartel during a given period, the Commission must demonstrate that each undertaking concerned either consented to the adoption of an overall plan comprising the constituent elements of the cartel or that it participated directly in all those elements during that period. An undertaking may also be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel. Where that is the case, the fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 85(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed (Case T-295/94 *Buchmann v Commission*; Case T-304/94 *Europa Carton v Commission*; Case T-311/94 *BPB de Eendracht v Commission*; Case T-334/94 *Sarrió v Commission*; Case T-348/94 *Enso Española v Commission*).*

As regards the *finés*, the Court of First Instance held that *the general level of fines adopted by the Commission was justified*. In these cases, fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed by the Decision had been imposed, respectively, on the undertakings considered to be the cartel "ringleaders" and on the other undertakings.

The Court also defined the scope of the Commission's duty to state reasons when criteria are systematically taken into account by it in order to fix the amount of fines. Thus, where the Commission finds that there has been an infringement of the competition rules and imposes fines it must, if it systematically took into account certain basic factors in order to fix the amount of the fines (reference turnover in a reference year, basic rates for calculating fines, and rates of reduction in the amount of fines), set out those factors in the body of the decision so that the addressees of the decision may verify that the level of the fine is correct and assess whether there has been any discrimination (Case T-295/94 *Buchmann v Commission*; Case T-308/94 *Cascades v Commission*; Case T-309/94 *KNP BT v Commission*; Case T-317/94 *Weig v Commission*; Case T-319/94 *Fiskeby v Commission*; Case T-327/94 *SCA Holding v Commission*; Case T-334/94 *Sarrió v Commission*; Case T-338/94 *Finnboard*

v *Commission*; Case T-347/94 *Mayr-Melnhof v Commission*; Case T-348/94 *Enso Española v Commission*; Case T-352/94 *MoDo v Commission*; Case T-354/94 *Stora v Commission*).

The disputed decision was the first in which the level of fines imposed on undertakings had been reduced on the ground that those undertakings had cooperated with the Commission. The Commission had reduced the amount of the fines by one third or by two thirds, according to the degree of cooperation by the undertaking during the administrative procedure. The Court held that such reductions were justified only if the conduct of the undertaking made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it. Thus, an undertaking which *expressly* states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having facilitated the Commission's task of finding and bringing to an end infringements of the Community competition rules. The Court held that the Commission is entitled to take the view that such conduct constitutes an acknowledgement of the factual allegations, thus proving that those allegations are correct, and that that conduct may justify a reduction in the fine (Case T-317/94 *Weig v Commission*; Case T-311/94 *BPB de Eendracht v Commission*; Case T-327/94 *SCA Holding v Commission*; Case T-347/94 *Mayr-Melnhof v Commission*; Case T-352/94 *MoDo v Commission*). By contrast, a decision not to reply to the statement of objections, or not to express a view, in such a reply, on the Commission's factual allegations in the statement of objections, and a decision to challenge all or most of those allegations in a reply – all of which are ways of exercising rights of the defence during the administrative procedure before the Commission – cannot justify a reduction in the fine on grounds of cooperation during the administrative procedure (Case T-311/94 *BPB de Eendracht v Commission*; Case T-327/94 *SCA Holding v Commission*; Case T-347/94 *Mayr-Melnhof v Commission*; Case T-352/94 *MoDo v Commission*).

The applicants in Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94, member companies of the trade association Finnboard, disputed that they could be held jointly and severally liable for payment of the fine imposed on Finnboard (Article 3 of the contested decision); they asserted that the Commission had not established their participation in anti-competitive conduct.

The Court did not uphold their submission. It held that an undertaking may be declared jointly and severally liable with another undertaking for payment of a fine imposed on the latter, which intentionally or negligently committed an infringement, provided that the Commission demonstrates, in the same decision, that that infringement could also have been found to have been committed by the undertaking held jointly and severally liable for the fine. The economic and legal links between Finnboard and the applicants were such that the Commission could in fact have held each of the applicants specifically and formally liable for the infringement.

The applicant in Case T-304/94 *Europa Carton v Commission* claimed that the Commission had calculated its fine on the basis of an incorrect figure, which included not only turnover from sales of cartonboard to third parties but also the value of internal deliveries of cartonboard to folding carton factories which were owned by the applicant and did not therefore have separate legal personality from it. The Court upheld the Commission's approach, holding that it had rightly taken the turnover figure calculated on that basis in order to determine the amount of the fine. It pointed out that no provision stated that internal supplies within one company could not be taken into account in order to determine the amount of the fine. It also stated that, despite the applicant's assertion that it had not derived any benefit from the cartel when it supplied its cartonboard to its own factories, and even though the Commission had asserted in its defence that internal deliveries were not affected by the unlawfully agreed increases in the price of cartonboard, the applicant had not adduced any evidence as to the value of those deliveries. It therefore held that the applicant's folding carton factories, which is to say, the applicant itself, had therefore benefited from the cartel by using cartonboard from its own production as a raw material since, unlike competing convertors, the applicant had not had to bear the cost increases caused by the concerted price increases.

To conclude the main questions relating to fines in this series of cases, it should be noted that the total amount by which the fines were reduced by the Court, in the exercise of its unlimited jurisdiction, was ECU 11 870 000.

Article 2 of the contested decision directed the undertakings to put an end to the infringement. It was partially annulled. After considering the extent of the various prohibitions which that article placed on the undertakings, the Court held that some of the applicants had rightly argued that the scope of the order

to desist was too wide. Having pointed out that the obligations which the Commission may impose on undertakings may not exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed, it held that a prohibition seeking to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information, on the ground that the information exchanged might be used for anti-competitive purposes, exceeds what is necessary in order to bring the conduct in question into line with what is lawful.

Other findings are also of interest.

The Court had occasion to recall the case-law of the Court of Justice according to which fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures. It stated that, to that end, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. It pointed out that the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "ECHR") has special significance in that respect (Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18 and Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, paragraph 14). Furthermore, it noted that, under Article F(2) of the Treaty on European Union, "the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they appear from the constitutional traditions common to the Member States, as general principles of Community law" (Case T-347/94 *Mayr-Melnhof v Commission* and Case T-348/94 *Enso Española v Commission*).

In Case T-347/94, *Mayr-Melnhof* submitted that its rights of defence had been infringed because the Commission had placed pressure on undertakings to refrain from challenging the charges against them in return for a reduction in their fine. It claimed that such an approach conflicted with Article 6 of the ECHR. The Court rejected that claim, holding first of all that it had no jurisdiction to apply the ECHR when reviewing an investigation under competition law, as the ECHR was not itself part of Community law. Referring, however, to the above case-law, it held that it was necessary to examine whether the Commission had failed to observe the rights of the defence, a fundamental principle of the Community legal order, by exercising unlawful pressure on the applicant during the administrative procedure, so as to induce it to acknowledge the factual allegations in the statement of objections. On that point it held that the fact that, without specifying the size of a reduction, the Commission indicates, during the administrative procedure, to an undertaking involved in the investigation that it would be possible to reduce the fine to be imposed, if it were to admit all or most of the factual allegations, cannot of itself constitute pressure on that undertaking.

In Case T-348/94 *Enso-Española v Commission*, the applicant pleaded that the decision should be annulled because its fundamental right to an independent and impartial tribunal had been infringed. It pointed out, in particular, that the rights guaranteed under Article 6 of the ECHR had not been respected, since the bias on the part of the Commission resulting from the fact that the investigation conducted in the context of the procedure leading to the imposition of a penalty coincided with the adoption of the decision terminating the procedure cannot be redressed by means of a subsequent action before a court that has full jurisdiction, which is contrary to the obligations imposed by the ECHR. In response to that argument the Court of First Instance, after recalling the case-law mentioned above, stated first of all that Community law confers upon the Commission a supervisory role which includes the task of taking proceedings in respect of infringements of Articles 85(1) and 86 of the Treaty and that Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), gives the institution the power to impose, by decision, fines on undertakings and associations of undertakings which have infringed those provisions either intentionally or negligently. Next it pointed out that the requirement for effective judicial review of any Commission decision that finds and punishes an infringement of those Community competition rules is a general principle of Community law which follows from the common constitutional traditions of the Member States.

In the instant case, it held, on the basis of three considerations, that that general principle of Community law had not been infringed. First, the Court of First Instance is an independent and impartial court, established by Council Decision 88/591. Second, by virtue of Article 3(1)(c) of that decision, the Court of First Instance is to exercise the jurisdiction conferred on the Court of Justice by the Treaties establishing the Communities and by the acts adopted in implementation thereof, *inter alia*, in actions brought against an institution of the Communities by natural or legal persons pursuant to Article 173 of

the Treaty relating to the implementation of the competition rules applicable to undertakings. In the context of such actions, the review of the legality of a Commission decision finding an infringement of the competition rules and imposing a fine in that respect on the natural or legal person concerned must be regarded as effective judicial review of the measure in question. The pleas which may be relied on in support of the application for annulment are of such a nature as to allow the Court to assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings. Finally, in accordance with Article 17 of Regulation No 17, the Court has unlimited jurisdiction within the meaning of Article 172 of the Treaty in actions challenging decisions whereby the Commission has fixed a fine or periodic penalty payment and may cancel, reduce or increase the fine or periodic penalty imposed. It follows that the Court has jurisdiction to assess whether the fine or penalty payment imposed is proportionate to the seriousness of the infringement found.

Ten appeals have been brought before the Court of Justice against the judgments of the Court of First Instance, namely against the judgments in Case T-308/94 *Cascades v Commission*, Case T-309/94 *KNP BT v Commission*, Case T-317/94 *Weig v Commission*, Case T-327/94 *SCA Holding v Commission*, Case T-334/94 *Sarrió v Commission*, Case T-338/94 *Finnboard v Commission*, Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others v Commission*, Case T-348/94 *Enso Española v Commission*, Case T-352/94 *MoDo v Commission* and Case T-354/94 *Stora v Commission* (see OJ 1998 C 299).

