Proceedings of the Court of First Instance in 1999

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

I. Activity of the Court of First Instance

1. On 19 October 1999 the Court of First Instance of the European Communities celebrated the first 10 years of its existence. On 25 September 1989 the first members of the Court had taken an oath before the Court of Justice and the first decision was delivered three months later, in December 1989.

In the opening addresses given by the President of the Court of First Instance and the President of the Court of Justice on that day, it was recalled that the Single European Act had opened the way for the institutional innovation which the creation of this new Community court constituted. The stated objectives, set out in the preamble to Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance, had been to improve the judicial protection of individuals by establishing a second court and to enable the Court of Justice to concentrate on its fundamental task of ensuring the uniform interpretation of Community law. In that regard, the progressive widening of the jurisdiction of the Court of First Instance was considered to be a tangible sign of success in the task initially entrusted to it. It was also mentioned that thought is now being given to reform of the Community court structure.

The President of the Court of First Instance pointed out that, after 10 years, approximately 2 000 cases have been decided.

During the study day of 19 October, two subjects were elaborated upon by eminent lawyers and gave rise to lively discussion. The first subject was the judicial protection of individuals. The second was that of openness, a topical and much debated subject, chosen because of the growth in litigation concerning access to documents of the Community institutions and the drawing up of new rules provided for by Article 255 EC (which was introduced by the Treaty of Amsterdam), governing exercise of the right of access.

2. The number of cases brought before the Court of First Instance in 1999, namely 356, [1] substantially exceeds the total of 215 cases brought in 1998, but is lower than the number recorded in 1997 (624 cases). [2] The number of cases brought in 1999 includes a group of 71 applications brought by managers of Netherlands petrol stations for the annulment of a Commission decision ordering the reimbursement of State aid paid to them.

The total number of cases determined was 634 (or 308 after the joinder of cases). This figure includes the cases brought in 1994 contesting decisions by which the Commission had found infringements of the competition rules in relation to steel beams (11 cases determined) and polyvinylchloride (12 cases determined). It also includes the disposal of a large group of cases which was burdening the Registry: the Court of First Instance had dismissed an action of a customs agent against the Council and the Commission, and when the Court of Justice dismissed the appeal challenging that judgment numerous applicants discontinued their actions.

Nevertheless, 88 cases relating to milk quotas and 59 staff cases concerning re-examination of the grading of the persons concerned remain pending. A total of 724 cases were pending at the end of the year (compared with 1 002 cases in 1998).

The number of judgments delivered by Chambers of five Judges (which have jurisdiction to decide actions concerning State aid rules and trade protection measures) was 39 (compared with 42 in 1998) while 74 judgments (88 in 1998) were delivered by Chambers of three Judges. In 1999 no case was referred to the Court sitting in plenary session, nor was an Advocate General designated in any case.

The number of applications for interim relief lodged in the course of 1999 provides confirmation that this special form of proceedings is being used more and more widely (38 applications in 1999, compared with

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1 The figures which follow do not include special proceedings relating to matters such as legal aid and the taxation of costs.

2 In 1997 several groups of similar cases were brought: customs agents claiming compensation for harm suffered by reason of the completion of the internal market provided for by the Single European Act, officials seeking re-examination of their grade on recruitment, and cases concerning milk quotas.

26 in 1998 and 19 in 1997); 37 sets of proceedings for interim relief were disposed of in the course of the year. The Court ordered the suspension of operation of the contested measure on three occasions.

Appeals were lodged against 61 decisions of the Court of First Instance (out of 177 appealable decisions). In total, 72 appeals were brought before the Court of Justice. [3] The percentage of appealable decisions against which an appeal was brought was higher than in the previous two years (70 appeals and 214 appealable decisions in 1998; 35 appeals and 139 appealable decisions in 1997); the percentage was 40.6% as at 31 December 1999 whereas it was 32.7% and 25.1% at the end of 1998 and 1997 respectively.

1999 also saw the delivery of the first decision in the field of protection of intellectual property (trade marks and designs). The number of appeals brought against decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market, established by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) is beginning, as forecast, to increase, 18 appeals being lodged in 1999.

3. On 26 April 1999 the Council adopted a decision amending Decision 88/591, enabling the Court to give decisions when constituted by a single Judge (OJ 1999 L 114, p. 52). The amendment to the Rules of Procedure of the Court of First Instance implementing that decision, adopted on 17 May 1999, was published in the *Official Journal of the European Communities* (OJ 1999 L 135, p. 92).

Eight cases have been allocated to a single Judge under these new provisions. Two judgments have been delivered by the Court sitting as a single Judge (judgments of 28 October 1999 in Case T-180/98 *Cotrim* v *Cedefop* and of 9 December 1999 in Case T-53/99 *Progoulis* v *Commission*, both not yet reported in the ECR).

4. Also, proposed amendments to Decision 88/591 and to the Rules of Procedure of the Court of First Instance have been submitted to the Council by the Court of Justice.

First, an amendment is proposed to Decision 88/591 which would extend the jurisdiction of the Court of First Instance by allowing it, in particular, to decide, within defined areas, certain actions for annulment brought by the Member States. That proposal, which was submitted on 14 December 1998, is currently being discussed within the Council's ad hoc working party on the Court of Justice. The opinions of the Commission and the Parliament have not yet been given.

Second, on 27 April 1999 the Court of Justice and the Court of First Instance submitted to the Council proposals under 225 EC (formerly Article 168a of the EC Treaty) concerning the newly conferred jurisdiction in the area of intellectual property. The main proposal was an increase to 21 in the number of Judges of the Court of First Instance,

5. In the course of the year, progress was made with regard to discussion of the reform of the court structure of the European Union. With a view to the forthcoming intergovernmental conference, a discussion paper entitled The Future of the Judicial System of the European Union (Proposals and Reflections) was drawn up in May 1999. This document was submitted by the President of the Court of Justice to the Council of Ministers of Justice, which met in Brussels on 27 and 28 May 1999.

In addition, a discussion group on the future of the Community judicial system, set up by the European Commission and comprising eminent lawyers, will complete its work at the beginning of the year 2000.

II. Developments in the case-law

The principal advances in the case-law in 1999 are set out below, grouped according to the main subject areas of the disputes which were before the Court.

1. *Competition rules applicable to undertakings*

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3 Of the 72 appeals, 16 were brought against the judgments delivered by the Court of First Instance in two groups of competition cases.

The *case-law concerning competition rules applicable to undertakings* was developed by judgments concerning the ECSC Treaty, the EC Treaty and Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

(a) The ECSC Treaty

The Court delivered its judgments in a series of 11 cases brought in 1994 which had arisen from Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of steel beams. By that decision the Commission found that 17 European steel undertakings and the trade association Eurofer had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65(1) of the ECSC Treaty, [4] and imposed fines on 14 undertakings operating within the sector for infringements committed between 1 July 1988 and 31 December 1990. Eleven addressees of the decision, including the trade association Eurofer, applied for its annulment and, in a subsidiary claim, the undertakings sought the reduction of the fines which had been imposed on them.

By judgments delivered on 11 March 1999, [5] the Court held that the Commission had satisfactorily proved most of the anti-competitive activities complained of in the decision. The partial annulment of the decision for lack of proof thus relates only to minor aspects of the alleged infringements. The level of proof required in order to establish that an infringement of Article 65 of the ECSC Treaty has been committed is set out in particular in the judgment in *Thyssen Stahl*, where it is stated that attendance by an undertaking at meetings involving anti-competitive activities suffices to establish its participation in those activities, in the absence of proof capable of establishing the contrary.

The Court also held that the allegations that the Commission had, under its policy for the management of the crisis in the steel industry, encouraged or tolerated the infringements which had been recorded were not well founded.

However, the fundamental contribution of these judgments is, without a doubt, their clarification of the scope of the competition rules in the ECSC Treaty and, more particularly, the ruling that the legal concepts contained in Article 65 of that Treaty do not differ from those referred to in Article 85 of the EC Treaty (now Article 81 EC).

As regards, first of all, the *specific characteristics of the legislative framework laid down by the ECSC Treaty*, which need to be taken into account when assessing the conduct of undertakings, the Court acknowledged in *Thyssen Stahl* that the steel market is an oligopolistic market, in which the system of Article 60 of the Treaty ensures, through the compulsory publication of scales of prices and transportation charges, publicity for the prices charged by the various undertakings. Nevertheless, the resulting immobility or parallelism of prices is not, in itself, contrary to the Treaty if it results not from an agreement, even tacit, between the parties concerned, but from the interplay of the strengths and strategies of independent and opposed economic units on the market. It follows that the idea that every undertaking must determine independently the market policy which it intends to pursue, without collusion with its competitors, is inherent to the ECSC Treaty and in particular to Articles 4(d) and 65(1).

Moreover, the Court responded to the argument that the Commission had misconstrued the scope of Article 65(1) of the ECSC Treaty by stating that, while the oligopolistic character of the markets covered by the Treaty may, to some extent, weaken the effects of competition, that consideration cannot justify an interpretation of Article 65 authorising undertakings to behave in such a way as reduces competition even further, particularly through price-fixing. In view of the consequences which the oligopolistic

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4 Article 65(1) of the ECSC Treaty prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market".

5 In Case T-134/94 *NMH Stahlwerke* v *Commission*, T-136/94 *Eurofer* v *Commission* (under appeal before the Court of Justice, Case C-179/99 P), Case T-137/94 *ARBED* v *Commission* (under appeal, Case C-176/99 P), Case T-138/94 *Cockerill-Sambre* v *Commission*, Case T-141/94 *Thyssen Stahl* v *Commission* (under appeal, Case C-194/99 P), Case T-145/94 *Unimétal* v *Commission*, Case T-147/94 *Krupp Hoesch* v *Commission* (under appeal, Case C-195/99 P), Case T-148/94 *Preussag* v *Commission* (under appeal, Case C-182/99 P), Case T-151/94 *British Steel* v *Commission* (under appeal, Case C-199/99 P), Case T-156/94 *Aristrain* v *Commission* (under appeal, Case C-196/99 P) and Case T-157/94 *Ensidesa* v *Commission* (under appeal, Case C-198/99 P), all not yet reported in the ECR.
With the exception of the judgment in *Thyssen Stahl* v *Commission* which will be reported in full, the ECR will contain only those paragraphs of the other judgments which, in the Court's view, it is useful to report.

structure of the market may have, it is all the more necessary to protect residual competition (judgment in *Thyssen Stahl*).

In another argument it was alleged that the Commission had misinterpreted Article 60 of the ECSC Treaty. The Court, after recalling the objectives pursued by the obligation in Article 60(2) that the price lists applied by undertakings within the common market be published, acknowledged that the system laid down by Article 60, and in particular the prohibition on departing from the price list, even temporarily, constitutes a significant restriction on competition. However, that fact does not prevent application of the prohibition of anti-competitive agreements which is laid down in Article 65(1). The Court stated that the prices which appear in the price lists must be fixed by each undertaking independently, without any agreement, even a tacit agreement, between them (judgment in *Thyssen Stahl*).

With regard to *the legal classification of anti-competitive conduct*, it is apparent from these judgments that there is an agreement within the meaning of Article 65(1) of the ECSC Treaty where undertakings have expressed the common desire to conduct themselves on a market in a particular manner. The Court added (judgment in *Thyssen Stahl*) that it saw no reason to interpret the concept of "agreement" in Article 65(1) of the ECSC Treaty differently from the concept of "agreement" in Article 85(1) of the EC Treaty (in that regard, see Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 120).

The prohibition by Article 65(1) of the ECSC Treaty of "concerted practices" in principle has the same purpose as the parallel prohibition of "concerted practices" in Article 85(1) of the EC Treaty. More particularly, it seeks to ensure the effectiveness of the prohibition under Article 4(d) of the ECSC Treaty by bringing within that prohibition a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of normal competition under the ECSC Treaty (judgment in *Thyssen Stahl*).

In this connection, where an undertaking (i) reveals to its competitors, during a meeting attended by most of them and set in a context of regular collusion, what its future market conduct will be in regard to prices, calling on them to adopt the same conduct, and thus acts with the express intention of influencing their future competitive activities, and (ii) is reasonably able to count on its competitors complying in large measure with its call or, at least, on their bearing it in mind when deciding on their own commercial policy, the undertakings concerned replace the risks of normal competition under the ECSC Treaty with practical cooperation between them, which must be regarded as a "concerted practice" within the meaning of Article 65(1) of that Treaty (judgment in *Thyssen Stahl*).

As regards the argument that the concept of a "concerted practice" in Article 65(1) of the ECSC Treaty presupposes that the undertakings have engaged in the practices which were the subject of their concertation, in particular by uniformly increasing their prices, the Court held (judgment in *Thyssen Stahl*) that the case-law relating to the EC Treaty can be transposed to the sphere of application of Article 65 of the ECSC Treaty; accordingly, *in order to be able to conclude that a concerted practice existed, it is not necessary for the concertation to have had an effect on the conduct of competitors on the market*. It is sufficient to find that each undertaking was bound to take into account, directly or indirectly, the information obtained during its contacts with its competitors. The Court also made it clear that undertakings "engage" in a concerted practice within the meaning of Article 65(5) of the ECSC Treaty where they take part in a scheme which is designed to eliminate the uncertainty about their future market conduct and necessarily implies that each of them takes into account the information obtained from its competitors. It is therefore not necessary to demonstrate that the exchanges of information in question led to a specific result or were put into effect on the relevant market.