In three judgments the Court of First Instance had to assess the lawfulness of Commission decisions rejecting complaints alleging the existence of conduct contrary to the Community competition rules. In Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, it dismissed an application by a company incorporated under Belgian law whose activities involve the publication of commercial telephone directories in Belgium, for annulment of a Commission decision definitively rejecting the heads of the applicant's complaint concerning infringements of Article 86 of the Treaty allegedly committed by Belgacom. In its complaint, the applicant had submitted that the infringements at issue consisted, first, of the fact that Belgacom had initiated vexatious litigation against it before the Belgian courts and, second, of Belgacom's request that the applicant transfer to Belgacom its industrial and commercial know-how in accordance with contractual commitments entered into between the two parties in 1984.

As regards the litigation, the Commission had considered in the contested decision that, in principle, "the bringing of an action, which is the expression of the fundamental right of access to a judge, cannot be characterised as an abuse" unless "an undertaking in a dominant position brings an action (i) which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party and, (ii) which is conceived in the framework of a plan whose goal is to eliminate competition". In the light of that opinion, it had concluded that, in this instance, the three actions brought by Belgacom before the Belgian courts could reasonably be regarded as having been brought with a view to asserting its rights and did therefore not constitute an abuse within the meaning of Article 86 of the Treaty. After pointing out that the applicant was challenging the application in this case of the two cumulative criteria relied on by the Commission but had not challenged the compatibility of those criteria as such with Article 86 of the Treaty, the Court of First Instance considered whether the Commission had correctly applied those two criteria. Before considering the pleas raised by the applicant in an attempt to show that the first of the two cumulative criteria was satisfied, the Court of First Instance pointed out, *inter alia*, that the ability to assert one's rights through the courts and the judicial control which that entails constitute the expression of a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 of the ECHR. It stated that, since access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty. Furthermore, since the two cumulative criteria constitute an exception to the general principle of access to the courts which ensures the rule of law, they must be construed and applied strictly, in a manner which does not defeat the application of the general rule. None of the four pleas in support of the claim for annulment, seeking to show that the first of the two cumulative criteria was satisfied, was finally accepted.

As regards the claim for performance of a provision of a 1984 agreement requiring the transfer to Belgacom of the applicant's industrial and commercial know-how, in order to enable Belgacom to ensure

the continuity of the publication of directories,³ the Commission had considered that a claim for performance of a contract cannot in itself constitute an abuse within the meaning of Article 86 of the Treaty. That assessment was challenged by the applicant in the context of its seventh plea. In its findings the Court of First Instance, on the basis of the objective nature of the concept of abuse, as explained by the Court of Justice in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91, recalled that it follows from the nature of the obligations imposed by Article 86 of the Treaty that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings. Thus, the conclusion of a contract or the acquisition of a right may amount to abuse for the purposes of Article 86 of the Treaty if that contract is concluded or that right is acquired by an undertaking in a dominant position. *A claim for performance of a contractual obligation may also constitute an abuse for the purposes of Article 86 of the Treaty if, in particular, that claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime.* In this instance, the Court of First Instance held that the applicant had not submitted any evidence to show that those conditions were satisfied.

In two judgments delivered on 16 September 1998,⁴ (Case T-110/95 *IECC v Commission* [1998], not yet published in the ECR, and Joined Cases T-133/95 and T-204/95 *IECC v Commission* [1998], not yet published in the ECR, the Court of First Instance dealt with actions against Commission decisions rejecting, respectively, heads of the complaint lodged under Article 3(2) of Regulation No 17 by International Express Carriers Conference (IECC), an organisation representing the interests of certain undertakings which provide express mail services and offer, *inter alia*, "re-mail" services. IECC had essentially claimed in its complaint, first, that a number of public postal operators established in the Community and in non-member countries had concluded a price-fixing agreement in 1987 in regard to terminal dues and, second, that a number of those operators were attempting to operate a market-allocation scheme on the basis of Article 23 of the Universal Postal Union Convention, adopted in 1964 under the aegis of the United Nations Organisation, with a view to declining delivery of mail posted by customers with public postal operators in countries other than those in which they resided. The Commission had rejected the first part of IECC's complaint relating to the application of Article 85 of the Treaty to the price-fixing agreement in regard to terminal dues (the decision at issue in Case T-110/95). It subsequently sent the applicant, on 6 April 1995, a decision rejecting the second part of its complaint, in so far as it concerned, in particular, the interception of commercial ABA remail (the decision at issue in Case T-133/95). Finally, on 14 August 1995, it adopted a decision concerning the application of the competition rules to the use of Article 23 of the Universal Postal Union Convention for the interception of ABC remail (the decision at issue in Case T-204/95).

The application in Case T-110/95, which was dismissed as unfounded, raised, in particular, the question whether, in the circumstances of the case, the Commission could rely on the insufficient Community interest of the case in order not to continue investigation of the matter and consequently to reject the applicant's complaint. The Court of First Instance first recalled that Article 3 of Regulation No 17 does not confer on a person who lodges an application under that article the right to obtain from the Commission a decision, within the meaning of Article 189 of the Treaty, regarding the existence or otherwise of an infringement of Article 85 or Article 86 or of both. It therefore rejected the applicant's argument that the Commission could no longer reject its complaint given the advanced stage reached in the investigation. In particular it referred to the absence of any *written provision requiring* the Commission to adopt a decision as to whether the alleged infringement exists and pointed out that the Commission may take a decision to close its file on a complaint for lack of sufficient Community interest not only before commencing an investigation of the case but also after taking investigative measures, if that course seems appropriate to it at that stage of the procedure. Nor did it accept the argument that the matters listed by the Court of First Instance in its judgment in Case T-24/90 *Automec v Commission*

³ Pursuant to agreements entered into in 1969 and 1984 between the predecessors in title of ITT Promedia and Belgacom, the last of which expired in February 1995, the applicant was granted the exclusive right to publish and distribute the official telephone directory in the name of Régie des Télégraphes et Téléphones, and commercial directories in its own name. The applicant published commercial directories under the trade name "Gouden Gids/Pages d'Or".

⁴ In a third judgment of the same date (Case T-28/95 *IECC v Commission* [1998], not yet published in the ECR), the Court of First Instance considered that there was no longer any need to adjudicate on the application for a declaration of failure to act lodged by the same applicant against the Commission, under Article 175 of the Treaty, since the action had become devoid of purpose.

[1992] ECR II-2223 ⁵ are the only factors which the Commission should take into account when assessing the Community interest in further investigation of the case. It held in that respect that the Commission is *not required to balance solely those matters which the Court listed in its judgment in Automec v Commission and it is thus entitled to take account of other relevant factors when making its assessment. The assessment of the Community interest is necessarily based on an examination of the circumstances particular to each case, carried out subject to review by the Court.*

In this instance, the Court of First Instance validated the Commission's assessment rejecting the relevant part of the complaint on the basis that there was no Community interest, on the ground that the undertakings against which the complaint had been directed were to change the conduct complained of in the manner it recommended. It considered that, in view of the general objective of the activities of the Community laid down by Article 3(g) of the Treaty, namely the institution of a system ensuring that competition in the common market is not distorted, and the general task of supervision conferred on the Commission by Articles 89 and 155 of the Treaty, that institution may decide, subject to the requirement that it gives reasons for such a decision, that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest. In such a situation, it is for the Commission, as part of its task of ensuring that the Treaty is properly applied, to decide whether it is in the Community interest to encourage undertakings challenged in administrative proceedings to change their conduct in view of the complaints made against them and to require from them assurances that such conduct will in fact be altered along the lines recommended by the Commission, rather than formally declaring in a decision that such conduct by undertakings is contrary to the Treaty rules on competition. An appeal has been brought against that judgment (Case C-449/98 P).

The action against the decision of 14 August 1995 (Case T-204/95), which related to the Commission's final assessment of the part of the complaint relating to the interception by certain public postal operators of ABC remail, was dismissed in its entirety. The Court of First Instance held, *inter alia*, that *the Commission was lawfully entitled to decide, on condition that it provided reasons for such a decision, that it was not appropriate to pursue a complaint denouncing practices which were subsequently discontinued.* The Commission was entitled to take the view that, where operators against which a complaint had been made had given undertakings and the applicant had failed to provide any evidence whatever that those undertakings had been disregarded, and the Commission had carefully examined the facts of the case, it was unnecessary for it to examine the complaint any further.

By contrast, the Court of First Instance partially annulled the decision of 6 April 1995 in so far as it related to physical commercial ABA remail (Case T-133/95). The applicant challenged the Commission's assessment that the interception of that type of mail did not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty, in so far as such interception results from the need for the public postal operators to protect their national monopoly in the distribution of mail from circumvention. The Court of First Instance decided in favour of the applicant, holding that the interception by public postal operators of international ABA remail – where mail originating in country A, where the public postal operator has a statutory postal monopoly, has been transported by private companies to country B and put into the postal system there in order to be sent via the traditional international postal system back to country A – cannot be regarded as lawful under Article 86 of the Treaty. Such interception cannot be justified by the mere existence of the postal monopoly and its alleged circumvention by ABA remail or by the fact that there may be an imbalance between the costs which a public postal operator bears in delivering incoming mail and the remuneration which it receives, where it is the result of an agreement concluded among the public postal operators themselves and, unless the Commission demonstrates otherwise, cannot be the only means by which the public postal operator of the country of destination can recover the costs involved in delivering that mail.

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In that judgment, the Court of First Instance held (paragraph 86) that: "[i]n order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and especially of the legal and factual particulars set out in the complaint referred to it. The Commission should, in particular, after assessing with all due care the legal and factual particulars submitted by the complainant, balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 of the Treaty are complied with". That paragraph is reproduced verbatim at paragraph 51 of the judgment in Case T-110/95.

Deutsche Post AG and IECC respectively have brought appeals against the judgments of the Court of First Instance in Case T-133/95 and Case T-204/95 (Case C-428/98 P and C-450/98 P).