Finally, the reference in Article 65(1) of the ECSC Treaty to agreements "tending" to distort normal competition is an expression which includes the formula "have as their object" found in Article 85(1) of the EC Treaty. The Commission was therefore correct in holding in the contested decision that, in order to establish an infringement of Article 65(1) of the ECSC Treaty, it was not obliged to demonstrate that there was an adverse effect on competition (judgment in *Thyssen Stahl*).

Other developments contained in the "steel beam" judgments of 11 March 1999, relating to the attribution of responsibility for conduct in breach of the competition rules, observance of the rights of the defence and the conditions in which an exchange of information is prohibited under Article 65 of the ECSC Treaty, may be noted.

First of all, the Court provided further clarification of the rules for determining *who may be held responsible for conduct which infringes the competition rules*.

In *NMH Stahlwerke* v *Commission*, it was held that in certain specific circumstances an infringement of the competition rules may be attributed to the economic successor of the legal person who was the perpetrator of the infringement even where that legal person has not ceased to exist on the date on which the decision finding the infringement is adopted, in order that the practical effect of those rules is not compromised because of changes to, *inter alia*, the legal form of the undertakings concerned. In the case before the Court, since (i) the concept of an undertaking, for the purposes of Article 65 of the ECSC Treaty, is economic in meaning, (ii) on the date on which the decision was adopted it was the applicant that was pursuing the economic activity to which the infringements related, and (iii) on that date the perpetrator, in the strict sense, of the infringements had ceased trading, the Court considered that the Commission was entitled to attribute the infringement in question to the applicant.

In the judgment in *Unimétal* v *Commission*, the Court recalled the case-law according to which the fact that a subsidiary has separate legal personality is not sufficient to rule out the possibility of its conduct being attributed to the parent company, in particular where the subsidiary does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company (see Case 48/69 *ICI* v *Commission* [1972] ECR 619), and on that basis attributed responsibility in the reverse direction by holding the subsidiary answerable for the infringement committed by the parent company. The Court had regard to the case-law of the Court of Justice in *ICI* v *Commission* and to the fact that the company responsible for coordinating the action of a group of companies may be held answerable for infringements committed by the companies in the group, even where they are not subsidiaries in the legal sense of the term. It then held that the case-law, given the fundamental concept of economic unity which underlies it, may in certain circumstances lead to a subsidiary being held responsible for the conduct of a parent company. The Commission was therefore entitled to attribute the conduct of the parent company (Usinor Sacilor) to its subsidiary (Unimétal) when it was apparent that the latter was the principal perpetrator and beneficiary of the infringements committed, while its parent company confined itself to an accessory role of providing administrative assistance, without having any decision-making power or freedom of initiative.

In the case of *Aristrain* v *Commission*, the applicant, Aristrain Madrid — the only undertaking in the Aristrain group to which the decision had been addressed — disputed, first, that it could be held responsible for the conduct of its sister company, Aristrain Olaberría, which was legally independent and bore sole responsibility for its own commercial activity and, second, that a fine could be imposed on it of an amount which took account not only of its conduct and turnover but also of those of the sister company. The Court stated that, in view of the economic unit formed by a parent group and its subsidiaries, the actions of subsidiaries may in certain conditions be attributed to a parent company. However, in the case before it, since, owing to the composition of the group and the dispersal of its shareholders, it was impossible or exceedingly difficult to identify the legal person at its head to which, as the person responsible for coordinating the group's activities, responsibility could have been attributed for the infringements committed by the various companies in the group, the Commission was entitled to hold the two subsidiaries Aristrain Madrid and Aristrain Olaberría — companies which constituted a single "undertaking" within the meaning of Article 65(5) of the ECSC Treaty and had been duly shown to have participated equally in the various infringements — jointly and severally liable for all the acts of the group. This outcome ensured that the formal separation between those companies, resulting from their separate legal personality, could not outweigh the unity of their conduct on the market for the purposes of applying the competition rules. In the particular circumstances of the case, the Commission was therefore justified in attributing to Aristrain Madrid responsibility for the behaviour of its sister company Aristrain Olaberría and in imposing on the two sister companies a single fine of an amount calculated with reference to their combined turnover while rendering them jointly and severally liable for payment.

The Court had to review whether the Commission had infringed an undertaking's *rights of defence* by addressing to it a decision imposing a fine calculated on the basis of its turnover, without first having formally sent it a statement of objections or even indicated its intention of holding it responsible for the infringements committed by its subsidiary (judgment in *ARBED* v *Commission*).

According to the Court, an omission of that kind may constitute a procedural irregularity capable of adversely affecting the rights of defence of the undertaking, such as those guaranteed by Article 36 of the ECSC Treaty. However where, as in the case before the Court: (i) the parent company (ARBED) and its subsidiary (TradeARBED) have replied interchangeably to the requests for information which the Commission has addressed to the subsidiary, which is regarded by the parent company as merely a sales "agency" or "organisation"; (ii) the parent company has spontaneously regarded itself as the addressee of the statement of objections formally notified to its subsidiary, has been fully aware of the statement and has instructed a lawyer to defend its interests; (iii) the parent company has been requested to provide the Commission with certain information concerning its turnover from the products concerned and during the

period of infringement referred to in the statement of objections; and (iv) the parent company has been given the opportunity to submit its observations on the objections which the Commission proposed to uphold against its subsidiary and on the attribution of responsibility contemplated, a procedural irregularity of that kind is not such as to entail the annulment of the contested decision.

The exchange of confidential information through the "Poutrelles" Committee (the monitoring of orders and deliveries) and the Walzstahl-Vereinigung, complained of in Article 1 of the operative part of the decision addressed to the undertakings, was held to constitute a separate infringement of Article 65(1) of the ECSC Treaty. In particular, the Court stated in the judgment in *Thyssen Stahl* that a system enabling the distribution of information, broken down by undertaking and by Member State, relating to the orders and deliveries on the main Community markets of the undertakings party to the system was given the up-to-date nature of that information which was intended solely for the manufacturers party to the arrangement to the exclusion of consumers and other competitors, the homogenous nature of the products concerned and the degree of market concentration capable of appreciably influencing the conduct of the participating undertakings. That was so because each undertaking knew that it was being kept under close surveillance by its competitors and because it could, if necessary, react to the conduct of its competitors, on the basis of considerably more recent and accurate data than those available by other means. Consequently, such information exchange systems had appreciably reduced the decision-making independence of the participating producers by substituting practical cooperation between them for the normal risks of competition.

The *fines* imposed on the undertakings to which the decision was addressed had been set in the light of the criteria set out in Article 65(5) of the ECSC Treaty, which requires the Commission to take into account the turnover of the undertaking concerned as the basic criterion for calculating the fine. The ECSC Treaty is based on the principle that the turnover realised on the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition.

In the judgment in *British Steel* v *Commission* (Case T-151/94), the Court pointed out that, in the absence of extenuating or aggravating circumstances, or other duly established exceptional circumstances, the Commission is required, by virtue of the principle of equal treatment, to apply, for the purpose of calculating the fine, the same percentage of turnover to undertakings which took part in the same infringement.

In ruling on the aggravating circumstance of recidivism, which the Commission had taken into account in order to increase certain fines, the Court noted that recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements. In the judgment in *Thyssen Stahl*, the Court held that the Commission had erred in law by taking into consideration, with regard to recidivism, infringements penalised in a previous decision when the greater part of the infringement period taken into account against the applicant in the contested decision predated the adoption of the first decision.

As regards possible extenuating circumstances, the Court, confirming previous case-law (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087 and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925), held that the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (judgments in *Cockerill-Sambre* v *Commission* and *Aristrain* v *Commission*).

Nor is a reduction in the amount of the fine justified on grounds of cooperation during the administrative procedure unless the conduct of the undertaking involved enabled the Commission to establish an infringement more easily and, where relevant, to bring it to an end. The Court found in *ARBED* v *Commission*, *Cockerill-Sambre* v *Commission* and *Aristrain* v *Commission* that the Commission had correctly considered that the conduct during the administrative procedure of the undertakings concerned (which, with a few exceptions, did not admit any of the factual allegations made against them) did not justify any reduction in the amount of the fines.

Finally, the Court held that the fixing of a fine, in the exercise of its unlimited jurisdiction, is by nature not an arithmetically precise exercise. Also, the Court is not bound by the Commission's calculations, but must carry out its own assessment, taking all the circumstances of the case into account (judgments in *ARBED* v *Commission*, *Unimétal* v *Commission*, *Krupp Hoesch* v *Commission*, *Preussag* v

Commission, *Cockerill-Sambre* v *Commission*, *British Steel* v *Commission*, *Aristrain* v *Commission* and *Ensidesa* v *Commission*). In the exercise of its unlimited jurisdiction, the Court reduced some of the fines, thus bringing their total amount down to EUR 65 449 000.

With regard to matters of a more procedural nature, the Court referred in some of the judgments to its case-law, which began with its judgment in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, relating to the principle that the Commission is to act within a reasonable period when it adopts decisions following administrative proceedings in competition matters. The question whether the length of the administrative proceedings is reasonable must be answered by reference to the particular circumstances of each case. The Court found in the judgment in *Aristrain* v *Commission* that a period of approximately 36 months from the first inspections in the undertaking's offices to the adoption of the final decision was not unreasonable. Also, having regard to the size and complexity of the case as well as to the number of undertakings involved, the Court considered that the fact that there was a gap of approximately 13 months several of which were devoted to an internal inquiry carried out at the request of the undertakings concerned themselves between the administrative hearing and the adoption of the decision did not constitute a breach of that principle.

It was also in *Aristrain* v *Commission* that the Court ruled on a plea for annulment alleging infringement of the right to an independent and impartial tribunal. The applicant contended in particular that the guarantees enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") had been violated because, first, the procedure followed by the Commission does not confer the functions of investigation and decision on different organs or persons and, second, the decision adopted by the Commission cannot, under the Treaty, form the subject-matter of an appeal to a tribunal with unlimited jurisdiction as required by the ECHR. In response to this plea, the Court pointed out that fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures, and that the procedural guarantees provided for by Community law do not preclude the Commission from combining the functions of prosecutor and judge. It also recalled that the requirement for effective judicial review of any decision of the Commission establishing and penalising an infringement of the Community competition rules is a general principle of Community law which follows from the constitutional traditions common to the Member States. The Court then held that in actions based on the second paragraph of Article 33 and the second paragraph of Article 36 of the ECSC Treaty, the review of the legality of a Commission decision establishing an infringement of the competition rules and imposing a fine on the natural or legal person concerned on that basis must be regarded as an effective judicial review of the decision. The pleas on which the natural or legal person concerned may rely in support of his application for annulment or amendment of a financial penalty are of such a kind as to enable the Court to assess the merits both in law and in fact of any accusation made by the Commission in the field of competition (see, in the context of the EC Treaty, Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875).

(b) The EC Treaty

(b.1) Article 85 of the EC Treaty (now Article 81 EC)

On 20 April 1999 the Court delivered a long judgment [6] under the EC Treaty, deciding 12 cases brought by undertakings involved in the polyvinylchloride ("PVC") sector. The starting point, as regards judicial decisions, in this matter is the judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, by which the Court declared non-existent Commission Decision 89/190/EEC of 21 December 1988 penalising the PVC producers for infringement of Article 85(1) of the EEC Treaty ("the 1988 decision"). On appeal by the Commission, the Court of Justice, in its judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ("the judgment of 15 June 1994"), set aside the judgment of the Court of First Instance and simultaneously annulled the 1988 decision.

Following that judgment, the Commission adopted, on 27 July 1994, a fresh decision in relation to the producers who had been the subject of the original decision, with the exception of Solvay and Norsk Hydro ("the 1994 decision"). By this second decision, the Commission found that there had been an agreement and/or concerted practice contrary to Article 85 of the EC Treaty under which the producers

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6 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission*, not yet reported in the ECR. Eight appeals against that judgment have been brought before the Court of Justice (Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P).

supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of those collusive arrangements. Article 3 of the 1994 decision confirmed the fines imposed in 1988 on each of the 12 undertakings still involved in the infringement proceedings, amounting to ECU 19 000 000 in total.

In their actions, the 12 undertakings to which the 1994 decision had been addressed claimed that that decision should be annulled and the fines annulled or reduced. The substantial volume of the written pleadings submitted by the applicants is noteworthy: they set out, on more than 2 000 pages, nearly 80 distinct grounds of challenge, expressed in the five languages of the case.

With regard to the claims for annulment of the decision, the Court considered first the pleas alleging defects of form and procedure and then the pleas on the substance.

The various *pleas alleging defects of form and procedure* fell into four main categories, the applicants contending: (a) that the Commission's appreciation of the scope of the judgment of 15 June 1994 annulling the 1988 decision and the consequences it drew therefrom were wrong; (b) that there were irregularities in the adoption and authentication of the 1994 decision; (c) that the procedure prior to the adoption of the 1988 decision was vitiated by irregularities; and (d) that insufficient reasons were given for the 1994 decision so far as concerned certain questions falling within the preceding three categories.