The judgment in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998], not yet published in the ECR, concerns the application of the competition rules to agreements entered into between the railway undertakings British Rail, Deutsche Bundesbahn, NV Nederlandse Spoorwegen and Société Nationale des Chemins de Fer Français concerning the carriage of passengers by rail through the Channel Tunnel. European Night Services (hereinafter "ENS"), acting on behalf of those railway undertakings before the Commission, had submitted an application seeking a declaration either that the competition rules did not apply to those agreements or that the agreements were exempt.⁶ The first agreement notified concerned the formation by those railway undertakings of ENS, whose business was to consist of providing and operating overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel. The other agreements notified comprised operating agreements concluded by ENS with the four railway undertakings, under which each of them agreed to provide ENS with certain services, including traction over its network (locomotive, train crew and path), cleaning services on board, servicing of equipment and passenger-handling services. By its decision, the Commission had declared Article 85(1) of the Treaty and Article 53(1) of the Agreement on the European Economic Area (hereinafter "EEA Agreement") inapplicable to the ENS agreements for a period of eight years. That exemption was subject to the condition that the railway undertakings concerned would supply to any "international grouping" of railway undertakings or any "transport operator" wishing to operate night passenger trains through the Channel Tunnel the same necessary rail services as they had agreed to supply to ENS, on the same technical and financial terms as they allowed to ENS.

The Court of First Instance annulled the contested decision on several grounds. It essentially held that the statement of reasons for the contested decision did not enable it to make a ruling on the shares held by ENS on the various relevant markets for services and geographic markets and, consequently, on whether the agreements had an appreciable effect on trade between Member States. Furthermore, it considered that the Commission had not made a correct and adequate assessment of the economic and legal context in which those agreements were concluded.

As regards the condition to which the exemption was subject, the applicants claimed that by imposing on the parent undertakings the condition that necessary rail services be provided not only to international groupings but also to transport operators, the Commission had applied the rules on competition in a manner contrary to the regulatory framework set out by Council Directive 91/440 EEC of 21 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25).⁷ After considering the question whether ENS provided its international passenger rail services activities as an "international grouping" in accordance with Directive 91/440⁸ or, as claimed by the Commission, as a "transport operator" and therefore subject to the competition provisions of the Treaty, the Court of First Instance held that the Commission had interpreted the term "international grouping" restrictively, by transposing the term "transport operator" from the market for combined transport of goods into the market for the transport of passengers, despite the fact that that concept has no role in that market as it actually functions.

In view of the conditions to which grant of the exemption was made subject, the Court of First Instance, referring to the case-law concerning the prohibition of abuse of a dominant position, held that an undertaking may not be regarded as being in possession of infrastructure, products or services which are "necessary" or "essential" for entry to the relevant market unless such infrastructure, products or services are not interchangeable and unless, by reason of their special characteristics – in particular the prohibitive cost of and/or time reasonably required for reproducing them – there is no viable alternative available to potential competitors of the joint venture, which are thereby excluded from the market.

⁶ That application was submitted pursuant to Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

⁷ The Commission had categorised the ENS as a transport operator and, in the decision, had concluded from that categorisation that any special treatment accorded to that company by the undertakings which had made the notification should also be accorded to third parties, whether international groupings or transport operators, on the same technical and financial terms.

⁸ Under Article 3 of that Directive, an international grouping is defined as "any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States".

Finally, the Court of First Instance upheld the plea based on the insufficient duration of the exemption granted. It stated in that respect that the duration of an exemption granted under Article 85(3) of the Treaty or Article 5 of Regulation No 1017/68, and Article 53(3) of the EEA Agreement must be sufficient to enable the beneficiaries to achieve the benefits justifying such exemption. Where such benefits cannot be achieved without considerable investment, the length of time required to ensure a proper return on that investment is an essential factor to be taken into account when determining the duration of an exemption. That factor is particularly important where the exemption relates to an agreement for the creation of a joint venture offering completely new services, involving major investments and substantial financial risks and requiring the pooling of know-how by the undertakings participating in the agreement. In this instance, it considered that the decision did not contain any detailed assessment of the length of time required to achieve a return on the investments in question under conditions of legal certainty and, also in that respect, was vitiated by an absence of reasoning.

2. State aid

In the *field of State aid*, the Court of First Instance ruled on ten actions brought pursuant to the fourth paragraph of Article 173 of the Treaty (Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1; Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757; Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] ECR II-2405; Case T-11/95 *BP Chemicals v Commission* [1998], not yet published in the ECR; Case T-140/95 *Ryanair v Commission* [1998] ECR, not yet published in the ECR; Joined Cases T-126/96 and T-127/96 *BFM and EFIM v Commission* [1998], not yet published in the ECR; Case T-188/95 *Waterleiding Maatschappij "Noord-West Brabant" v Commission* [1998], not yet published in the ECR; orders in Case T-189/97 *Comité d'Entreprise de la Société Française de Production and Others v Commission* [1998] ECR II-335 and Case T-238/97 *Comunidad Autónoma de Cantabria v Council* [1998] ECR II-2271), on one action based on Article 33 of the ECSC Treaty (Case T-129/96 *Preussag Stahl v Commission* [1998] ECR II-609) and on two actions seeking a declaration under Article 175 of the Treaty that the Commission had failed to act (Case T-107/96 *Pantochim v Commission* [1998] ECR II-311 and Case T-95/96 *Gestevisión Telecinco v Commission* [1998], not yet published in the ECR).

As regards the *admissibility* of the actions based on the fourth paragraph of Article 173 of the Treaty, the Court of First Instance ruled on applications for annulment of Commission decisions adopted in the context of the preliminary examination stage provided for by Article 93(3) of the Treaty and, also, of decisions adopted at the end of the examination procedure provided for by Article 93(2) of the Treaty.

In *BP Chemicals v Commission*, the applicant challenged the Commission's decision approving, at the end of the procedure provided for by Article 93(2), the aid paid by ENI to EniChem in the form of two capital injections and finding, at the end of the preliminary examination under Article 93(3), that the third injection did not involve State aid. Having held that the whole of the proceedings had been brought against the decision within the period prescribed in the fifth paragraph of Article 173 (that time-limit had started to run on the date of publication of the decision in the *Official Journal of the European Communities*, to the extent that the contested decision had not previously been notified to the applicant), the Court of First Instance considered whether the contested measure was of direct and individual concern to the applicant. The action was declared inadmissible as regards the first two capital injections, since the applicant had not complained to the Commission, and had not approached that institution under its own name with a view to submitting comments as a party concerned within the meaning of Article 93(2) of the Treaty. Nor was the *applicant distinguished individually by virtue of its participation, as a member of a working party made up of representatives of industry and the Department of Trade and Industry, in the preparation of the observations submitted to the Commission by the United Kingdom, since those observations were submitted in the name of the United Kingdom and in its capacity as a Member State*. Finally, in view of the structure of the market and the overall situation of the petrochemical industry at the time the contested aid was paid (1993 and 1994), it was held that the information provided by the applicant did not distinguish it individually for the purposes of the fourth paragraph of Article 173 of the Treaty. In the context of its examination of the admissibility of the action as regards the third capital injection, the Court of First Instance referred to the judgment of the Court of Justice in Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719. It held that the principle that the persons intended to benefit from the procedural guarantees afforded by Article 93(2) of the Treaty may secure compliance therewith only if they are able to challenge a decision not to open the procedure in proceedings before the Community judicature *applies whether the ground on*

which the decision is taken is that the Commission regards the aid as compatible with the common market or that, in its view, the very existence of aid must be discounted. The applicant, in its capacity as a party concerned within the meaning of Article 93(2) of the Treaty, was therefore individually concerned by the decision in so far as that measure concerned the third capital injection.

In *Waterleiding Maatschappij "Noord-West Brabant" v Commission*, the Court of First Instance considered the admissibility of the action brought by a water distribution company for annulment of a Commission decision approving, without initiating the procedure provided for in Article 93(2) of the Treaty, the aid measures in a Netherlands law introducing taxes on consumption for the protection of the environment. In that respect, it held that, in its capacity as a party concerned within the meaning of Article 93(2), the applicant was directly and individually concerned by the contested decision in so far as it concerned the two aid elements in the Dutch law, namely the relief for self-supplying undertakings and the exemption for irrigation or watering purposes. In its assessment, it considered that the general nature of a measure notified by a Member State to the Commission does not in itself preclude the applicant from being regarded as having the status of a party concerned within the meaning of Article 93(2) of the Treaty provided that the applicant challenging the Commission decision declaring an aid scheme to be compatible with the common market on the basis of Article 93(3) demonstrates that its competitive position in the market is affected by the grant of the aid. In this instance, it was held that the competitive position of the applicant in the market would be affected by one of the tax reliefs provided for for self-supplying undertakings. It was held that, by means of that aid, the beneficiaries, which "are current or potential customers of the applicant ... are encouraged to switch to self-supply to meet their water needs". The Court of First Instance found there to be "a switch towards self-supply" and held that the relief at issue "directly [affected] the structure of the market in the provision of water in which the applicant [operated]" and "[affected] its competitive position on that market". The same approach was taken in respect of an "exemption for irrigation or watering purposes", capable of causing a certain amount of "desertion" to self-extraction. However, it was apparent from the facts of the case that, as regards those two aid elements, the contested decision confirmed previous decisions which had not been challenged within the required period. The application was therefore dismissed as inadmissible.

In the judgments in *Vlaams Gewest v Commission* and *Cityflyer Express v Commission* the Court of First Instance dealt with two applications for annulment of the Commission decision of 26 July 1995 concerning aid granted by the Flemish Region to the Belgian airline Vlaamse Luchttransportmaatschappij (hereinafter "VLM"). In that decision the Commission had concluded that the loan granted by the Flemish Region to VLM included components of State aid which were unlawful and incompatible with the common market. Consequently the Commission required the Belgian authorities to order that interest at the rate of 9.3% be paid on that loan and that the aid component, equal to interest charged at that rate on the amount borrowed since the date of the loan, be repaid.

The contribution of the judgment in *Vlaams Gewest v Commission* consists of the examination of the conditions of admissibility of actions brought under the fourth paragraph of Article 173 by a region. In that case, the Court of First Instance held that the contested decision had a direct and individual effect on the legal position of the Flemish region by directly preventing it from exercising its own powers, which here consisted of granting the aid in question, as it saw fit, and required it to modify the loan contract entered into with VLM.