While none of the pleas as to procedure raised by the applicants was upheld, some of the Court's findings should be noted.

Certain applicants contended that the Commission had infringed the general legal principle *non bis in idem* (no one shall be tried twice for the same offence) by adopting a fresh decision following the judgment of 15 June 1994. The Court stated that the Commission could not bring proceedings against an undertaking under Regulation No 17 [7] and Regulation No 99/63 [8] for infringement of Community competition rules, or penalise it by the imposition of a fine, for anti-competitive conduct which the Court of First Instance or the Court of Justice had already found to be either proven or unproven by the Commission in relation to that undertaking. In the case before it, the Court of First Instance rejected this plea because, first, the Commission's adoption of the 1994 decision after the 1988 decision had been annulled did not result in the applicants' incurring a penalty twice in respect of the same offence and, second, when the Court of Justice annulled the 1988 decision in its judgment of 15 June 1994 it did not rule on any of the substantive pleas raised by the applicants, so that the Commission was merely remedying the formal defect found by the Court of Justice when it adopted the 1994 decision and did not take action against the applicants twice in relation to the same set of facts.

Among the pleas based on lapse of time, certain applicants argued that the Commission had offended against the principle that it must act within a reasonable time. The Court observed that the Commission had to comply with the general principle of Community law laid down in *SCK and FNK* v *Commission*, cited above. It then found that the administrative procedure before the Commission had lasted for a total of some 62 months, pointing out that the period during which the Community judicature had examined the legality of the 1988 decision and the validity of the judgment of the Court of First Instance could not be taken into account in determining the duration of that procedure. It held that the Commission had acted consistently with the principle in question.

In determining whether the administrative procedure before the Commission was reasonable, the Court drew a distinction between the procedural stage opening with the investigations in the PVC sector in November 1983, based on Article 14 of Regulation No 17, and the procedural stage which started on the date upon which the undertakings concerned received notification of the statement of objections, and considered separately whether the time taken for each of those two stages was reasonable. Its reasonableness was assessed in relation to the individual circumstances of the case, and in particular its context, the conduct of the parties during the procedure, what was at stake for the various undertakings concerned and the case's complexity. As regards the second stage, the Court considered that the criterion of what was at stake for the undertakings involved was of particular importance. First, the notification of the statement of objections in a procedure for establishing an infringement presupposes the initiation

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7 Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87).

8 Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47).

of the procedure under Article 3 of Regulation No 17. By initiating that procedure, the Commission evidences its intention to proceed to a decision finding an infringement (see, to that effect, Case 48/72 *Brasserie de Haecht* v *Wilkin Janssen* [1973] ECR 77). Secondly, it is only on receipt of the statement of objections that an undertaking may take cognisance of the subject-matter of the procedure which is initiated against it and of the conduct of which it is accused by the Commission. Undertakings thus have a specific interest in that second stage of the procedure being conducted with particular diligence by the Commission, without, however, their defence rights being affected. In the present case, the length of the second procedural stage before the Commission, that is to say 10 months, was held to be reasonable.

The Court provided an important clarification with regard to the plea in support of the claims for annulment of the 1994 decision which alleged infringement of the principle requiring the Commission to act within a reasonable time. It held that *infringement of that principle, if established, would justify the annulment of the 1994 decision only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned*. According to the Court, where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, *failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature* in the context of an action based on Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 308 EC respectively).

The scope of the judgment of 15 June 1994 was likewise discussed before the Court, since certain applicants contended that the annulment of the 1988 decision by the Court of Justice had called into question the validity of the preparatory measures taken before that decision was adopted. The Court of First Instance rejected those claims since it considered, having regard to the operative part of the judgment of 15 June 1994 read in the light of its grounds, that the Court of Justice had annulled the 1988 decision on account of a procedural defect affecting only the manner in which it was finally adopted by the Commission. Since the procedural defect had occurred at the final stage of the adoption of the 1988 decision, the annulment did not affect the validity of the measures preparatory to that decision, before the stage at which the defect was found.

The applicants also challenged the detailed procedure for the adoption of the 1994 decision, after the annulment of the 1988 decision, on the ground that, even if the defect occurred at the final stage of the adoption of the 1988 decision, the Commission could only have remedied the defect if it had complied with certain procedural guarantees before adopting the 1994 decision (the opening of a new administrative procedure, the completion of certain procedural stages provided for by secondary legislation and, more generally, the right to be heard). In that regard, the Court essentially stated that observance of the rights of the defence requires that each undertaking or association of undertakings concerned be given the opportunity to be heard as to the objections raised against each of them which the Commission proposes to deal with in the final decision finding infringement of the competition rules. In the present case, since the annulment of the 1988 decision had not affected the validity of the measures preparatory to that decision, taken prior to the stage at which the defect had occurred, the Court held that the validity of the statement of objections sent to each of the applicants at the beginning of April 1988 was not affected by the judgment of 15 June 1994, nor was the validity of the oral stage of the administrative procedure which had taken place before the Commission in September 1988. A new hearing of the undertakings concerned would therefore have been required before the 1994 decision only if, and to the extent that, the latter had contained objections which were new in relation to those set out in the original decision annulled by the Court of Justice.

The *pleas on the substance* put forward by the applicants were also rejected, so that the findings made by the Commission were confirmed, with the exception, however, of the allegations that Société Artésienne de Vinyle ("SAV") had participated in the infringement after the first half of 1981. [9]

The applicants put forward a series of pleas on the matter of evidence. In this connection, the Court considered whether the evidence used by the Commission against the undertakings was admissible. In particular, it had to decide on the admissibility and the merits of the plea relied on by certain applicants that, in carrying out its investigations, the Commission had infringed the principle of inviolability of the home. Drawing a distinction between decisions to investigate and authorisations to investigate, the Court held that certain undertakings could, in so far as documents obtained by the Commission were used against them, challenge, in the actions brought by them against the 1994 decision, the legality of decisions

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9 The fine imposed on SAV was accordingly reduced by the Court.

to investigate addressed to other undertakings [10] whose actions to challenge the legality of those decisions directly, if brought, may or may not have been admissible. Similarly, in an action for the annulment of the final decision, the applicants could challenge the legality of the authorisations to investigate, which were not measures that could be challenged by an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). With regard to the merits, the Court stated that the plea had to be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which was disproportionate or arbitrary (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137 and Joined Cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica* v *Commission* [1989] ECR 3165). It pointed out, in ruling on the challenge to the validity of the formal acts relating to the investigations, that it was apparent from Article 14(2) of Regulation No 17 that investigations carried out on a simple authorisation were based on the voluntary cooperation of the undertakings. Since the undertakings did in fact cooperate in an investigation carried out on authorisation, the plea alleging undue interference by the public authority in the sphere of private activities of the natural or legal person concerned was unfounded, in the absence of any evidence that the Commission went beyond the cooperation offered by the undertakings.

Infringement of the "right to silence" and of the privilege against self-incrimination was also pleaded before the Court. In its assessment of the merits of this plea, [11] the Court stated that it had to consider whether, in the absence of any right to silence expressly granted by Regulation No 17, certain limitations on the Commission's powers of investigation were nevertheless implied by the need to safeguard the rights of the defence, which the Court has held to be a fundamental principle of the Community legal order. It noted that, while the rights of the defence had to be observed in administrative procedures which could lead to the imposition of penalties, it was also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which could be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283 and Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545). It was true that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission was entitled to compel an undertaking to provide all necessary information concerning such facts as might be known to it and to disclose to the Commission, if necessary, such documents relating thereto as were in its possession, even if the latter could be used to establish, against it or another undertaking, the existence of anti-competitive conduct. However, the Commission could not, by a decision to request information, undermine the undertaking's defence rights. Thus it could not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it was incumbent upon the Commission to prove. Within the limits restated in that way, the Court assessed, and ultimately rejected, the applicants' arguments.

With regard to requests for information (which do not place undertakings under an obligation to reply), the Court stated, first, that by making such requests the Commission could not be regarded as compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it was incumbent upon the Commission to prove and, second, that the refusal to reply to requests for information, or the impossibility of replying to them, could not in itself constitute proof of an undertaking's participation in an agreement.

Next, the Court confirmed that, under Article 85 of the EC Treaty, the Commission could classify conduct alleged against undertakings as an agreement "and/or" a concerted practice. *In the context of a complex infringement which involved many producers seeking over a number of years to regulate the market between them the Commission could not be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement were covered by Article 85 of the EC Treaty.* The Commission was therefore entitled to classify that type of complex infringement as an agreement "and/or" concerted practice, inasmuch as the infringement included elements which were to be classified as an "agreement" and elements which are to be classified as a "concerted practice".

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10 Since a decision to investigate is a measure against which an action for annulment may be brought under Article 173 of the Treaty (now, after amendment, Article 230 EC), an undertaking to which such a decision is addressed that does not challenge it within the period laid down is time barred in an action brought against the decision adopted following the administrative procedure from arguing that the decision to investigate is unlawful.

11 Since Regulation No 17 draws a distinction between requests for information (Article 11(2)) and decisions requiring information to be provided (Article 11(5)), the admissibility of this plea was dealt with in the same way as the admissibility of the plea concerning authorisations to investigate and decisions to investigate.

As regards proof that an undertaking has participated in a concerted practice, the Court held that where the proof is based not on a mere finding of parallel market conduct but on documents showing that the practices were the result of concerted action, the burden is on the undertakings concerned not merely to submit an alleged alternative explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents produced by the Commission.

The Court also stated that an undertaking could be held *responsible for an overall cartel* such as the cartel referred to in Article 1 of the operative part of the 1994 decision, [12] even though it were shown to have participated directly only in one or some of its constituent elements, *if it were shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel*.

The judgment contains a ruling with regard to the question of *determining who is to be made answerable for the infringement committed*. It states that where the legal entity which was responsible for the operation of the undertaking at the time when the infringement was committed exists at law, the Commission is justified in holding that legal entity liable.

Also, where large numbers of operating companies are active in both production and marketing and are also designed to cover specific geographical areas, the Commission is entitled to address its decision to the group's holding company rather than to one of its operating companies.

In adopting measures of organisation of procedure, the Court informed the parties in May 1997 of its decision to allow each of the applicants *access to the Commission's administrative file* on the matter which gave rise to the 1994 decision, save for internal Commission documents and documents containing business secrets or other confidential information. After consulting the file, almost all the applicants lodged observations at the Court Registry and the Commission submitted observations in reply. A number of pleas for annulment relating to access to the Commission's administrative file were raised before the Court, which rejected all of them. It found that during the administrative procedure the Commission had not given the applicants proper access to the file, but that was not sufficient of itself to warrant annulment of the 1994 decision. It explained that an alleged infringement of the rights of the defence had to be examined in relation to the specific circumstances of each particular case, because it was effectively the objections raised by the Commission which determined the infringement which was alleged to have been committed. It was therefore necessary to consider whether the applicant's ability to defend itself had been affected by the conditions in which it had access to the Commission's administrative file. In that respect, *it was sufficient for a finding of infringement of defence rights for it to be established that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment* (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847; see also, in the area of State aids, Case 259/85 *France* v *Commission* [1987] ECR 4393). If that had been so, the administrative procedure would have been defective and the decision would have had to be annulled.

With regard to fines, those imposed on SAV, Elf Atochem and Imperial Chemical Industries were reduced by the Court in the exercise of the unlimited jurisdiction conferred upon it. The Court found that the estimate of the average market shares of Elf Atochem and Imperial Chemical Industries which the Commission had taken into account when setting the fines was exaggerated, so that the fines imposed on both those undertakings were too high.

In two similar judgments delivered on 19 May 1999 (Case T-175/95 *BASF Coatings* v *Commission* and Case T-176/95 *Accinauto* v *Commission*, both not yet reported in the ECR), the Court held that the Commission had not erred in its assessment when finding that an agreement entered into in 1982 by BASF Coatings and Accinauto was contrary to Article 85(1) of the EC Treaty. In order to reach that conclusion, the Court determined whether the parties to the agreement had agreed upon a restriction on the freedom of the authorised dealer, namely Accinauto, to carry out passive sales of the products covered by the exclusive distribution contract to customers based in Member States other than the State in which the exclusive arrangement applied. For the purposes of its assessment, the Court specified that the factors to be taken into account included the wording of the relevant clause of the contract, the scope of the other terms of the contract which related to the authorised dealer's obligation under that clause and the factual and legal circumstances surrounding the conclusion and implementation of the agreement which enabled its purpose to be elucidated.

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12 The cartel consisted in the regular organisation over the years of meetings of rival producers, the aim of which was to establish illicit practices intended to organise artificially the functioning of the PVC market.

In Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, the Court dismissed actions brought by former dealers of VAG France in which they sought the annulment of decisions by the Commission rejecting complaints lodged by them under Article 3 of Regulation No 17. Those complaints alleged infringements of Article 85(1) of the EC Treaty, namely refusals, based on Volkswagen's standard-form distribution agreement, to supply them after their removal from the distribution network. This judgment provides an illustration of the Commission's power (acknowledged in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223) to dismiss a complaint where it finds that the case lacks a sufficient Community interest to justify pursuing the investigation. The Court reiterated the various principles established by the case-law concerning the exercise of that power (see *Automec* v *Commission*, Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185 and Case T-186/94 *Guérin* v *Commission* [1995] ECR II-1753).