In *Cityflyer Express v Commission*, the Court of First Instance dismissed the plea of inadmissibility raised by the Commission. According to the Commission, the applicant had no interest in bringing the proceedings, since if the decision were to be annulled and VLM subsequently to obtain new financing from a credit institution, VLM's financial situation would improve owing to the fall in interest rates which occurred after the adoption of the contested decision. The Court of First Instance held in that respect that, in its capacity as a competitor of the company receiving the aid, the applicant had a legal interest in bringing proceedings, since the contested decision was *liable to have an adverse effect on its competitive position*.

As is apparent from the order in *Comité d'Entreprise de la Société Française de Production and Others*, although a trade union may have the status of a party concerned within the meaning of Article 93(2) of the Treaty, it is neither directly nor individually concerned by the Commission's decision declaring aid to be incompatible with the common market. An appeal has been brought against that order (Case C-106/98 P).

Furthermore, the Court of First Instance considered that a Spanish regional authority, which was challenging the legality of a Council regulation on aid to certain shipyards under restructuring, on the ground that its application would result in a limitation of the activities of a shipyard established on its territory and would therefore have serious socio-economic consequences in that territory, cannot be regarded as being concerned for the purposes of the fourth paragraph of Article 173 of the Treaty (order in *Comunidad Autónoma de Cantabria v Council*). It held that any general interest the applicant might have, as a third party, in obtaining a result which would favour the economic prosperity of a given undertaking and, consequently, the level of employment in the geographical region where it carries on its activities, was not in itself sufficient for the applicant to be regarded as being directly concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by the contested regulation, nor – *a fortiori* – as individually concerned.

As regards the *substance*, the Court of First Instance partially annulled the Commission decision of 27 July 1994 regarding the aid Italy had decided to grant to EniChem SpA, on the ground that, at the end of the examination pursuant to Article 93(3) of the Treaty, the Commission had not been in a position to overcome all the difficulties raised by the question whether the last of the three capital injections referred to by the contested decision constituted aid within the meaning of Article 92(1) of the Treaty and that it had therefore infringed the applicant's rights as a party concerned within the meaning of Article 93(2) of the Treaty (*BP Chemicals v Commission*).

Similarly, it annulled the Commission decision authorising the French authorities to grant aid, in the period 1994 to 1996, in favour of Compagnie Nationale Air France, in the form of a FF 20 billion capital increase to be paid in three tranches and aimed at its restructuring, on the ground that it had failed to state reasons in respect of two essential elements (*British Airways and Others v Commission*). In its examination, the Commission had considered that a genuine restructuring of Air France would be in the common interest, by contributing to the development of the European air transport industry and improving its competitiveness. It had also considered that the amount of aid did not appear to be excessive for the successful accomplishment of the restructuring plan and that that aid did not affect trade to an extent contrary to the common interest, in the light of the commitments made by the French Government. It had concluded that the aid was compatible with the common market and the EEA Agreement, provided that the French authorities complied with 16 commitments made at the time the decision was drafted.

The Court of First Instance considered that it was not sufficiently clear from the decision whether the Commission had examined the extent to which the modernisation of the Air France fleet, consisting of the purchase of 17 new aircraft for a total of FF 11.5 billion, could be partially financed by the aid at issue. It also considered that the decision was vitiated by a failure to state reasons as regards the effects of the aid on competitors of Air France worldwide. Although it conceded that the conditions imposed in the decision, limiting Air France's freedom and preventing it from pursuing an aggressive price policy on all the routes which it operated within the EEA, were explained in sufficient detail in the decision, it considered, by contrast, that the decision did not contain any indication as to the assessment of the effects of the aid on the competitive position of Air France in regard to its network of non-EEA routes and the associated feeder traffic.

In several cases, the Court of First Instance reviewed whether the Commission was reasonably able to conclude whether or not a measure by a Member State constituted State aid for the purposes of Article 92(1) of the Treaty. It recalled, in *BFM and EFIM v Commission*, that the Commission has a wide discretion when determining, at the end of a complex economic appraisal, whether a particular measure may be regarded as aid within the meaning of Article 92(1) of the Treaty where the State did not act as an ordinary economic agent. Judicial review by the Court of First Instance is restricted to determining whether the Commission complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based are accurate and whether there was any manifest error of assessment or misuse of powers. In the circumstances of the case, the Court of First Instance held that the Commission had not committed any manifest error of assessment.

In a decision dated July 1995 concerning the aid granted by the Flemish region to the airline VLM, the Commission had considered that the difference between the interest which VLM would have paid under normal market conditions and that actually paid constituted aid within the meaning of Article 92(1) of the Treaty. In response to the applicant's assertion that the Commission had committed manifest errors of assessment in not also classifying the principal sum loaned as aid, the Court of First Instance held that

the manifest errors allegedly committed in the assessment had not been proven (*Cityflyer Express v Commission*).

In *Ladbroke Racing v Commission*, the Court of First Instance pointed out that the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings. The characterisation of a measure as State aid, which, according to the Treaty, is the responsibility of both the Commission and the national courts, cannot in principle justify the attribution of a broad discretion to the Commission, save for particular circumstances owing to the complex nature of the State intervention in question. The relevance of the causes or aims of State measures falls to be appraised only in the context of determining – pursuant to Article 92(3) of the Treaty – whether such measures are compatible with the common market. It is only in cases where Article 92(3) falls to be applied and where, accordingly, the Commission must rely on complex economic, social, regional and sectoral assessments, that a broad discretion is conferred on that institution.

In that case, the applicant, a company belonging to the Ladbroke Group, whose activities include organising and providing betting services in connection with horse-races in the United Kingdom and other countries in the Community, had submitted a complaint to the Commission in respect of several forms of aid which the French authorities had granted to Paris Mutuel Urbain (PMU), the body with the exclusive right to manage the organisation of off-course totalisator betting by the racecourse undertakings, and which it claimed were incompatible with the common market. Of the seven measures adopted by the French Government in favour of the PMU with regard to which the procedure under Article 93(2) of the Treaty was initiated, three were identified by the Commission in its final decision as State aid within the meaning of Article 92(1) of the Treaty, eligible for exemption under Article 92(3)(c) of the Treaty, namely (i) the waiver from 1982 to 1985 of the sums deriving from the practice of rounding down betters' winnings to the nearest 10 centimes; (ii) the exemption prior to 1989 from the one-month delay rule for the deduction of VAT; (iii) the exemption from the housing levy up to 1989. As regards the four other measures, the Commission had found that various advantages granted to the PMU, through the amendment of the allocation of the public levies, cash-flow benefits whereby the PMU was authorised to defer payment of certain charges levied on horse-race betting, the exemption from corporation tax and the retention of unclaimed winnings by PMU did not constitute State aid. Following its assessment, the Court of First Instance concluded that the decision should be annulled, in particular in so far as the Commission had decided that several measures did not constitute State aid.

As regards the amendment of the allocation of the public levies, it considered that although both tax legislation and the implementation of national tax arrangements are matters for the national authorities, the exercise of those powers may, in certain cases, prove incompatible with Article 92(1) of the Treaty. In that respect the Commission was not entitled to conclude that a tax measure, involving the reduction of the share of the PMU's revenue from horse-racing bets accruing to the French authorities did not constitute State aid within the meaning of Article 92(1) but a "reform in the form of a tax adjustment that is justified by the nature and economy of the system in question", on the ground that the measure is ongoing in character, is not aimed at financing an *ad hoc* operation and is merely a limited reduction in the rate of taxation.

As regards the cash-flow benefits, the Court of First Instance held that the decision of the French authorities had had the effect of granting financial advantages to the undertaking and improving its financial position. The fact that that decision could also indirectly benefit a number of other operators whose affairs depend on the principal activities of the undertaking to which the aid was granted was not held to be conclusive and it does not follow that the measure in question was a general measure outside the ambit of Article 92(1) of the Treaty. At the very most it means that the measure may qualify for the sectoral derogation provided for in Article 92(3)(c) of the Treaty.

As regards the retention of unclaimed winnings by the PMU, the Court of First Instance held that the condition for applying Article 92(1) of the Treaty, namely that State funds are transferred to the recipient, is satisfied where a Member State permits the body responsible for the operation of totalisator betting to retain unclaimed winnings, in order to finance social security expenditure. In this instance, all the French legislature did was in effect to waive revenue which would otherwise have been paid to the Treasury. However, in so far as those resources were used to finance social security expenditure, they constituted a reduction in the social security commitments which the undertaking would normally have had to discharge and hence a grant of aid.

In the same case, the Court of First Instance was also called upon to determine whether the Commission had infringed Article 93(2) of the Treaty by deciding, when exercising its power of appraisal as to whether to instruct the French authorities to recover aid declared incompatible with the common market, to restrict the effects in time of such a decision on the ground that the Member State concerned considered that a judgment of a national court⁹ was liable to give rise to a legitimate expectation on the part of the PMU, the recipient of the aid, that the latter was lawful. It replied that the Commission was not entitled to impose such a temporal limitation on that ground. It was not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national court, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid.

The French Republic has brought an appeal against that judgment before the Court of Justice (Case C-83/98 P).

In its judgment in *Ryanair v Commission*, the Court of First Instance dismissed the applicant's application for annulment of the Commission decision authorising the Irish Government to pay the second of three tranches of aid to the Aer Lingus Group. In 1993, following a procedure initiated pursuant to Article 93(2) of the Treaty, the Commission had authorised Ireland to provide aid of IRL 175 million to the Aer Lingus Group, in the form of a capital injection in the context of a restructuring plan. That injection was to be made in three successive tranches: IRL 75 million to be paid in 1993, IRL 50 million in 1994 and IRL 50 million in 1995. The aid at issue had, however, been approved subject to certain conditions. In particular, the payment of the second and third tranches was conditional upon the Aer Lingus Group achieving an IRL 50 million annual reduction in costs.

In December 1994, the Commission had found that the Aer Lingus Group had not achieved that target. However, it had conceded that the progress of the restructuring and the results already achieved were satisfactory, despite the fact that the stipulated objective had not been achieved in full. It therefore authorised the Irish Government to pay the second tranche of the aid by a decision which Ryanair challenged before the Court of First Instance.