The judgments of 13 December 1999 in Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* and Joined Cases T-9/96 and T-211/96 *Européenne Automobile* v *Commission*, both not yet reported in the ECR, also illustrate the conditions in which the Commission may exercise the power accorded to it.

(b.2) Article 86 of the EC Treaty (now Article 82 EC)

Irish Sugar, the sole processor of sugarbeet in Ireland and the principal supplier of sugar in that Member State, brought an action before the Court for the annulment of a Commission decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty. This case led the Court to consider the problem of joint dominant positions and to assess whether certain behaviour in relation to prices constitutes an abuse (judgment of 7 October 1999 in Case T-228/97 *Irish Sugar* v *Commission*, not yet reported in the ECR, under appeal in Case C-497/99 P).

First of all, the Court recalled the case-law of the Court of Justice on the control of concentrations, according to which a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375). In the case before it, the Court stated that the mere independence of the economic entities concerned was not sufficient to remove the possibility of their holding a joint dominant position and that the connecting factors identified by the Commission showed that the applicant and Sugar Distributors Ltd ("SDL"), the distributor of sugar supplied by the applicant, had the power to adopt a common market policy. The following were identified as connecting factors: the applicant's shareholding in SDL's parent company (Sugar Distribution (Holding) Ltd), its representation on the boards of Sugar Distribution (Holding) Ltd and SDL, the policy-making structure of the companies and the communication process established to facilitate it, and the direct economic ties constituted by SDL's commitment to obtain its supplies exclusively from the applicant and the applicant's financing of all consumer promotions and rebates offered by SDL to its customers.

Second, the fact that two undertakings are in a vertical commercial relationship does not, according to the Court, affect the finding that there is a joint dominant position. The Court agreed with the Commission that, unless one supposes there to be a lacuna in the application of Article 86 of the EC Treaty, it cannot be accepted that undertakings in a vertical relationship, without however being integrated to the extent of constituting one and the same undertaking, should be able abusively to exploit a joint dominant position.

Finally, the Commission was entitled to take the view that the individual conduct of one of the undertakings together holding a joint dominant position constituted the abusive exploitation of that position. Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings. It only has to be capable of being identified as one of the manifestations of a joint dominant position being held. Therefore, undertakings occupying such a position may engage in joint or individual abusive conduct.

The Court also confirmed that the applicant had a dominant position in the industrial sugar market simply by virtue of holding a market share of over 50%.

The Commission's findings concerning abuses by the applicant of its dominant position in the Irish industrial and retail sugar markets were also reviewed by the Court, which confirmed almost all of those

findings. [13] In order to determine whether the pricing practices of which the applicant was accused in fact constituted an abuse, the Court, relying on case-law of the Court of Justice, stated that it was necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount at issue, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tended to remove or restrict the buyer's freedom in choosing his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.

In particular, the Court confirmed that border rebates granted in the form of special allowances to certain customers established near the border with Northern Ireland, in order to compete with cheap imports of sugar from Northern Ireland intended for retail sale, amounted to an abuse. The parties to the case differed as to whether or not special rebates to customers facing competition constitute a reaction that is compatible with the particular responsibility owed by an undertaking holding a dominant position, in so far as the prices in question are not predatory within the meaning of the judgments of the Court of Justice in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 and Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951. According to the Court, the applicant infringed subparagraph (c) of the second paragraph of Article 86 of the EC Treaty since, by granting a rebate of that kind, it applied dissimilar conditions to equivalent transactions with other trading parties, thereby placing the latter at a competitive disadvantage. The applicant's argument that it was lawful to grant the special rebates having regard, in particular, to the defensive nature of its conduct was therefore not accepted. The Court held in relation to this argument that, *even though the existence of a dominant position does not deprive an undertaking placed in that position of the right to protect its own commercial interests when they are threatened, the protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and be consistent with the interests of consumers.* In the case before the Court, the applicant had not shown that those conditions were fulfilled.

Finally, the Court considered, in connection with the claim seeking a reduction of the fine, whether the Commission had, in the procedure prior to the adoption of the contested decision, failed to comply with the general principle of Community law that it must act within a reasonable time, in accordance with the criteria laid down in *SCK and FNK* v *Commission*, cited above. Having regard to the particular circumstances of the case, the total duration of the administrative proceedings — approximately 80 months — was not held to be unreasonable.

By judgment of 16 December 1999 in Case T-198/98 *Micro Leader Business* v *Commission*, not yet reported in the ECR, the Court annulled a decision by the Commission rejecting a complaint lodged by Micro Leader Business, a company specialising in the wholesale marketing of office and computer equipment, in which it had alleged that actions of Microsoft France and Microsoft Corporation were contrary to Articles 85 and 86 of the EC Treaty. The Court considered that the Commission had not erred in law or manifestly erred in its assessment when it found that the matters brought to its attention by the complainant contained no evidence of the existence of an agreement or concerted practice within the meaning of Article 85(1). It held, on the other hand, that the contested decision contained a manifest error in the assessment of the infringement of Article 86 alleged by the complainant, namely that the resale prices of Microsoft products on the French market were influenced by means of a prohibition on importing French-language versions of products marketed by Microsoft Corporation on the Canadian market. The Court stated that the Commission could not argue, without undertaking further investigation into the complaint, that the information in its possession did not constitute evidence of abusive conduct by Microsoft — in the Court's view that information contained an indication that Microsoft applied dissimilar conditions in the Canadian and Community markets to equivalent transactions and that the Community prices were excessive. The Court pointed out that while, as a rule, the *enforcement of copyright by its holder, as in the case of the prohibition on importing certain products from outside the Community into a Member State of the Community, was not in itself a breach of Article 86 of the EC Treaty, such enforcement could, in exceptional circumstances, involve abusive conduct* (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743).

In an action brought under Article 175 of the EC Treaty (now Article 232 EC) the Court found that the Commission had unlawfully failed to act (judgment of 9 September 1999 in Case T-127/98 *UPS Europe* v *Commission*, not yet reported in the ECR). The case arose from a complaint under Article 3(2) of Regulation No 17 which the applicant had sent to the Commission in July 1994, alleging conduct on the part of Deutsche Post contrary to Article 86 of the EC Treaty. The applicant asked the Court for a

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[13] Only one of the unlawful acts alleged was held to be unfounded. That finding justified a reduction in the fine.

declaration that the Commission had unlawfully failed to take a decision on its complaint although (on the date when the application was brought) six months had elapsed since it submitted observations on the notification sent to it by the Commission under Article 6 of Regulation No 99/63. The Court stated that where, as in the case before it, the procedure for examining a complaint has entered its third stage (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367), the Commission is required either to initiate a procedure against the subject of the complaint or to adopt a definitive decision rejecting the complaint, against which proceedings for annulment may be brought before the Community judicature (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503). That decision must, in accordance with the principles of good administration, be adopted within a reasonable time after receipt by the Commission of the complainant's observations. The Court held that the issue as to whether the period between the submission of the applicant's observations in response to the notification under Article 6 of Regulation No 99/63 and the formal request asking the Commission to take a position on the complaint is acceptable must be assessed having regard to the years already spent on the investigation, the present state of the investigation of the case and the attitudes of the parties considered as a whole. The Court granted the application before it since the Commission had not justified its failure to take action within the periods concerned and had not denied its failure to act.

(c) Regulation No 4064/89

The Court delivered four judgments relating to the control of concentrations and mergers (judgments of 4 March 1999 in Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission*, of 25 March 1999 in Case T-102/96 *Gencor* v *Commission*, of 28 April 1999 in Case T-221/95 *Endemol* v *Commission*, and of 15 December 1999 in Case T-22/97 *Kesko* v *Commission*, all not yet reported in the ECR). None of the applications was allowed.

Assicurazioni Generali and Unicredito v *Commission* helped to define the circumstances in which Regulation No 4064/89 is applicable to joint ventures. In that case, the applicant contested a Commission decision adopted under Article 6(1)(a) of Regulation No 4064/89 (corrected version, OJ 1990 L 257, p. 13), by which the Commission had found that the creation of a joint venture notified to it did not constitute a concentration within the meaning of Article 3 of the regulation [14] and therefore fell outside the regulation's scope. The Court found that the decision adopted constituted a definitive decision which could form the subject-matter of an action for annulment under Article 173 of the Treaty in order to secure judicial protection of the applicants' rights under Regulation No 4064/89. It then held that the Commission had not erred in its assessment when it found that the operation notified was not in the nature of a concentration.

The Court assessed the effect of the parent companies' support on the operational autonomy of the joint venture, for which purpose it had regard to the characteristics of the market in question and determined the extent to which the joint venture carried out the functions normally performed by other undertakings operating on that market. It then held that, where the joint venture is dependent on its parent companies for the provision of a body of services beyond an initial running-in period during which such assistance may be deemed to be justified in order to enable it to gain access to the market, it has no operational autonomy and therefore cannot be regarded as being in the nature of a concentration.

In *Gencor* v *Commission*, the Court dismissed an application for annulment of the Commission decision of 24 April 1996 prohibiting a concentration involving Gencor Ltd, a company incorporated under South African law operating in the mineral resources and metals industries, and Lonrho Plc, a company incorporated under English law with interests in the same industries. The basis for the Commission's decision was that the concentration would have led to the creation of a dominant duopoly position between the entity resulting from the concentration and another company (Amplats) in the world platinum and rhodium market as a result of which effective competition would have been significantly impeded in the common market. The South African Competition Board did not oppose the operation under national rules.

First, the Court confirmed that the Commission had competence to rule on the concentration. It rejected the plea put forward by Gencor that the Commission could not apply Regulation No 4064/89 to a transaction relating to economic activities conducted within the territory of a non-member country and

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14 It follows from the wording of Article 3 (in the version applicable at the time when the contested decision was adopted, before the entry into force of Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation No 4064/89 (OJ 1989 L 180, p. 1)) that the creation of a joint venture is covered by Regulation No 4064/89 only if the joint venture enjoys operational autonomy and its creation does not have as its object or effect the coordination of the competitive behaviour of the participating undertakings.

approved by the authorities of that country. The Court observed that Regulation No 4064/89 does not require that, in order for a concentration to be regarded as having a Community dimension within the meaning of Article 1 of the regulation, the undertakings party to the concentration must be established in the Community or that the mining and/or production activities covered by the concentration must be carried out within Community territory. Since the objective of the regulation is to ensure that competition is not distorted in the common market, concentrations which, while relating to mining and/or production activities conducted outside the Community, create or strengthen a dominant position significantly impeding effective competition in the common market fall within the regulation's field of application. Moreover, the regulation adopts as a criterion sales operations within the common market rather than production operations.

The Court also held that the contested decision was compatible with the rules of public international law given that it was *foreseeable that the concentration*, while proposed by undertakings established outside the Community, *would have an immediate and substantial effect in the Community.*

Second, the Court confirmed, on the basis of the legislative objective, that Regulation No 4064/89 applies to cases of collective dominant positions (see Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375).

Third, the Court held that the Commission had been fully entitled to find that the concentration would have created a collective dominant position. The Court observed that, while the existence of very large market shares is highly important in determining whether there is a dominant position, it is not a constant factor when making such a determination: its importance varies from market to market according to the structure of those markets, especially so far as production, supply and demand are concerned. The fact that the parties to an oligopoly hold large market shares does not necessarily have the same significance, compared to the analysis of an individual dominant position, with regard to the opportunities for those parties, as a group, to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers. Nevertheless, particularly in the case of a duopoly, a large market share is, in the absence of evidence to the contrary, likewise a strong indication of the existence of a collective dominant position.

The Court also held that *links of a structural nature do not have to exist in order for it to be found that two or more independent economic entities hold a collective dominant position; rather, the entities must be linked economically, in a more general manner*. The Court stated that there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices.

Finally, the Court held that, under Regulation No 4064/89, the Commission has power to accept from the undertakings concerned only such commitments as are capable of enabling it to conclude that the concentration at issue would not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of the regulation, it being unimportant *whether a commitment is categorised as behavioural or structural.*

In *Endemol* v *Commission*, the applicant sought the annulment of the Commission decision of 20 September 1995 which had declared the agreement creating the joint venture Holland Media Groep to be incompatible with the common market. The Court was required to determine the extent of the Commission's powers in relation to concentrations without a Community dimension when a Member State requests it under Article 22(3) of Regulation No 4064/89 to examine whether such a concentration is compatible with that regulation. The Court observed that Article 22 did not grant to the Member State the power to control the Commission's conduct of the investigation once it had referred the concentration in question to it or to define the scope of the Commission's investigation.

This case also enabled the Court to define the extent of rights of the defence. The Court held that the principles governing access to the files in procedures under Articles 85 and 86 of the Treaty were applicable to access to the files in concentration cases examined under Regulation No 4064/89, even though their application could reasonably be adapted to the need for speed, which characterised the general scheme of that regulation. It followed that access to certain documents could be refused, in particular in the case of documents or parts of documents containing other undertakings' business secrets, internal Commission documents, information enabling complainants to be identified where they wished

to remain anonymous and information disclosed to the Commission subject to an obligation of confidentiality. Also, the right of undertakings to protection of their business secrets had to be balanced against safeguarding the rights of the defence, so that the Commission could be required to reconcile the opposing interests by preparing non-confidential versions of documents containing business secrets or of other sensitive information.