In this case, one of the questions which arose was *which administrative procedure should be followed by the Commission when it has approved State aid payable in tranches under Article 92(3)(c) of the Treaty, following a procedure under Article 93(2), subject to the fulfilment of a certain number of conditions, but it subsequently becomes apparent that one of those conditions has not been fulfilled.* In that respect, the Court of First Instance held that the effect of failure to comply with a condition imposed in a decision approving aid is to raise a presumption that subsequent tranches of the aid *cannot be released without a new Commission decision granting a formal derogation from the condition in question.* It stated that, once the Commission has adopted a decision approving aid subject to conditions at the end of a procedure under Article 93(2), it is not entitled to depart from the scope of its initial decision without re-opening that procedure. *It follows that, if one of the conditions to which approval of an aid was subject is not satisfied, the Commission may normally adopt a decision derogating from that condition without re-opening the procedure under Article 93(2) of the Treaty only in the event of relatively minor deviations from the initial condition, which leave it with no doubt as to whether the aid at issue is still compatible with the common market.* However, the Commission enjoys a power to manage and monitor the implementation of aid to be awarded in tranches, which must, in particular, enable it to deal with developments which could not have been foreseen when the initial decision was adopted. In this instance, since the deviation from the condition at issue was relatively minor (IRL 42.4 million rather than IRL 50 million) and the Commission had not dispensed Aer Lingus from compliance with that condition, but had merely extended by one year the time-limit within which the IRL 50 million reduction in costs was to be achieved, the Court of First Instance held that the Commission had not departed from the scope of the 1993 decision. It also pointed out that the cost reduction had not been achieved as a result of circumstances which could not have been foreseen at the time the initial decision was adopted, in particular, a social conflict which had developed at Team Aer Lingus, a maintenance subsidiary.

Furthermore, it considered that Ryanair had not proved that the developments in Aer Lingus' activities should have led the Commission to entertain doubts as to the compatibility of the second tranche of the

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aid with the common market, thus obliging it to re-open the procedure under Article 93(2) of the Treaty.

Finally, since none of the other grounds of challenge raised by the applicant were accepted, the application was dismissed.

As regards the application of *Article 175 of the Treaty*, the Court of First Instance formally declared, for the first time, that the Commission had failed to act in the field of State aid (*Gestevisión Telecinco v Commission*). The applicant, Gestevisión Telecinco, a private commercial television company, had submitted two complaints to the Commission in March 1992 and November 1993, alleging that the subsidies granted by the autonomous Spanish communities and the central Spanish State to certain regional television companies were incompatible with the common market. Since the Commission had still not adopted a position on the two complaints in February 1996, the applicant had set in motion the procedure under Article 175 of the Treaty and lodged an application for a declaration that the Commission had failed to fulfil its obligations under the Treaty, by failing to adopt a decision in relation to the two complaints submitted by it and by failing to initiate the procedure provided for under Article 93(2) of the Treaty.

The Court of First Instance first pointed out that the investigation of the alleged aid took place at the analysis stage provided for by Article 93(3) of the Treaty and that, by its action, *the applicant was asking it to declare that the Commission had failed to adopt one of the three decisions it is required to adopt vis-à-vis the Member State concerned at the end of that stage*. That is to say either a decision finding that the State measure at issue does not constitute State aid within the meaning of Article 92(1) of the Treaty, or a decision conceding that, although constituting aid within the meaning of Article 92(1) of the Treaty, the measure is compatible with the common market under Article 92(2) or (3) of the Treaty or, finally, a decision to initiate the analysis stage provided for by Article 93(2). Having stated that the applicant could be considered as directly and individually concerned by such measures, the Court concluded that the application was admissible. As regards the substance, it considered whether, at the time when the Commission was formally called upon to define its position, it was under a duty to act. It pointed out that, at that time, the Commission's investigation of the first complaint had already taken 47 months and the investigation of the second complaint 26 months. It considered that, in those circumstances, the Commission should have been in a position to adopt a decision on the aid in question, unless it could show exceptional circumstances justifying such periods. It considered that not to be the case and held that the Commission had failed to fulfil its obligations under the Treaty.

It should be noted that the judgment in *Gestevisión Telecinco v Commission* was the only judgment, in 1998, declaring that an institution had failed to act.

According to Article 4(c) of the *ECSC Treaty*, aid granted by the Member States to the steel industry, in any form whatsoever, is prohibited. On the basis of Article 95 of that Treaty, on 27 November 1991 the Commission adopted Decision No 3855/91/ECSC establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57), the so-called "Fifth Steel Aids Code". The interpretation of certain provisions of the Fifth Code were at the heart of the dispute in *Preussag Stahl v Commission*. In that case, the German Government had notified the Commission of two proposals for aid to the company Walzwerk Ilsenburg, one in May 1994 and the other in November 1994. As regards the latter, the Commission had informed the German authorities that it would be impossible for it to give a decision before the deadline of 31 December 1994 laid down by the Code. Since the German authorities maintained the notification of that proposal, by decision adopted in May 1996 the Commission found that the regional aid to the company constituted State aid incompatible with the common market and prohibited under the Treaty and the Code and ordered it to be repaid. The Court of First Instance dismissed the application for annulment of that decision lodged by the company concerned, Preussag Stahl, the successor in title to Walzwerk Ilsenburg. As regards the application of Decision No 3855/91, it pointed out in particular that the deadline of 31 December 1994 laid down for the payment of regional investment aid was necessarily the deadline imposed on the Commission for adopting decisions on the compatibility of that category of aid. After the expiry of that time-limit, such aid could no longer be regarded as compatible with the common market on the basis of Article 1(1) of Decision No 3855/91 and was thus prohibited pursuant to Article 4(c) of the ECSC Treaty. Firstly, in the light of the provisions of Decision No 3855/91, aid to which that decision applied could be put into effect only with the prior approval of the Commission. Secondly, unlike the EC Treaty, which empowers the Commission to adopt decisions on the compatibility of State aids on a permanent basis, the derogation allowed by Decision

No 3855/91 to the principle of the absolute prohibition of aid in Article 4(c) of the ECSC Treaty was limited in time and must therefore be interpreted even more strictly since, according to the 11th recital in the preamble to the decision, "as regional investment aids are exceptional in nature, there would [have been] no justification in maintaining them beyond the appropriate period for the modernisation of the steel plants concerned, which [was] set at three years".

Furthermore, the general scheme of the procedural provisions of Decision No 3855/91 indicated that it was designed to afford the Commission a period of at least six months within which to give a decision on the compatibility of planned aid notified to it. In this case, the Commission therefore needed at least six months before the deadline of 31 December 1994 in order to open and close the procedure before that deadline. Since planned aid was notified after 30 June 1994, the Commission was no longer required to adopt a decision on its compatibility before 31 December 1994. By having maintained the notification of the planned aid on a date which left the institution substantially less than the six-month period required by the Code, the German authorities had taken the risk of making it impossible for the Commission to examine the planned aid before its powers in that respect expired. In the absence of any proof of manifest negligence on its part, the Commission could therefore not be criticised for the fact that that risk materialised.

An appeal has been brought against that judgment before the Court of Justice (Case C-210/98 P).

3. Access to documents of the Council and the Commission

The Court of First Instance had cause to rule on the conditions of public access to documents¹⁰ of the Commission (Case T-124/96 *Interporc v Commission* [1998] ECR II-231 and Case T-83/96 *Van der Wal v Commission* [1998] ECR II-545) and of the Council (Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289).

The judgment in *Interporc v Commission* censured the Commission's refusal to provide access to certain documents, on the basis of the exception for protection of the public interest (court proceedings). The decision contained no explanation from which it was possible to ascertain whether all the documents requested did indeed fall within the scope of the exception relied upon because they bore relation to a decision whose annulment was sought in a case pending before the Court of First Instance.

By contrast, the judgment in *Van der Wal v Commission* dismissed the application for annulment of a Commission decision refusing to grant access to *letters which the Directorate-General for Competition (DG IV) had sent to various national courts*. The Court of First Instance considered that the Commission was entitled to rely on the exception provided for by Decision 94/90 of 8 February 1994, based on the protection of the public interest (court proceedings), in order to refuse to grant access to documents sent to a national court in response to a request for information from that court in the context of the cooperation based on the Commission's notice on the application of Articles 85 and 86 of the Treaty, even though the Commission was not a party to the proceedings pending before the national court which gave rise to the request. It held in that respect that that exception to the general principle of access to documents is designed to ensure respect for the right of every person to a fair hearing by an independent tribunal and is not restricted to the protection of the interests of the parties in the context of specific court proceedings. Consequently, the decision whether or not to grant access to documents drafted by the Commission for the sole purposes of a particular court case was a matter exclusively for the appropriate national court on the basis of its own rules of procedure and, in particular, the principles of confidentiality applicable to documents on the file. The Court of First Instance also considered that sufficient reasons had been given for the contested decision. The Kingdom of the Netherlands and Mr Van der Wal respectively have brought appeals against that judgment (registered as Case C-174/98 P and C-189/98 P).

¹⁰ On 6 December 1993, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41). In implementation of the principles set out by that Code, on 20 December 1993 the Council adopted Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43). Similarly, on 8 February 1994, the Commission adopted Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58).

In *Svenska Journalistförbundet v Council* the Court of First Instance was required to review the legality of the Council's refusal to disclose certain documents concerning the European Police Office (Europol) to an association of Swedish journalists. The Council had based its refusal on both the mandatory exception based upon the protection of public security and also the discretionary exception based upon protection of the confidentiality of its proceedings. Considering a plea of inadmissibility based on an absolute bar to proceeding, the Court of First Instance first held that, although it has no jurisdiction to review the legality of measures adopted under Title VI of the Treaty on European Union (Provisions on Co-operation in the fields of Justice and Home Affairs), it does have jurisdiction to review the legality of decisions of the Council taken under Decision 93/731 of 20 December 1993. As regards the substance, it recalled the requirements of a proper statement of reasons for a refusal based on exceptions to the general principle of access to any document. In this instance, in the absence of any explanation as to why the disclosure of the documents would in fact have been liable to prejudice a particular aspect of public security, it was not possible for the Court of First Instance to determine whether the documents to which access had been refused fell within one of those exceptions. Furthermore, in so far as it concerned the exception based upon protection of the confidentiality of proceedings, the contested decision did not permit the journalists' association and, therefore, the Court of First Instance, to check whether the Council had complied with its duty to carry out a genuine balancing of the interests concerned.

Furthermore, that case raised a procedural issue, which had not previously arisen. The applicant had published an edited version of the defence on the Internet and encouraged the public to send their comments to the Council's Agents. Referring to the general principle of the due administration of justice, according to which parties have the right to defend their interests free from all external influences, and particularly from influences on the part of members of the public, it held that such actions involved abuses of procedure which should be taken into account in awarding costs.

4. Trade protection measures

In the field of anti-dumping duties, the Court of First Instance ruled on the substance in four cases (Case T-97/95 *Sinochem v Council* [1998] ECR II-85, Case T-118/96 *Thai Bicycle Industry v Council* [1998] ECR II-2991, Case T-232/95 *CECOM v Council* [1998] ECR II-2679 and Case T-2/95 *Industrie des Poudres Sphériques v Council* [1998], not yet published in the ECR). It dismissed the four actions, all seeking annulment of Council regulations imposing definitive anti-dumping duties on imports from countries not members of the Community, as unfounded. It also dismissed two actions as inadmissible (orders in Case T-84/97 *BEUC v Commission* [1998] ECR II-795 and Case T-267/97 *Broome & Wellington v Commission* [1998] ECR II-2191). Finally, in Case T-147/97 *Champion Stationery and Others v Council* [1998], not yet published in the ECR), the Court of First Instance rejected the applicants' sole plea in law based on infringement of their rights of the defence.

In *Thai Bicycle Industry v Council*, the applicant, a company incorporated under the law of Thailand, was challenging the legality of a Council regulation imposing a definitive anti-dumping duty on imports of bicycles originating in Indonesia, Malaysia and Thailand and collecting that duty definitively. The main question raised was whether the Council had infringed Article 2(3)(b)(ii) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1) or had committed a manifest error of assessment by using a new criterion in establishing the profit margin to be included in the constructed normal value of the applicant's products exported to the Community. In this instance it had not been possible for the Commission and Council to determine the dumping margin of the bicycles produced by the applicant by comparing the normal value of those products with their export prices to the Community. Those institutions therefore had to establish the constructed value of those products by adding to the production costs of the exported models a reasonable amount for selling, general and administrative expenses and a reasonable profit margin. The Court of First Instance held that, in order to calculate that profit margin, the Council had been entitled to consider that where a producer realises profits on a sales volume which is less than 10% of the total volume of its domestic sales of the like product, those profits are not reliable within the meaning of Article 2(3)(b)(ii) of Regulation No 2423/88 and are consequently not suitable for use in calculating the aforementioned margin.

In *Sinochem v Council*, the applicant, a State company in the People's Republic of China which had been the sole exporter of furfuraldehyde¹¹ from the People's Republic of China, challenged the legality of a Council Regulation imposing a definitive anti-dumping duty on imports of that product from that country in the light, in particular, of several provisions of Regulation No 2423/88. In particular, it submitted that, in the circumstances of that case, an anti-dumping measure limited to imports of furfuraldehyde only intended for the cleaning of lubricating oils would have been adequate to remove the injury. The Court of First Instance did not accept that argument. It held that the imposition of anti-dumping duties on the whole of the imports of the product at issue from China was not contrary either to Article 2(1) of Regulation No 2423/88 or to the principle of proportionality, since the two different applications of furfuraldehyde did not correspond to two separate markets and the product was the same. Since none of the other pleas in law raised were held to be founded, the application was dismissed in its entirety.

The Committee of European Copier Manufacturers (CECOM) had brought an action before the Court of First Instance for annulment of a provision of a Council Regulation imposing a definitive anti-dumping duty on plain paper photocopiers originating in Japan and due to expire, in principle, two years after its entry into force (*CECOM v Council*). The definitive anti-dumping duty in question had been adopted following a procedure for the review of the measures initially adopted by the Council in 1987. As regards the question whether the Council could, pursuant to Regulation No 2423/88, adopt anti-dumping measures for a period of less than five years, the Court of First Instance held that *Article 15(1) of that regulation¹² must be construed as allowing the Council a discretionary power to fix at less than five years the period of application of definitive anti-dumping duties adopted following a procedure for the review of the measures initially adopted if, owing to special circumstances, such a limitation best serves to protect the differing interests of the parties to the procedure and maintain the equilibrium between those interests which Regulation No 2423/88 seeks to establish*. The other pleas in law were also rejected.

Finally, the judgment in *Industrie des Poudres Sphériques v Council* settled the dispute arising from the resumption by the Commission of the anti-dumping procedure finalised by a Council regulation imposing a definitive anti-dumping duty on imports of calcium metal originating in China and Russia¹³ following a judgment of the Court of Justice annulling a previous Council Regulation with the same subject-matter (Case C-358/89 *Extramet Industrie v Council* [1992] ECR I-3813¹⁴). *It therefore fell to the Court of First Instance to consider the effect of a judgment annulling such a regulation on the administrative procedure leading to its adoption*. It held in that respect that, as regards an act concluding an administrative proceeding which comprises several stages, the annulment does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment. In particular, when, in the context of an anti-dumping proceeding, the annulment of a regulation fixing the duties imposed is based on a finding that the institutions did not follow the proper procedure in determining the injury suffered by the Community producer, the preliminary measures preparatory to the investigation, which led to the adoption of that regulation, and in particular the initiation of the proceeding under Article 7(1) of Regulation No 2423/88 are not affected by the unlawfulness found by the Court. In those circumstances, the Commission could lawfully resume the proceeding on the basis of all the acts in the proceeding which were not affected by the annulment in order to conduct an investigation into the same reference period as that taken into account in the Council regulation annulled by the Court or where, as in this case, the anti-dumping is still in progress after the judgment pronouncing the annulment, conduct a fresh investigation relating to a different reference period. An appeal has been brought against that judgment (Case C-458/98 P).

¹¹ Furfuraldehyde is a chemical used, first, as a selective solvent in oil refining for the production of lubricating oils and, second, as a raw material for the production of furfuryl alcohol.

¹² Article 15(1) of Regulation No 2423/88 provides that "anti-dumping ... duties ... shall lapse after five years from the date on which they entered into force or were last modified or confirmed".

¹³ Adopted pursuant to Regulation No 2423/88.

¹⁴ The Court of Justice had annulled the Council regulation at issue on the grounds that the Community institutions had not actually considered whether the Community producer of the product referred to in the regulation had by its conduct itself contributed to the injury suffered and had not established that the injury on which they based their conclusions did not derive from the factors as mentioned by the applicant, and had therefore not followed the proper procedure in determining the injury.

As regards the orders dismissing two applications as inadmissible, they ruled, respectively, on an application for annulment by the Bureau Européen des Unions de Consommateurs against a Commission decision which merely confirmed a previous decision not challenged within the time-limits (order in *BEUC v Commission*) and an application for annulment of the act whereby the Commission had initiated anti-dumping proceedings, that is to say a purely preparatory act which was not capable of having an immediate and irrevocable effect on the applicant's legal position (order in *Broome and Wellington v Commission*).

5. Customs disputes

The Community legislation governing the detailed rules for repayment or remission of import duties (Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), and Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) was at the centre of three cases (Case T-42/96 *Eyckeler & Malt v Commission* [1998] ECR II-401; Case T-195/97 *Kia Motors Nederland and Broekman Motorships v Commission* [1998], not yet published in the ECR and Case T-50/96 *Primex Produkte Import-Export and Others v Commission* [1998], not yet published in the ECR). In each of those three cases, the Court of First Instance annulled the contested decision of the Commission. By contrast, it dismissed as unfounded actions challenging the legality of a Commission decision ordering the post-clearance recovery of customs duties (Joined Cases T-10/97 and T-11/97 *Unifrijo Gadus and CPL Imperial 2 v Commission* [1998] ECR II-2231); an appeal has been brought against that judgment (Case C-299/98 P).

In Case T-42/96 *Eyckeler & Malt v Commission* the Court of First Instance heard an action for annulment of the Commission decision rejecting an application for remission of import duties submitted to the German authorities by Eyckeler & Malt, a company which had imported high-quality beef from Argentina. Those imports had been subject to customs duty but had been granted an exemption from levies pursuant to the Community tariff quota opened by the Council in respect of 1991 and 1992, since the applicant had submitted the certificates of authenticity required by the applicable legislation for that purpose. It was subsequently discovered that those certificates had been falsified and the applicant, from whom the German authorities had sought post-clearance payment of the import duties, applied to those authorities for remission of the import duties. At the end of the administrative customs procedure, the Commission had addressed the contested decision to the Federal Republic of Germany; in that decision, *inter alia*, it alleged for the first time that Eyckeler & Malt had failed to exercise due care by omitting to adopt all the necessary safeguards concerning its interlocutors in Argentina.

In concluding that the decision should be annulled, the Court of First Instance accepted that the Commission had, firstly, breached the applicant's rights of defence and, secondly, committed a manifest error of assessment. As regards the rights of the defence, it pointed out that respect for those rights in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any rules governing the procedure in question. The Court of First Instance stressed that it is all the more important that respect for that right be guaranteed where the Commission has a margin of assessment in adopting the measure, such as in procedures for the remission or repayment of import or export duties. In circumstances such as those of that case, it considered that that principle requires not only that the person concerned should be placed in a position in which he may effectively make known his views on the relevant circumstances, but also that he should at least be able to put his own case on the documents taken into account by the Commission, or even have access to all non-confidential official documents concerning the contested decision, where it is alleged that the Commission committed serious breaches of its obligations. More specifically, it held that, in customs procedures such as those in this case, when the Commission contemplated diverging from the position taken by the competent national authorities, it had a duty to arrange for a hearing of the person alleged to have failed to act with due care or to have acted with obvious negligence. The same question arose in *Primex Produkte Import-Export and Others v Commission*, and the Court of First Instance gave an identical answer in its judgment of 17 September 1998. The Commission has brought appeals against the judgments in *Eyckeler & Malt v Commission* and *Primex Produkte Import-Export and Others v Commission* before the Court of Justice (Case C-163/98 P and Case C-417/98 P).