Finally, the Court found that, in this instance, joint control within the meaning of Article 3(3) of Regulation No 4064/89 was exercised over the joint venture. In order to reach that conclusion, the Court examined the provisions of the merger agreement governing the procedure for the adoption of the most important strategic decisions and the provision under which issues submitted to the general meeting had to be decided by consensus. It also noted that the shareholders' committee, which took decisions by unanimous vote, had to give its prior approval to certain decisions of the managing board which went beyond what was necessary to protect the interests of a minority shareholder.

Article 22(3) of Regulation No 4064/89, whose scope was analysed in the above case, was also considered by the Court in *Kesko* v *Commission*, where it dismissed an application for annulment of a Commission decision declaring a concentration involving Kesko and Tuko to be incompatible with the common market. The applicant disputed that the Commission, to which a request had been submitted by the Finnish Office of Free Competition, had the power under Article 22(3) to adopt the decision. In rejecting that challenge, the Court stated, first, that *the notion of a request by a "Member State" within the meaning of Article 22(3) was not limited to requests from a government or ministry but also encompassed requests from national authorities such as the Finnish Office of Free Competition* and, second, that the Commission had had good grounds for considering that the Finnish Office for Free Competition was competent to submit the request, having regard to the information available to it at the time of the adoption of the contested decision.

The applicant also contended that the contested decision had failed to establish that the concentration had an effect on intra-Community trade. The Court held that it was necessary to apply to the criterion of an effect on trade between Member States, within the meaning of Article 22(3) of Regulation No 4064/89, an interpretation which was consistent with that given to it in the context of Articles 85 and 86 of the EC Treaty. The Commission was thus entitled in the context of Article 22(3) to take account of potential effects of the concentration on trade between Member States, provided that they were sufficiently appreciable and foreseeable, without being required to establish that the concentration had actually affected intra-Community trade.

2. *State aid*

In the field of State aid, the Court decided numerous cases brought under the fourth paragraph of Article 173 of the EC Treaty [15] and Article 33 of the ECSC Treaty. [16] It also dealt with an action for a declaration under Article 175 of the EC Treaty that the Commission had failed to act (judgment of 3 June 1999 in Case T-17/96 *TF1* v *Commission*, not yet reported in the ECR; under appeal, Cases C-302/99 P and C-308/99 P) and an action for damages (judgment in Case T-230/95 *BAI* v *Commission* [1999] ECR II-123).

So far as concerns the *admissibility of actions pursuant to the fourth paragraph of Article 173 of the EC Treaty*, the Court had to determine an application (*ARAP and Others* v *Commission*, under appeal in Case C-321/99 P) for the annulment of a decision adopted by the Commission under the preliminary examination procedure provided for by Article 93(3) of the EC Treaty (now Article 88(3) EC) as well as

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15 Judgments in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139; in Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179; of 15 June 1999 in Case T-288/97 *Regione Autonoma Friuli Venezia-Giulia* v *Commission*, not yet reported in the ECR; of 17 June 1999 in Case T-82/96 *ARAP and Others* v *Commission*, not yet reported in the ECR (under appeal, Case C-321/99 P); of 6 October 1999 in Case T-123/97 *Salomon* v *Commission*, not yet reported in the ECR; of 6 October 1999 in Case T-110/97 *Kneissl Dachstein Sportartikel* v *Commission*, not yet reported in the ECR; of 15 December 1999 in Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen* v *Commission*, not yet reported in the ECR; and order of 30 September 1999 in Case T-182/98 *UPS Europe* v *Commission*, not yet reported in the ECR.

16 Judgments in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17 (under appeal, Case C-111/99 P); of 25 March 1999 in Case T-37/97 *Forges de Clabecq* v *Commission*, not yet reported in the ECR (under appeal, Case C-179/99 P); of 12 May 1999 in Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission*, not yet reported in the ECR (under appeal, Cases C-280/99 P, C-281/99 P and C-282/99 P); of 7 July 1999 in Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission*, not yet reported in the ECR; of 7 July 1999 in Case T-89/96 *British Steel* v *Commission*, not yet reported in the ECR; of 9 September 1999 in Case T-110/98 *RJB Mining* v *Commission*, not yet reported in the ECR (under appeal, Case C-427/99 P); and of 16 December 1999 in Case T-158/96 *Acciaierie di Bolzano* v *Commission*, not yet reported in the ECR.

applications for the annulment of decisions adopted following the examination procedure laid down in Article 93(2) of the EC Treaty. With regard to the latter decisions, the Court confirmed that, of the criteria referred to in the fifth paragraph of Article 173 of the EC Treaty, that of publication in the *Official Journal of the European Communities* must be adopted when determining the starting point for the period within which a person other than the Member State to which a decision is notified may institute proceedings (*Salomon* v *Commission* and *Kneissl Dachstein Sportartikel* v *Commission*) even where the Commission has sent to the applicant the text of its press release announcing the adoption of the decision (Case T-14/96 *BAI* v *Commission*). [17]

In *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission*, the Court dismissed as inadmissible an action brought by an association and an undertaking for the annulment of a Commission decision declaring fiscal aid given to German airlines in the form of a depreciation facility to be incompatible with the common market.

With regard to the undertaking's standing to bring proceedings, the Court found first of all that, in prohibiting the temporal extension of tax provisions of general application, the contested decision affected the undertaking merely by virtue of its objective position as a potential beneficiary of the depreciation facility in question, in the same way as any other operator who was, or might in the future be, in the same situation. The prohibited tax advantage therefore was not individual in nature. The Court then held that the fact that a natural or legal person is an interested third party within the meaning of Article 93(2) of the EC Treaty cannot confer on it standing to bring an action against the decision adopted at the end of the second stage of the examination. In other words, a natural or legal person may be individually concerned by reason of its status as an interested third party only by a Commission decision refusing to initiate the examination stage provided for by Article 93(2). Where the Commission has adopted its decision at the end of the second stage of the examination, interested third parties have in fact availed themselves of their procedural guarantees, *so that they can no longer be regarded, by virtue of that status alone, as being individually concerned by that decision within the meaning of Article 173 of the EC Treaty.* Finally, the Court held that the fact that the undertaking participated in the procedure under Article 93(2) did not of itself suffice to distinguish it individually as it would the person to whom the contested decision was addressed.

This case also gave the Court the opportunity to reiterate the conditions in which a trade association is treated as having standing to bring an action for the purposes of Article 173 of the EC Treaty. In this instance, since the association could not be regarded as having legitimately taken the place of one or more of its members (in accordance with the solution in Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971) and did not have the status of negotiator within the meaning of the judgments in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, its application was not admissible.

In its judgments in *Regione Autonoma Friuli-Venezia Giulia* v *Commission* and *Freistaat Sachsen and Volkswagen* v *Commission*, the Court declared admissible actions brought by infra-State authorities, thereby confirming its previous case-law (Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717).

The case of *Regione Autonoma Friuli-Venezia Giulia* v *Commission* arose from a decision addressed to the Italian Republic by which the Commission declared aid granted by the Friuli-Venezia Giulia Region in Italy to road haulage companies in the Region to be incompatible with the common market and ordered that the aid be reimbursed. The Court found that the contested decision concerned the Region individually since the decision not only affected measures adopted by it but, in addition, prevented it from exercising its own powers as it saw fit. Furthermore, the decision prevented it from continuing to apply the legislation in question, nullified the effects of that legislation and required it to initiate the administrative procedure for the recovery of the aid from the beneficiaries. The Region was also directly concerned by the decision since the national authorities, to which the decision was addressed, did not act in the exercise of a discretion when communicating it to the Region. Nor did the Region's interest in bringing proceedings merge with that of the Italian State inasmuch as it had rights and interests of its own: the aid with which the contested decision was concerned constituted a set of measures taken in the exercise of the legislative and financial autonomy which was vested in it directly under the Italian constitution.

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17 A similar interpretation was placed on Article 33 of the ECSC Treaty in *Forges de Clabecq* v *Commission*, in *British Steel* v *Commission* (Case T-89/96) and in *Wirtschaftsvereinigung Stahl* v *Commission*, all cited above.

The Court adopted a similar legal analysis in the case brought by the Freistaat Sachsen (Free State of Saxony), a *Land* in the Federal Republic of Germany, for the partial annulment of Commission Decision 96/666/EC of 26 June 1996 concerning aid granted to the Volkswagen Group for works in Mosel and Chemnitz. The Court thus accepted that this territorial entity had standing to bring the proceedings (*Freistaat Sachsen and Volkswagen* v *Commission*).

In *UPS Europe* v *Commission* the Court allowed the objection of inadmissibility raised by the Commission, on the ground that the letter which the Commission had sent to the applicant, the author of the complaint containing allegations of State aid, had no legal effects. By that letter the applicant was informed, first, that the Commission had decided not to initiate for the time being a procedure for the review of aid under Article 93 of the EC Treaty and, second, that the Commission did not preclude "the possibility that State aid aspects might be involved in the case".

So far as concerns the application of *Article 175 of the EC Treaty*, the Court, as it did the year before in Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, made a declaration that the Commission had failed to act with regard to State aid. In *TF1* v *Commission* the Court held that the Commission had unlawfully failed to adopt a decision on the part of the complaint lodged by the applicant which concerned State aid granted to public television channels. In this instance, in order to assess whether, at the time when the Commission was called upon to act pursuant to Article 175 of the Treaty, it had been under any obligation to act, the Court had regard to the period from the date on which the complaint was lodged (in March 1993) to the date on which the Commission was called upon to act (in October 1995). The Court found that so much time had elapsed that the Commission ought to have been able to complete its preliminary examination of the measures at issue and adopt a decision on them, unless the delay could be justified by exceptional circumstances. Since no circumstances of that kind were established, the Commission had unlawfully failed to act once the two-month period starting from the request to act expired.

The Court was required to interpret the *concept of State aid* in several cases: Case T-14/96 *BAI* v *Commission*, *Forges de Clabecq* v *Commission* and *Neue Maxhütte Stahlwerke and Lech Stahlwerke* v *Commission*.

In its judgment in Case T-14/96 *BAI* v *Commission*, the Court annulled the decision by the Commission to terminate a review procedure initiated in relation to an agreement concluded by the Regional Council of Biscay and Ferries Golfo de Vizcaya on the ground that it did not constitute State aid. It held that the Commission's assessment was based on a misinterpretation of Article 92(1) of the Treaty, observing that a State measure in favour of an undertaking which takes the form of an agreement to purchase travel vouchers cannot be excluded in principle from the concept of State aid merely because the parties undertake reciprocal commitments. In this instance, the Court found, first, that it had not been established that the purchase of travel vouchers by the Regional Council of Biscay was in the nature of a normal commercial transaction and, second, that the aid in question affected trade between Member States because the undertaking which received it provided transport between towns situated in different Member States and competed with shipping lines established in other Member States.

In its judgment in *Forges de Clabecq* v *Commission* the Court dismissed an action for annulment of a decision by the Commission declaring financial assistance granted to the applicant to be incompatible with the common market. It held that a capital contribution and advances made on that contribution, the waiver of debts, the provision of State guarantees in respect of loans and the grant of bridging loans could be regarded as aid within the meaning of Article 4(c) of the ECSC Treaty. It stated that aid for the purposes of that provision included any payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produced, and also any intervention which alleviated the normal burdens on an undertaking's budget.

By the judgment in *Neue Maxhütte Stahlwerke and Lech Stahlwerke* v *Commission*, the Court dismissed applications brought by two German steel undertakings, Neue Maxhütte Stahlwerke and Lech Stahlwerke for the annulment of three Commission decisions. In essence, the applicants disputed the categorisation as State aid, within the meaning of the ECSC Treaty, of certain financial measures adopted in their favour by the *Land* of Bavaria. In the contested decisions, the Commission had considered that a normal private investor operating in a market economy would not have granted them the benefit of such measures. The Court confirmed that analysis, holding that the Commission had not infringed Article 4(c) of the ECSC Treaty.

In this connection, the Court stated that the concepts referred to in the provisions of the EC Treaty relating to State aid are relevant when applying the corresponding provisions of the ECSC Treaty to the

extent that they are not incompatible with that Treaty. *It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty, in particular the case-law defining the concept of State aid, in order to assess the legality of decisions regarding aid covered by Article 4(c) of the ECSC Treaty.* In order to determine whether a transfer of public resources to a steel undertaking constituted State aid within the meaning of Article 4(c) of the ECSC Treaty, the Court applied the private investor test and stated that, in the case before it, the injection of capital by a public investor without any prospect of profitability, even in the long term, constituted State aid. In view of the fact that Neue Maxhütte Stahlwerke was heavily overindebted, the Commission was entitled to consider that a private investor, even one operating on the scale of a group in a broad economic context, could not, in normal market conditions, have been able to count on an acceptable return, even in the longer term, on the invested capital. The Court accepted that parent companies may, for a limited period, bear the losses of one of their subsidiaries in order to enable the latter to close down its operations under the best possible conditions, when such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities. None the less, a private investor cannot reasonably allow himself, after years of continuous losses, to make a contribution of capital which, in economic terms, proves to be not only costlier than selling the assets, but is moreover linked to the sale of the undertaking, which removes any hope of profit, even in the longer term.

On several occasions the Court was called on to examine whether the Commission had applied the *derogations from the prohibition of aid* correctly.

As regards the derogations under Article 92(3) of the EC Treaty, the cases of *Salomon* v *Commission* and *Kneissl Dachstein Sportartikel* v *Commission* may be noted. Here the applicants contested a Commission decision declaring that, subject to certain conditions, aid granted by the Austrian Government to the company Head Tyrolia Mares in the form of capital injections was compatible with the common market as restructuring aid.

The two judgments, in which the applications for annulment were dismissed, define the scope of the review carried out by the Court when it assesses whether State aid is compatible with the common market. The Court observed that the Commission enjoys a broad discretion in the application of Article 92(3) of the EC Treaty. Since that discretion involves complex economic and social appraisals, the Court must, in reviewing a decision adopted in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and the stating of reasons, whether the facts on which the contested finding was based are accurately stated and whether there has been any manifest error in the assessment of those facts or any misuse of powers. In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision.

The Court found in *Kneissl Dachstein Sportartikel* v *Commission* that since the Commission was justified in that instance in finding that the survival of the undertaking receiving the aid would contribute to the maintenance of a competitive market structure, the aid could not be regarded as favouring a single undertaking. In addition, it stated that it was clear from the disjunctive nature of the conjunction "or" used in Article 92(3)(c) of the EC Treaty [18] that aid to facilitate development either of certain activities or of certain economic areas could be regarded as compatible with the common market. Consequently, the grant of authorisation for aid was not necessarily subordinate to the provision's regional aim.

The Court also found in this judgment, when ruling on a plea alleging that the reduction of capacity imposed on the undertaking in receipt of the aid was insufficient, that, in the context of aid for restructuring an undertaking in difficulty, the reductions in capacity could not be equated with the reduction in jobs, since the relationship between the number of employees and production capacity depended on a number of factors, in particular the products manufactured and the technology used.

In *ARAP and Others* v *Commission*, the applicants challenged a Commission decision concerning State aid granted by Portugal to an undertaking for the establishment of a beet sugar refining plant in Portugal. The aid comprised, in particular, tax relief which, in the applicants' submissions, was incompatible with the common agricultural policy in the sugar sector. The Court found that, since that aid was designed to permit use of the quota of 70 000 tonnes of sugar expressly allocated to Portugal by the Community

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18 Under this provision, "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be considered to be compatible with the common market.

legislation so that undertakings could "start up" production there, it could not be denied that it contributed to attainment of the aims pursued in the context of the common agricultural policy.

In *Freistaat Sachsen and Volkswagen* v *Commission* the Community judicature was called on for the first time to interpret Article 92(2)(c) of the EC Treaty, under which aid is compatible with the common market where it is "granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division". In ruling on a plea alleging infringement of Article 92(2)(c), the Court found that the conception of the applicants and the German Government, according to which that provision permitted full compensation for the undeniable economic backwardness suffered by the new *Länder* until such time as they reached a level of development comparable with that of the original *Länder*, disregarded both the nature of the provision as a derogation and its context and aims. The Court pointed out that the economic disadvantages suffered by the new *Länder* as a whole had not been caused by the division of Germany within the meaning of Article 92(2)(c). The Commission could therefore correctly state that *the derogation laid down in Article 92(2)(c) should not be applied to regional aid for new investment projects* and that the derogations provided for in Article 92(3)(a) and (c) of the EC Treaty and the Community framework were sufficient to deal with the problems faced by the new *Länder*. The allegations that Article 92(3) of the EC Treaty had been infringed were rejected as unfounded.

In the context of the ECSC Treaty, the derogations founded on Article 95 of that Treaty were considered in the judgments in *Wirtschaftsvereinigung Stahl* v *Commission* and in *British Steel* v *Commission* (Case T-89/96).

By their actions, the United Kingdom undertaking British Steel and the German association Wirtschaftsvereinigung Stahl sought the annulment of a Commission decision approving the grant of aid by the Irish Government to the steel company Irish Steel on the basis that it would be restructured and privatised. After finding that *the Commission could approve the restructuring aid by an individual decision directly based on Article 95 of the Treaty* since the fifth Community code governing aid to the steel industry ("the Fifth Steel Aid Code") did not provide for such aid, the Court held that the Commission had not manifestly erred in its assessment. In that regard, it noted that the measures for restricting production and sales imposed on Irish Steel in return for approval of the aid were sufficient to eliminate distortion of competition and stated that *the Commission was not required to impose capacity reductions as a condition for granting State aid in the coal and steel sector* such a reduction would in this instance have brought about the closure of the undertaking, which possessed only one mill. The Court also found that the restoration of the undertaking receiving the aid to economic health, which was liable to prevent the economic difficulties in the area concerned from worsening, served the objectives of the ECSC Treaty. The Court also held in these judgments that, under the ECSC Treaty, failure to give prior notification of aid did not excuse or even prevent the Commission from taking action on the basis of Article 95 of that Treaty and, where appropriate, declaring the aid compatible with the common market. Since the Commission had found that the aid for the restructuring of Irish Steel was necessary for the proper functioning of the common market and that it did not give rise to unacceptable distortion of competition, the fact that notification had not been made did not affect the legality of the contested decision, whether as a whole or solely in so far as the non-notified aid was concerned.

By contrast, in *Forges de Clabecq* v *Commission*, the Commission refrained from authorising by way of derogation under Article 95 of the ECSC Treaty aid falling outside the Fifth Steel Aid Code which the Belgian authorities had granted to the undertaking Forges de Clabecq. According to the Court, the Commission had not made a manifest error in coming to that decision on the ground that there was no aim in the ECSC Treaty requiring the aid to be authorised. Noting that, in spite of numerous generous measures to assist it, the undertaking was almost bankrupt, the Court stated that it was not unreasonable of the Commission to take the view that the fresh measures envisaged would not secure the undertaking's viability over any period.

The Court also confirmed two Commission decisions declaring that aid which the Italian authorities planned to grant to a number of undertakings was incompatible with the common market within the meaning of Article 4(c) of the ECSC Treaty (*Moccia Irme and Others* v *Commission*). In its judgment the Court held that, within the framework of the strict rules imposed by the Fifth Steel Aid Code, the purpose of the requirement of regular production laid down in the second indent of Article 4(2) of the code, under which an undertaking seeking aid for closure must have been producing ECSC steel products on a regular basis, is to ensure that aid for closure achieves maximum effectiveness on the market so as to reduce steel production as substantially as possible.

A need for an interpretation of the rules applicable to State aid in the coal sector gave rise to an *interlocutory judgment* restricted to two questions of law. Those questions had been raised by RJB Mining, a company established in the United Kingdom, in its action for the annulment of the Commission decision authorising German aid to the coal industry for 1997 amounting to DEM 10.4 thousand million (*RJB Mining* v *Commission*). The questions were: (i) whether the Commission was authorised by Commission Decision No 3632/93/ECSC [19] to give *ex post facto* approval to aid which had already been paid without its prior approval; and (ii) whether the Commission had power under Article 3 of that decision to authorise the grant of operating aid provided only that the aid enabled the recipient undertakings to reduce their production costs and achieve a relative decrease in aid, without their having any reasonable chance of achieving economic viability within the foreseeable future.

The Court held in reply to the first question that the plea alleging a prohibition on giving *ex post facto* approval to aid paid without prior approval was unfounded.

With regard to the answer to the second question, it should be noted that, under Article 3 of Decision No 3632/93, Member States which intend to grant *operating aid* for the 1994 to 2002 coal production years to coal undertakings are required to submit to the Commission in advance "a modernisation, rationalisation and restructuring plan *designed to improve the economic viability of the undertakings concerned* by reducing production costs".

The Court found, contrary to the interpretation put forward by the applicant, that no provision in Decision No 3632/93 states expressly that operating aid must be strictly reserved for undertakings with reasonable chances of achieving economic viability in the long term, in the sense that they must be capable of meeting competition on the world market on their own merits. The provisions require only that economic viability "improve". It follows that *improvement in the economic viability of a given undertaking necessarily means no more than a reduction in the level of its non-profitability and its non-competitiveness.* It is to be secured by a significant reduction in production costs making it possible for a relative decrease in the operating aid granted to the undertakings concerned to be achieved.

3. *Article 90 of the EC Treaty (now Article 86 EC)* [20]

In it judgment in *TF1* v *Commission* (under appeal before the Court of Justice, Cases C-302/99 P and C-308/99 P), the Court declared admissible an action pursuant to Article 175 of the EC Treaty for a declaration that the Commission had unlawfully failed to act under Article 90 of the Treaty. In reaching that conclusion, the Court stated that the wide discretion which the Commission enjoys in implementing Article 90 of the Treaty cannot undo the protection provided by the general principle of Community law that any person must be able to obtain effective judicial review of decisions which may infringe a right conferred by the Treaties. Referring to the judgment of the Court of Justice in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, where it was held that the possibility could not be ruled out that exceptional situations might exist where an individual had standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3) of the Treaty, the Court found, having regard to the facts brought to its notice, that the applicant was in such a situation. However, the action for failure to act was not examined as to the substance because the Commission sent a letter to the applicant in the course of the judicial proceedings.

The judgment of 8 July 1999 in Case T-266/97 *Vlaamse Televisie Maatschappij* v *Council*, not yet reported in the ECR, relates to an action challenging Commission Decision 97/606/EC of 26 June 1997 which declared that the legislative provisions granting Vlaamse Televisie Maatschappij the exclusive right to broadcast television advertising in Flanders were incompatible with Article 90(1) of the EC Treaty, read in conjunction with Article 52 of that Treaty (now, after amendment, Article 43 EC). The decision was based on the ground that the State measures forming the legal basis of the exclusive right were

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19 Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12).

20 Article 90(1) of the EC Treaty requires the Member States, in the case of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and in Article 85 to Article 94 (now Article 89 EC).

Article 90(3) of the EC Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by means of directives and decisions.

incompatible with Article 52 of the EC Treaty and were not justified "on imperative grounds in the public interest".

This judgment defined the extent of the rights granted to third parties in the procedure leading to the adoption of decisions under Article 90(3) of the EC Treaty and confirmed the manner in which Article 90(1) of the EC Treaty is to be applied in conjunction with Article 52 of that Treaty.

With regard to the first aspect, the Court, referring to the judgment of the Court of Justice in Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, found that an undertaking falling within Article 90(1) of the EC Treaty which is the direct beneficiary of the State measure at issue, is expressly named in the applicable law, is directly covered by the contested decision and is directly affected by the economic consequences of that decision (like the applicant), is entitled to be heard by the Commission during that procedure. The Court stated that observance of that right requires the Commission to communicate formally to the undertaking benefitting from the contested State measure the specific objections which it raises against the measure as set out in the letter of formal notice addressed to the Member State and, where appropriate, in any subsequent correspondence, and to grant it an opportunity to make known its views effectively on those objections. *However, it does not require the Commission to afford the undertaking benefitting from the measure an opportunity to make known its views on the observations submitted by the Member State against which the procedure has been initiated, whether in response to objections that have been addressed to it or in response to observations submitted by interested third parties, nor formally to transmit to the undertaking a copy of any complaint which may have given rise to the procedure.* In the case before it, the Court found that the applicant had been properly heard.

As regards the second aspect, Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, must be applied where a measure adopted by a Member State constitutes a restriction on the freedom of establishment of nationals of another Member State in its territory and, at the same time, gives an undertaking advantages by granting it an exclusive right, unless the State measure is pursuing a legitimate objective compatible with the Treaty and is *permanently* justified by overriding reasons relating to the public interest, such as cultural policy and the maintenance of pluralism in the press. In such a case it is still necessary for the State measure to be appropriate for ensuring attainment of the objective it pursues and not to go beyond what is necessary for that purpose.

The Court found, first, that there was an obstacle to freedom of establishment and, second, that the barrier could not be justified by an overriding reason relating to the public interest. The application was therefore not granted.

4. *Access to Council and Commission documents*

The Court was required to rule on the conditions governing public access to documents [21] of the Commission (judgments of 19 July 1999 in Case T-188/97 *Rothmans* v *Commission*, of 14 October 1999 in Case T-309/97 *Bavarian Lager* v *Commission* and of 7 December 1999 in Case T-92/98 *Interporc* v *Commission*, all not yet reported in the ECR) and of the Council (judgment of 19 July 1999 in Case T-14/98 *Hautala* v *Council*, not yet reported in the ECR; under appeal, Case C-353/99 P). In addition, by order of 27 October 1999 in Case T-106/99 *Meyer* v *Commission*, not yet reported in the ECR (under appeal, Case C-436/99 P), the Court dismissed an action as inadmissible where the applicant had requested information without specifying any document or written text.

In *Rothmans* v *Commission* the Court held that the Commission had unlawfully refused to give access to minutes of the Customs Code Committee by relying on the *rule on authorship contained in the code of conduct*. Under that rule, where a document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application for access must be sent direct to the author.