6. Social policy

The European Social Fund (ESF) participates in the financing of vocational training and guidance operations, the successful completion of which is to be guaranteed by the Member States. When the financial assistance is not used in conformity with the ESF's conditions for approval, the relevant legislation provides that the Commission may suspend, reduce or withdraw the aid. In fact, the Court of First Instance had to rule on Commission decisions reducing the financial assistance granted by the ESF to Portuguese companies (Case T-72/97 *Proderec v Commission* [1998] ECR II-2847; Joined Cases T-180/96 and T-181/96 *Mediourso v Commission* [1998], not yet published in the ECR and Case T-142/97 *Branco v Commission* [1998], not yet published in the ECR). Each of those three judgments states in so far as is necessary the nature and scope of the certification, by the Member State concerned, of the accuracy of the facts and accounts in the claims for payment of the balance of the financial assistance.

¹⁵ In *Proderec v Commission* and *Mediourso v Commission* the Court of First Instance also considered whether, as the applicants claimed, their rights of defence had been infringed in so far as they had not been granted a hearing by the Commission before it adopted the decisions reducing the financial assistance concerned. In both cases, the Court of First Instance, having recalled that *the Commission was not entitled to adopt a decision to reduce ESF aid without first giving the beneficiary the possibility, or ensuring that it had the possibility, of effectively setting forth its views on the proposed reduction*, rejected the pleas, holding that the applicants had had the possibility of effectively setting forth their views.

Only in *Mediourso v Commission* did the Court of First Instance annul a small part of one of the contested decisions on the grounds that the statement of reasons was defective. The other actions were dismissed.

Appeals have been brought against all three of those judgments (Case C-341/98 P, Case C-462/98 P and Case C-453/98 P).

7. The admissibility of actions under the fourth paragraph of Article 173 of the EC Treaty

The Court of First Instance dismissed as inadmissible several actions seeking either the annulment of decisions which were not addressed to the applicants or the annulment of legislative measures. Only one case in the second category was determined by way of judgment (Case T-135/96 *UEAPME v Council* [1998] ECR II-2335), the others being settled by way of order. In addition to the cases of inadmissibility of actions for annulment of regulations in the field of commercial policy or State aid already mentioned ¹⁶ several decisions declared inadmissible actions for annulment of regulations in the fields of agricultural policy *lato sensu* (in particular, orders in Joined Cases T-14/97 and T-15/97 *Sofivo and Others v Council* [1998] ECR II-2601; Case T-269/97 *Azienda Agricola Tre e Mezzo and Carlo Bazzocchi v Commission* [1998], not yet published in the ECR; Case T-100/94 *Michailidis and Others v Commission* [1998], not yet published in the ECR; Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel v Commission* [1998], not yet published in the ECR; Case T-609/97 *Regione Puglia v Commission and Spain* [1998], not yet published in the ECR); Case T-38/98 *ANB and Others v Council* [1998], not yet published in the ECR and Case T-39/98 *Sadam Zuccherifici Divisione della SECI SpA and Others v Council* [1998], not yet published in the ECR) and economic and monetary policy (order in Case T-207/97 *Berthu v Council* [1998] ECR II-509), and a directive in the field of social policy (*UEAPME v Council*).

In particular, by the order in *Molkerei Großbraunshain and Bene Nahrungsmittel v Commission*, the Court of First Instance declared inadmissible the application by a cheese producer in the German canton of Altenburger Land for annulment of Commission Regulation (EC) No 123/97 of 23 January 1997 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EEC) No 2081/92 ¹⁷ in so far as it provided for the registration of the protected designation of origin 'Altenburger Ziegenkäse' for a geographical area extending beyond the borders of that canton.

¹⁵ As required by Article 5 of Council Regulation (EC) No 2950/83 of 17 October 1983 on the implementation of Council Decision 83/516/EEC on the tasks of the European Social Fund (OJ 1983 L 289, p. 1).

¹⁶ In the field of State aid, only one case was involved (order in Case T-238/97 *Comunidad Autónoma de Cantabria v Council*).

¹⁷ 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).

It held, firstly, that, by its nature and scope, the contested regulation was a legislative measure and did not constitute a decision within the meaning of the fourth paragraph of Article 189 of the Treaty. In that respect it held that the legislation at issue, which recognised the right of any undertaking whose products satisfy the geographical and qualitative requirements, to market those products under the protected designation of origin, applied to objectively determined situations and produced legal effects for persons defined in a general and abstract manner. It pointed out that the protection resulting from the designation of origin "Altenburger Ziegenkäse" for a specific geographic area had been objectively determined in relation to one of the aims of Regulation No 2081/92, namely the promotion of certain rural areas. Secondly, it recalled that, in certain circumstances, even a legislative measure which applies to the traders concerned in general, may be of individual concern to some of them, provided that the measure 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 (*Case C-309/89 Codorniu v Council* [1994] ECR I-1853). That was not the case in this instance. In that respect, the Court of First Instance considered, *in particular*, that the mere fact that, before adopting the regulation, the Commission had received comments from the applicant concerning the contested geographical area and responded to its comments, was not capable of distinguishing him individually with regard to all other traders since, in the absence of expressly guaranteed procedural rights, it would be contrary to the wording and to the spirit of Article 173 of the Treaty to allow any individual who participated in the preparation of a legislative measure, subsequently to bring an action against that measure. An appeal has been brought against that order (*Case C-447/98 P*).

In bringing his action, Mr Berthu, a Member of the European Parliament, was seeking the annulment of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1) which provides, *inter alia*, that every reference in a legal instrument to the ecu, as referred to in Article 109g of the Treaty, is to be replaced by a reference to the euro at a rate of one euro to one ecu. The Court of First Instance held that while the applicant was affected by the change in the name of the single currency, it was only in his objective capacity as citizen of a Member State and user of the single currency, and in the same way as any other citizen or undertaking in a Member State. Therefore since the applicant had not shown that he was affected by that regulation by reason of certain attributes which were peculiar to him or by reason of circumstances in which he was differentiated from all other persons, the applicant could not claim that that measure was of individual concern to him. The fact that he held a French fungible Treasury bond drawn in ecu was not enough to give him *locus standi* under the fourth paragraph of Article 173 of the Treaty. The application was therefore dismissed as inadmissible (order in *Berthu v Council*).

Finally, in its judgment in *UEAPME v Council*, the Court of First Instance dismissed as inadmissible an application by Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) for annulment of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE), Centre Européen de l'Entreprise Publique (CEEP) and Confédération Européenne des Syndicats (ETUC) (OJ 1996 L 145, p. 4). That directive had been adopted by the Council on the basis of Article 4(2) of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, annexed to Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community. By reason of the procedural mechanism applied for the adoption of the directive in that case, the applicant, a European association which represents and defends at European level small and medium-sized undertakings, had not been among the associations which concluded the framework agreement on parental leave, namely UNICE, CEEP and ETUC, and submitted it to the Commission for implementation by the Council on a proposal from the Commission.

In concluding that the application was inadmissible, a plea which was formally raised by the Council, the Court of First Instance first held that, by its nature, the contested directive was a legislative measure and did not therefore constitute a decision within the meaning of Article 189 of the Treaty. Second, it held that UEAPME was not individually concerned by the contested directive, since it was not affected by it by reason of certain attributes peculiar to it or by reason of circumstances which differentiated it from all other persons. In that respect it examined, first, whether, in view of the particular features of the procedure culminating in the adoption of the directive, the applicant did, as it claimed, possess special rights in the context of the procedural mechanisms established by the Agreement on social policy. Following its examination, it held that UEAPME could not claim to possess either a general right to participate in the negotiation stage provided for by Article 4(2) of that Agreement or, in the context of

this case, an individual right to participate in negotiation of the framework agreement. It also examined whether, in view of the procedural route followed in adopting the directive, the Commission and the Council had ascertained the representativity of the social partners who concluded the agreement which was endowed by the Council, acting on a proposal from the Commission, with a legislative foundation at Community level. *In this instance*, the Commission and the Council had properly taken the view that the collective representativity of the organisations which signed the framework agreement was sufficient in relation to that agreement's content, having regard to their cross-industry character and the general nature of their mandate, for its implementation at Community level by means of a Council legislative measure. Therefore, *the applicant was not entitled to require the Council to prevent the implementation of the framework agreement at Community level by the adoption of the directive* and could not be regarded as individually concerned by that measure. An appeal has been brought against that judgment before the Court of Justice (Case C-316/98 P).

8. Non-contractual liability of the Community

Case T-113/96 *Dubois et Fils v Council and Commission* [1998] ECR II-125 is of particular interest since, by this judgment, the Court of First Instance expressed its opinion in respect of an application for a declaration that the Council and Commission are liable under the second paragraph of Article 215 of the EC Treaty for the damage caused to the applicant by the repercussions on its activities as a customs agent of the implementation of the Single Act establishing an area without frontiers between the Member States of the Community from 1 January 1993. It should be pointed out that 295 actions with the same subject-matter were brought in 1997.

The Court of First Instance first considered the applicant's claim based on the Community's strict liability and, secondly, the claim based on its liability for fault. With regard to the former, the Court of First Instance held that the actual thrust of the application was to impute liability to the Community on account of the Single Act, a direct and necessary consequence of which was the abolition of customs and tax frontiers. Without there being any need to answer the question whether in Community law the Community can incur non-contractual liability without any fault, it therefore observed that the Single Act – an international treaty adopted and approved by the Member States – constituted neither an act of the Community institutions nor an act of the servants of the Community in the performance of their duties and could not therefore give rise to liability on the part of the Community. The first claim was therefore rejected as inadmissible. In support of the second claim, the applicant relied on the inadequate nature of the Community's compensatory measures and its disregard for the principles of Community law. The Court of First Instance held that claim to be unfounded for two reasons. First, the Community was under no legal obligation to compensate the applicant. Second, even if a legal obligation to act had been infringed, the conditions entailing the non-contractual liability of the Community as a result of that failure to act in respect of acts of a legislative nature were not satisfied in the circumstances of the case. None of the higher-ranking rules of law relied on by the applicant, namely the principle of respect for vested rights, the principle of protection of legitimate expectations and the freedom to pursue a trade or profession had been breached. In view of those factors, the Court of First Instance dismissed the application. The appeal to the Court of Justice against that judgment was registered as Case C-95/98 P. As stated above, 297 cases remain pending before the Court of First Instance, awaiting the judgment of the Court of Justice.