The Court held that, *for the purposes of the Community rules on access to documents, "comitology" committees established pursuant to Decision 87/373 laying down the procedures for the exercise of*

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21 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 order to implement the principles laid down by the code, the Council adopted, on 20 December 1993, Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43). The Commission likewise adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58).

implementing powers conferred on the Commission [22] *come under the Commission itself* and that the Commission is itself therefore responsible for ruling on applications for access to documents of those committees, such as the minutes in question in that case. "Comitology" committees assist the Commission to carry out the tasks given to it by the Council, have a chairman provided by the Commission and do not have their own infrastructural back-up. The Court found that a committee of that kind therefore cannot be regarded as being "another Community institution or body" within the meaning of the code of conduct adopted by Decision 94/90.

The dispute between the company Interporc and the Commission concerning imports of "Hilton" beef from Argentina continues to give rise to litigation (see, as regards the lawfulness of the decision rejecting the request for remission of import duty, the judgments in Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401 and Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773). It will be recalled that in its judgment in Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231 ("*Interporc I*"), the Court found fault with a refusal by the Commission, founded on the exception relating to the protection of the public interest with regard to court proceedings, to grant access to certain documents: the Commission's decision contained no explanation from which it might be ascertained whether all the documents requested did indeed fall within the scope of the exception relied upon because they bore a relation to a decision whose annulment was sought in a case pending before the Court.

In implementing the judgment in *Interporc I*, the Commission adopted a fresh decision refusing access as regards the documents emanating from Member States, authorities of a non-member country and the Commission itself to which the applicant had not yet had access in connection with the pending proceedings referred to above. In dealing with the legality of that decision, the Court was required to clarify the scope of, first, the exception relating to the protection of the public interest and, second, the rule on authorship (set out above in relation to *Rothmans* v *Commission*).

As to the exception for the protection of the public interest with regard to court proceedings, the Commission had stated in the contested decision that some of the documents requested concerned legal proceedings pending before the Court (Case T-50/96) and therefore could not be disclosed to the applicant. The Court held that the exception based on the existence of court proceedings had to be interpreted as meaning that *the protection of the public interest precluded the disclosure of the content of documents drawn up by the Commission solely for the purposes of specific court proceedings*, that is to say not only the pleadings or other documents lodged and internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of that definition of the scope of the exception was to ensure, first, the protection of work done within the Commission and, second, confidentiality and the safeguarding of professional privilege for lawyers. However, the exception based on the protection of the public interest with regard to court proceedings contained in the code of conduct could not enable the Commission to escape from its obligation to disclose documents which had been drawn up in connection with a purely administrative matter. That principle had to be respected even if the disclosure of such documents in proceedings before the Community judicature might be prejudicial to the Commission. The Court also made it clear that the existence of court proceedings seeking the annulment of the decision taken following the administrative procedure in question was immaterial in that regard. Consequently, the Court concluded that the contested decision had to be annulled in so far as it refused access to documents emanating from the Commission.

It was held in the judgment that the Commission had been fully entitled, on the basis of the rule on authorship, to refuse access to the documents emanating from the Member States and the Argentine authorities.

The judgment in *Bavarian Lager* v *Commission* confirmed the Commission's refusal, founded on the exception relating to the protection of the public interest, to grant access to a draft reasoned opinion which it had drawn up under Article 169 of the EC Treaty (now Article 226 EC). The disclosure of such preparatory documents relating to the investigation stage of the procedure under Article 169 could undermine the proper conduct of the procedure inasmuch as the procedure's purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position, could be jeopardised.

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22 *Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33.)*

In *Hautala* v *Council* the Court annulled a decision by which the Council had refused access to a report on conventional arms exports without having examined the possibility of disclosing extracts from it.

In response to an application made by Mrs Hautala, the Council refused to grant her access to the report on the ground that it contained sensitive information whose disclosure would prejudice the relations of the European Union with non-member countries. It thus based its refusal on the exception relating to the protection of the public interest with regard to international relations. The Court found first of all that the Council had given adequate consideration to the application for access to the document. It then held that it had not been shown that the Council had erred in its assessment in considering that access to the report could harm the public interest.

It stated, however, that since the principle was that public access to documents should be as wide as possible, the exceptions to that principle laid down in Article 4(1) of Decision 97/731 had to be interpreted and applied restrictively. The aim of protecting the public interest could be achieved even if the Council did no more than remove, after examination, the passages in the contested report which might harm international relations. In so doing, the Council had to balance the interest in public access to the unremoved passages against the interests of good administration, having regard to the burden of work which could result from the grant of partial access.

5. *Trade protection measures*

In the field of anti-dumping duties, the Court ruled on the substance in four cases (judgments of 12 October 1999 in Case T-48/96 *Acme* v *Council*, of 20 October 1999 in Case T-171/97 *Swedish Match Philippines* v *Council*, of 28 October 1999 in Case T-210/95 *EFMA* v *Council* and of 15 December 1999 in Joined Cases T-33/98 and T-34/98 *Petrotub* v *Council*, all not yet reported in the ECR). The four actions, which all sought the annulment of Council regulations imposing definitive anti-dumping duties on imports from countries not members of the Community, were dismissed by the Court as unfounded.

In *Acme* v *Council*, the applicant, a company incorporated under Thai law, challenged the legality of a Council regulation imposing definitive anti-dumping duties on imports of microwave ovens originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and collecting definitively the provisional duty imposed. The fundamental question raised was whether the Council had infringed 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), first, by falling back on the general provision, laid down in the final part of Article 2(3)(b)(ii), under which the expenses incurred and the profit realised were to be determined "on any other reasonable basis" when calculating the constructed normal value and, second, by using the Korean data for that purpose and not the data relating to the company responsible for exporting the microwave ovens produced by the applicant. Having regard to the documents in the case, the Court found that, for the purpose of determining the constructed normal value, the institutions had been entitled to conclude that the data relating to that exporter could not be used since they were unreliable, and that they had correctly taken as a basis the data relating to Korean producers.

The judgment in *Swedish Match Philippines* v *Council* was concerned in particular with the question whether the Community institutions were entitled to find that material injury could be caused to the Community industry where the extent of the export of the product concerned to the Community during the period of the investigation was extremely limited. In the case before the Court, of the lighters exported from the three countries covered by the investigation (the Philippines, Thailand and Mexico), those manufactured in the Philippines and exported by Swedish Match Philippines accounted, according to the applicant, for only 0.0083%.

The Court had regard to the wording of certain provisions in Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1) and to the absence of a provision obliging the Community institutions to consider, in anti-dumping proceedings, whether and if so how far each exporter responsible for dumping individually contributes to the injury caused to the Community industry. It found that, for the purposes of determining the existence of injury, the Community legislature had chosen to use the territorial scope of one or more countries, considering all dumped imports from the country or countries concerned together. It therefore rejected the applicant's ground of challenge.

In *EFMA* v *Council*, the Court set out the method for determining the profit margin which the Council is to use when it calculates the target price, that is to say the minimum price required to remove the injury

caused to the Community industry by the imports of the product concerned (in that case, ammonium nitrate from Russia).

First, it stated that this profit margin must be limited to the profit margin which the Community industry could reasonably count on under normal conditions of competition, in the absence of the dumped imports.

Second, where the undertakings in the Community industry have different production costs, and thus different profit levels, the Community institutions have no choice, when determining the target price, but to calculate the weighted average of the production costs of the Community producers as a whole and to add to it the average profit margin which they consider reasonable in view of all the relevant circumstances. The Court added that the Council has no authority to calculate the target price solely on the basis of the highest production costs, as to do so would result in the setting of a target price which is unrepresentative of the Community as a whole.

Finally, the judgment in *Petrotub and Republica* v *Council*, which confirmed the regulation subject to challenge, clarifies the scope of the procedural rights granted to exporters under Regulation No 384/96. The Court, interpreting the relevant provisions of that regulation — in particular Article 20(2) relating to disclosure — in the light of its general scheme and the general principles of Community law, held that exporters are entitled to be informed, at least summarily, of the considerations concerning the Community interest.

6. *Agriculture*

In the field of agricultural policy in the broad sense, the most significant judgments in terms of substantive law [23] concern the banana sector.

In the judgments of 28 September 1999 in Case T-612/97 *Cordis* v *Commission* (under appeal, Case C-442/99 P) and Case T-254/97 *Fruchthandelsgesellschaft Chemnitz* v *Commission*, both not yet reported in the ECR, the applicants, companies incorporated under German law, sought the annulment of Commission decisions refusing to grant them additional import licences under the transitional measures provided for in Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1). This regulation introduced a common system for the importation of bananas which replaced the various national arrangements. Since the changeover risked causing disturbances in the internal market, Article 30 allowed the Commission to take specific transitional measures it considered necessary in order to overcome difficulties encountered by traders following the establishment of the common organisation of the market but originating in the state of national markets prior to the entry into force of Regulation No 404/93.

In Case T-254/97 the Commission had considered that the case of Fruchthandelsgesellschaft Chemnitz was not one of excessive hardship such as to justify the special grant of import licences because it appeared from the facts that this company, which was formed after the publication of Regulation No 404/93 in the *Official Journal of the European Communities*, could not have acted without having been able to foresee the consequences which its action would have after the establishment of the common organisation of the market in bananas. The Court confirmed that analysis and dismissed the action.

In Case T-612/97 the Commission had taken the view that the problems encountered by the company Cordis Obst und Gemüse Großhandel were not due to the transition to the common organisation of the markets. At the conclusion of its examination the Court confirmed that assessment too and dismissed the action.

In its judgment of 12 October 1999 in Case T-216/96 *Conserve Italia* v *Commission*, not yet reported in the ECR (under appeal, Case C-500/99 P), the Court confirmed that aid from the European Agricultural Guidance and Guarantee Fund granted pursuant to Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1) could be discontinued in the event of a serious breach of fundamental obligations. Such a breach was considered to occur where a recipient of aid failed to comply with its undertaking not to start work on the project before receipt of the application for aid by the Commission, failed to inform the Commission of this and, in response to a request for information, forwarded a copy which was not consistent with the original of the contract for the sale of a machine referred to in the subsidised project.

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23 Issues of admissibility raised by actions in the field of agricultural policy are to be found in the section on admissibility.

In its judgment of 14 October 1999 in Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission*, not yet reported in the ECR (under appeal, Case C-496/99 P), the Court found that the Commission had failed to observe the terms of the notice of invitation to tender prescribed by Commission Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, and had offended against the principles of transparency and equal treatment, by permitting the successful tenderer, in payment for the supply, to withdraw from the market quantities of a product different from that prescribed by the regulation. The Court, which considered that the case-law of the Court of Justice concerning the award of public works contracts could be applied to the case before it, held that the Commission was obliged to specify clearly in the notice of invitation to tender the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down, so as to afford equality of opportunity to all tenderers when formulating their tenders. In particular, the Commission could not subsequently amend the conditions of the tendering procedure, and in particular those relating to the tender to be submitted, in a manner not laid down by the notice of invitation to tender itself, without offending against the principle of transparency.

Milk quotas gave rise to a number of judgments. Although its interest relates to the law governing the institutions, the judgment of 20 May 1999 in Case T-220/97 *H & R Ecroyd* v *Commission*, not yet reported in the ECR, will be dealt with now under this heading. The judgment deals with the effects of a declaration that a provision in a regulation is unlawful and with the resulting obligations for the Community institutions.

The Court of Justice had, on a reference for a preliminary ruling, declared invalid a provision of Regulation No 857/84, [24] as amended (judgment in Case C-127/94 *R* v *MAFF ex parte Ecroyd* [1996] ECR I-2731). The Court of First Instance stated, on the basis of case-law of the Court of Justice, that that judgment had the legal effect of requiring the competent Community institutions to adopt the measures necessary to remedy the illegality. In those circumstances, they were to take the measures that were required in order to comply with the judgment containing the ruling in the same way as they were, under Article 176 of the EC Treaty (now Article 233 EC), in the case of a judgment annulling a measure or declaring that the failure of a Community institution to act was unlawful. The Court added, however, that, for that purpose, the institutions had not only to adopt the essential legislative or administrative measures but also to make good the damage which had resulted from the unlawful act, subject to fulfilment of the conditions laid down in the second paragraph of Article 215 of the EC Treaty, namely the presence of fault, harm and a causal link. Thus, the Commission could have initiated action with a view to compensating the applicant, because the conditions for non-contractual liability of the Community to arise were satisfied.

7. *Social policy*

The European Social Fund ("the ESF") participates in the financing of operations concerning vocational training and guidance, the successful completion of which is guaranteed by the Member States. The applicable legislation provides that, when the financial assistance is not used in accordance with the conditions set out in the decision of approval of the ESF, the Commission may suspend, reduce or withdraw the assistance. It was decisions by the Commission reducing financial assistance granted by the ESF to Portuguese companies that the Court had to deal with in its judgments of 16 September 1999 in Case T-182/96 *Partex* v *Commission* (under appeal, Case C-465/99 P) and of 29 September 1999 in Case T-126/97 *Sonasa* v *Commission*, both not yet reported in the ECR.

In *Partex* v *Commission*, the Court clarified, to the extent necessary, the effect of certification by the Member State concerned of the accuracy of the facts and accounts contained in claims for payment of the balance of the financial assistance ("final payment claims") [25] and confirmed that the Member State may alter its assessment of a final payment claim if it considers that it contains irregularities which had not been previously detected.