In this section reference should also be made to the judgment in Case T-149/96 *Coldiretti and Others v Council and Commission* [1998], not yet published in the ECR, which dismisses as inadmissible the claims for compensation submitted by Confederazione Nazionale Coltivatori Diretti (Coldiretti), a confederation made up of regional and provincial federations of farmers, on the ground that it had no legal interest in bringing the proceedings. Indeed, Coldiretti did not allege *any damage to its own interests for which it was claiming compensation; nor did it plead any assignment of rights or any express mandate authorising it to bring proceedings for compensation for losses suffered by its member associations or by the individual farmers who are members of those associations*. The applications for compensation made in the same case by 110 individual farmers were also dismissed as unfounded. Those farmers essentially maintained that the Community institutions, and the Commission in particular, had misused the powers and duties assigned to them by the legislation in force with a view to preventing the spread of bovine spongiform encephalopathy – so-called 'madcow' disease – and that they were thus liable for the serious disturbances which had occurred in the market in beef and veal. In the light of the material in the file, the Court of First Instance held that the fall in demand for beef and veal which gave rise to the damage pleaded by the individual farmers had been caused by the effect on public opinion of

a press release in March 1996 by an advisory body to the United Kingdom Government, that is to say by the concern which knowledge of the possible transmissibility of the disease to humans prompted amongst European consumers of beef and veal. Furthermore, it held that the applicants had not established that the fall in demand had been caused by allegedly wrongful acts and omissions on the part of the Council and the Commission.

As for the judgment in Case T-184/95 *Dorsch Consult v Council and Commission* [1998] ECR II-667, it states that in the event of the principle of the Community's liability in respect of a lawful act being recognized as forming part of Community law *such liability can be incurred only if the damage alleged, if deemed to constitute a "still subsisting injury", affects a particular circle of economic operators in a disproportionate manner by comparison with others (special damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest.* In the circumstances of the case, the ground on which the application was dismissed was, however, the fact that the applicant, a company owed outstanding debts by the Iraqi authorities in respect of services provided under a contract of technical assistance, had been unable to demonstrate to the requisite legal standard that those debts had become definitively irrecoverable. The Court of First Instance could therefore not establish that the damage alleged was actual and certain. An appeal has been brought against that judgment before the Court of Justice (Case C-237/98 P).

9. Staff cases

Following the judgment in Case T-17/95 *Alexopoulou v Commission* [1995] ECR-SC II-683, "*Alexopoulou I*", concerning the classification in grade of officials at the time of their recruitment, a series of cases were brought before the Court of First Instance, all seeking annulment of decisions of the institutions rejecting applications for reconsideration of the classification in grade.¹⁸

With the exception of certain cases which had specific features, those cases can be split into two categories comprising, on the one hand, those brought by officials who submitted an application for reclassification more than three months after the definitive decision classifying them in grade (first category) and, on the other, those brought by officials who challenged the decision concerning their classification in grade within the time-limits laid down by the Staff Regulations (second category).

As regards the first category of case, the Court of First Instance held, in an order in Case T-16/97 *Chauvin v Commission* [1997] ECR-SC II-681), that, since the applicant had been unable to put forward any new facts which caused time to start running afresh in relation to the periods prescribed by the Staff Regulations, he was out of time for the purposes of contesting the decision fixing his classification in grade. In that respect, it had stated that the judgment in *Alexopoulou I* did not constitute a material new fact capable of causing time to start running afresh for the purposes of enabling the applicant to lodge a complaint. Since no appeal was brought against that order, the reasoning has been taken up in other cases (orders in Case T-160/97 *Gevaert v Commission* [1998] ECR-SC II-1363; Case T-237/97 *Progoulis v Commission* [1998] ECR-SC II-1569; Case T-235/97 *Campoli v Commission* [1998], not yet published in the ECR and Case T-224/97 *Martínez del Peral Cagigal v Commission* [1998], not yet published in the ECR). Appeals have been brought against the orders in *Gevaert v Commission* (Case C-389/98 P), *Martínez del Peral Cagigal v Commission* (Case C-459/98 P) and *Campoli v Commission* (Case C-7/99 P).

As regards the second category of cases, the judgment in Case T-12/97 *Barnett v Commission* [1997] ECR-SC II-863) had dismissed an application for annulment of a Commission decision rejecting a complaint, submitted within the time-limit laid down by the Staff Regulations, against a decision classifying the applicant in grade *which was adopted after the judgment in Alexopoulou I*. It was held that the applicant had not furnished any evidence such as to lead the Court to believe that the appointing authority had exercised its *wide discretion* under Article 31(2) of the Staff Regulations in a manifestly erroneous manner. By order of 13 February 1998 (Case T-195/96 *Alexopoulou v Commission* [1998] ECR-SC II-117), a new action brought by Mrs Alexopoulou was also dismissed by the Court of First Instance, on the basis of Article 111 of the Rules of Procedure. Since an appeal has been brought against

¹⁸ Seven cases of this type were brought in 1996, 74 in 1997 and 3 in 1998.

that order (Case C-155/98 P), the cases falling within the secondary category have been stayed pending the decision of the Court of Justice.

10. Applications for interim measures

In 1998, the President of the Court of First Instance ordered the suspension of execution of a contested measure on just one occasion (order in Case T-65/98 R *Van den Bergh Foods v Commission* [1998] ECR II-2641).

The applicant Van den Bergh Foods, formerly HB Ice Cream, a wholly-owned subsidiary of Unilever NV/plc, is the principal manufacturer of ice cream in Ireland. Its practice, in that country, *is to make freezer cabinets available to retailers selling its ice creams on condition that they be used exclusively for the sale of those ice creams*. In 1990 its competitor Mars had brought proceedings in an Irish court for a declaration that the exclusivity requirement in HB Ice Cream's freezer-cabinet agreements was void under domestic law and under Articles 85 and 86 of the Treaty. Its application was, however, dismissed and the case has been continued before the Supreme Court which, on 10 June 1998, expressed its intention to seek a preliminary ruling from the Court of Justice under Article 177 of the Treaty in order that the case be dealt with in conformity with Community law. In September 1991, Mars had submitted a complaint to the Commission on the basis of Regulation No 17, concerning HB Ice Cream's provision to a large number of retailers of freezer-cabinets to be used exclusively for its own products. Changes, in the form suggested by the Commission, had been made to the distribution agreements between HB Ice Cream and retailers, for the purposes of obtaining an exemption under Article 85(3) of the Treaty. However, considering that those changes had not achieved the expected results in terms of outlets rendered accessible, the Commission issued a new statement of objections and, on 11 March 1998, finally adopted the decision¹⁹ in respect of which Van den Bergh Foods brought an action for annulment and applied for suspension of execution. In that decision, the Commission (i) found that the exclusivity provision in the freezer-cabinet agreements concluded in Ireland between Van den Bergh Foods and retailers for the placement of cabinets in retail outlets having only one or more freezer-cabinets supplied by Van den Bergh Foods for the stocking of single-wrapped items of impulse ice-cream and not having a freezer-cabinet either procured by themselves or provided by another ice-cream manufacturer constituted an infringement of Article 85(1) of the Treaty; (ii) rejected the request for an exemption for the exclusivity provision submitted pursuant to Article 85(3) of the Treaty and (iii) found that there was an infringement of Article 86 of the Treaty. Furthermore, that decision required Van den Bergh Foods *immediately to cease the infringements and, within three months of notification of the decision, to inform the retailers concerned by the freezer-cabinet agreements constituting infringements of Article 85(1) of the Treaty of the operative part of the decision and to notify them that the exclusivity provisions in question were void*.

The President of the Court of First Instance considered that the conditions for suspension of execution were satisfied in this case.²⁰ As regards the requirements of a *prima facie* case, he pointed out that the applicant was challenging the degree of foreclosure of the market on which the Commission had based its conclusion that there was an infringement of the competition rules. Such an argument, which is relevant for the purposes of assessing the degree of restriction of competition on the market within the meaning of Article 85(1) of the Treaty, needs to be examined thoroughly. Such an examination was not possible in the context of interlocutory proceedings. He also highlighted the very close links between the assessment made by the Commission in this case under Article 85(1) and the assessment made under Article 85(3) and Article 86 of the Treaty. Furthermore, he pointed out that the national court had held in 1992 that the exclusivity provision did not infringe the Community competition rules. As regards the condition of *urgency*, he held that any effect on the applicant's distribution system as a result of revocation of the exclusivity requirement would be serious and irreparable. In those circumstances, he *struck a balance between the interests at stake*, namely the risk to the applicant of finding its distribution system modified and the Commission's interest in putting an immediate end to what it regarded as an infringement. In that respect, he pointed out that, in view of the fact that the length of the administrative

¹⁹ Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 – Van den Bergh Foods Limited), published in the *Official Journal of the European Communities* after delivery of the order by the President (OJ 1998 L 246, p. 1).

²⁰ Article 104(2) of the Rules of Procedure provides that an application for interim measures is to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

procedure which culminated in the contested decision was due in part to steps taken by the Commission itself, it was not entitled to claim that immediate enforcement of the decision was a matter of urgency. Furthermore, finding that there was an apparent contradiction between the views of the Commission and those of the national court in the application of Articles 85 and 86 of the Treaty and in view of the fact that the Supreme Court had expressed its intention to refer the case to the Court of Justice under Article 177 of the Treaty, he held that, in the circumstances of the case, the adverse effects of the contradiction observed could be contained only by not interfering with the proceedings brought before the national court. He therefore granted the requested suspension of execution.

Furthermore, the legal value of amicable settlements which may be reached by the parties before the judge hearing an application for interim measures and are recorded in the minutes of the interlocutory hearing was made clear by the President of the Court of First Instance in an order in Case T-42/98 R *Sabbatucci v Parliament* [1998], not yet published in the ECR. It was held that *an amicable settlement reached between the parties before the judge hearing the application for interim measures is legally binding and this Court must ensure that it is respected.*