The Court examined, under one of the pleas for annulment, the reasonableness of the period which had elapsed between the lodging of the final payment claim by the national authorities in October 1989 and the adoption of the contested decision in August 1996. Having regard to a series of events, it was held

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24 Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13).

25 Such certification is provided for by Article 5 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund (OJ 1983 L 289, p. 1).

that in this instance each of the procedural steps leading up to the adoption of the contested decision had taken place within a reasonable time.

It is to be noted above all that the Court annulled the contested decision in part, on the grounds of insufficient reasoning. Referring to the judgment in Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, the Court stated that in a case, such as the instance before it, where the Commission purely and simply confirmed the proposal of a Member State to reduce financial assistance initially granted, a Commission decision could be regarded as sufficiently reasoned either when the decision itself clearly demonstrated the reasons justifying the reduction in the assistance or, if that was not the case, when it referred sufficiently clearly to a measure of the competent national authorities in the Member State concerned in which those authorities clearly set out the reasons for such a reduction. In addition, if it appeared from the file that the Commission did not diverge on any particular point from the measures adopted by the national authorities, it could properly be considered that the content of those measures formed part of the reasons given for the Commission's decision, at least in so far as the person receiving the assistance had been able to take cognisance thereof. The Court found that, in this instance, those conditions were not met as regards several reductions in the sums sought by the applicant in his final payment claim.

8. *Admissibility of actions under the fourth paragraph of Article 173 of the EC Treaty*

The Court dismissed a number of actions seeking the annulment either of decisions not addressed to the applicants or of measures of a legislative nature. In three cases see *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission*, referred to above in relation to State aid, and judgments of 8 July 1999 in Case T-168/95 *Eridania and Others* v *Council* (under appeal, Case C-352/99 P) and Case T-158/95 *Eridania and Others* v *Council* (under appeal, Case C-351/99 P), both not yet reported in the ECR the actions were dismissed by means of a judgment, in the others by an order.

In addition to the instances already referred to where actions for the annulment of decisions in the fields of State aid and access to documents were inadmissible, the Court declared inadmissible a number of actions for the annulment of regulations in the fields of agricultural and fisheries policy (in particular, orders of 26 March 1999 in Case T-114/96 *Biscuiterie-confiserie LOR and Confiserie du Tech* v *Commission*, not yet reported in the ECR; of 29 April 1999 in Case T-78/98 *Unione provinciale degli agricoltori di Firenze and Others* v *Commission*, not yet reported in the ECR; of 8 July 1999 in Case T-12/96 *Area Cova and Others* v *Council and Commission* and in Case T-194/95 *Area Cova and Others* v *Council*, neither yet reported in the ECR (under appeal, Cases C-300/99 P and C-301/99 P); of 9 November 1999 in Case T-114/99 *CSR Pampryl* v *Commission*, not yet reported in the ECR; and of 23 November 1999 in Case T-173/98 *Unión de Pequeños Agricultores* v *Council*, not yet reported in the ECR; and judgments in Case T-168/95 *Eridania and Others* v *Council* and in Case T-158/95 *Eridania and Others* v *Council*, cited above) and of customs nomenclature (order of 29 April 1999 in Case T-120/98 *Alce* v *Commission*, not yet reported in the ECR). Finally, the Court held that an application for annulment of a regulation was admissible in its judgment of 1 December 1999 in Joined Cases T-125/96 and T-152/96 *Boehringer Ingelheim Vetmedica and C.H. Boehringer Sohn* v *Commission*, not yet reported in the ECR.

The developments in the case-law in 1999 concern the following matters: establishing the point from which time starts to run for bringing an action, possession of a legal interest in bringing proceedings and standing to bring proceedings.

As regards the point from which time starts to run, the fifth paragraph of Article 173 of the EC Treaty provides that the time-limit of two months [26] for bringing an action for annulment starts to run from publication of the measure or from its notification to the applicant or, in the absence thereof, from the day on which it came to the applicant's knowledge, as the case may be. It is therefore only if the measure is not published or notified to the applicant that time starts to run from the day on which it came to his knowledge. In this connection, it is settled case-law that the request for the full text of the measure must be made within a reasonable period from the date on which the measure's existence became known to the person concerned. In *CAS Succhi di Frutta* v *Commission*, cited above, the Court took the view that a reasonable period for requesting the full text of the contested decision had "long since elapsed", as a

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26 Without prejudice to the extensions of time-limits on account of distance from Luxembourg, specified in Annex II to the Rules of Procedure of the Court of Justice and applicable to the Court of First Instance by virtue of Article 102(2) of its Rules of Procedure.

period of three months separated the date on which, at the latest, the contested decision had come to the applicant's knowledge and the date on which it received a copy of that decision in proceedings for interim measures before the President of the Court.

While a legal interest in bringing proceedings is not expressly required by Article 173 of the EC Treaty, it is none the less a condition which must be satisfied if an action for annulment is to be admissible. In particular, a natural or legal person must demonstrate a personal interest in the annulment of the contested measure. Thus, an action brought by olive oil producers for the annulment of Regulation No 644/98 in so far as it provided for registration solely of the name 'Toscano' as a protected geographical indication was dismissed as inadmissible because the producers did not have a legal interest in bringing the proceedings (*Unione provinciale degli agricoltori di Firenze and Others* v *Commission*). The Court found, first, that they used, for the marketing of their products, names other than the name which had been registered for the purposes of Regulation (EEC) No 2081/92 [27] and, second, that their right to submit an application for registration of the names in question as designations of origin or geographical indications remained unimpaired so that the maintenance in force of Regulation No 644/98 could in no way affect their interests.

As regards standing to bring proceedings where the measure is of a legislative nature, in *Biscuiterie-confiserie LOR and Confiserie du Tech* v *Commission* the Court declared inadmissible an action brought by French confectionery producers who manufactured "tourons", some with the name "Jijona" and "Alicante". The action was for the annulment of Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation No 2081/92, in so far as it registered the names "Turrón de Jijona" and "Turrón de Alicante" as protected geographical indications. The Court found, first, that the contested regulation was, by nature and by virtue of its sphere of application, of a legislative nature and did not constitute a decision within the meaning of the fourth paragraph of Article 189 of the EC Treaty it applied to objectively determined situations and produced its legal effects with respect to categories of persons envisaged in the abstract, namely any undertaking which manufactured a product having objectively defined characteristics. Second, the Court recalled that it was conceivable that a provision of a legislative nature could be of individual concern to natural or legal persons where it affected them by reason of certain attributes which were peculiar to them or by reason of factual circumstances which differentiated them from all other persons and by virtue of these factors distinguished them individually just as in the case of the addressee of a decision (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853). However, that was not the case here. The Court held that the applicants' *use for many years of the names* "Jijona" and "Alicante" when marketing the "tourons" they manufactured did not distinguish them individually as the applicant had been in *Codorniu* v *Council*, since that undertaking, unlike the applicants, had been prevented by the legislative provision regulating the use of a designation from *using a trade mark which it had registered and used for a long period.* The applicants had not shown that the use of the geographical names in respect of which they claimed rights stemmed from a similar specific right which they had acquired at national or Community level before the adoption of the contested regulation and which had been adversely affected by that regulation.

The Court made a similar assessment in *CSR Pampryl* v *Commission*, where a cider producer which, for a number of years, had marketed cider under various names including the indication "Pays d'Auge" contested a regulation registering as a protected designation of origin the names "Pays d'Auge/Pays d'Auge-Cambremer". The Court also found that Regulation No 2081/92 did not lay down specific procedural guarantees, at Community level, for the benefit of individuals, so that the admissibility of the action could not be assessed in the light of such guarantees.

While the Court declared the actions brought by Area Cova and others to be inadmissible in its orders in those two cases, it recalled some of the instances in which measures of a legislative nature could be of individual concern, within the meaning of the judgment in *Codorniu* v *Council*, to applicants other than trade associations. First, that may be so where an overriding provision of law requires the body responsible for the contested measure to take into account the applicant's particular circumstances. Second, the fact that a person intervenes in some way or other in the procedure leading to the adoption of a Community measure is not capable of distinguishing that person individually with regard to the measure in question unless the applicable Community legislation grants him certain procedural guarantees. Third, the economic impact of a contested regulation on an applicant's interests is not such as to distinguish it individually where it is not placed in a situation similar to the very special situation of the

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27 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).

applicant in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501. Since the applicants failed to show that they were in any of those situations [28] and their other arguments were rejected, the Court held that they did not have standing to challenge the legality of the regulations at issue. These orders also reiterated the conditions in which trade associations are entitled to bring actions on the basis of Article 173 of the EC Treaty. Finally, while the Court dismissed the actions as inadmissible, it nevertheless stated that the applicants could challenge the measures adopted on the basis of the Community legislation before the national courts and call into question there the validity of that legislation.

The Court concluded in *Boehringer Ingelheim Vetmedica and C.H. Boehringer Sohn* v *Commission* that the first applicant was individually concerned by the Commission regulation whose annulment it sought. [29] In order to reach this conclusion, the Court, after stating that the contested measure did not amount to a decision within the meaning of Article 189 of the EC Treaty, found that the applicant had established the existence of a series of factors resulting in a particular situation which, as regards the measure in question, differentiated it from all other traders. The Court noted in this connection that the contested regulation was adopted after a formal request by the applicant for a maximum residue limit to be fixed for a chemical compound, on the basis of the file which it had submitted in accordance with Regulation No 2377/90. The Court also pointed out that Regulation No 2377/90 provided for the involvement of the applicant, as the undertaking responsible for the marketing of the veterinary medicinal products concerned, in the procedure for establishing maximum residue limits. Furthermore, relying on the judgment in Case T-120/96 *Lilly Industries* v *Commission* [1998] ECR II-2571, in which it was held that the applicant had standing to challenge a decision refusing to include a substance in one of the annexes to Regulation No 2377/90, the Court decided that a person who is responsible for placing a product on the market, and who has made an application for a maximum residue limit to be fixed, is just as concerned by the provisions of a regulation setting certain limits on the validity of those maximum residue limits as he would be by a refusal.

9. *Non-contractual liability of the Community*

While several applications for the Community to be held liable were dismissed in the course of the year (judgments in Case T-1/96 *Böcker-Lensing and Schulze-Biering* v *Council and Commission* [1999] ECR II-1, in Case T-230/95 *BAI* v *Commission* and of 15 June 1999 in Case T-277/97 *Ismeri Europa* v *Court of Auditors*, not yet reported in the ECR (under appeal, Case C-315/99 P); order of 4 August 1999 in Case T-106/98 *Fratelli Murri* v *Commission*, not yet reported in the ECR (under appeal, Case C-399/99 P)), the Court held in its judgment of 9 July 1999 in Case T-231/97 *New Europe Consulting and Brown* v *Commission*, not yet reported in the ECR, that the conditions laid down by the second paragraph of Article 215 of the EC Treaty were met that is to say the conduct of the Commission was unlawful, there was real damage, and a direct causal link existed between the unlawful conduct and the damage.

In that last case, the first applicant, a consultancy chosen to implement a specific programme within the framework of the PHARE programme, claimed that the Community should make good the harm which the Commission had caused it, first, by sending a fax to a number of programme coordinators which contained accusations against it and recommended that they should not consider proposals which it might submit in the future, even though no investigation had taken place and it had not been given the opportunity to be heard and, second, by sending a rectification after undue delay. As regards the first unlawful act alleged, the Court found, in particular, that observance of the principle of sound administration required the Commission to conduct an inquiry into the alleged irregularities committed by the first applicant, in the course of which it would have been given the opportunity to be heard, and to consider the effects that its conduct could have had on the image of the undertaking. On the other hand, the second allegation of unlawful conduct was not upheld because the rectification was made immediately after the Commission realised its error. The Court then held that the harm to the image of the first applicant, which pursued activities within the context of the PHARE programme, and the

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28 The applicants were Spanish shipowners contesting: (i) Council Regulation (EC) No 1761/95 of 29 June 1995 amending, for the second time, Regulation (EC) No 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area as defined in the Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries (OJ 1995 L 171, p. 1) (Case T-194/95); and (ii) Commission Regulation (EC) No 2565/95 of 30 October 1995 concerning the stopping of fishing for Greenland halibut by vessels flying the flag of a Member State (OJ 1995 L 262, p. 27) (Case T-12/96).

29 Commission Regulation (EC) No 1312/96 of 8 July 1996 amending Annex III of Council Regulation (EEC) No 2377/90 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin (OJ 1996 L 170, p. 8).

non-pecuniary harm suffered by its manager had been established. Since the applicants proved the causal link, the Court assessed the damages and ordered the Commission to pay them a total of EUR 125 000.

10. *Trade mark law*

The first action challenging a decision of one of the Boards of Appeal of the Office for Harmonisation in the Internal Market ("the Office") was lodged on 6 October 1998.

On 8 July 1999 the Court gave judgment in that case (Case T-163/98 *Procter & Gamble* v *OHIM (Baby-Dry)*, not yet reported in the ECR; under appeal, Case C-383/99 P). The action arose from a decision of the Board of Appeal dismissing the appeal brought by the applicant against the refusal of the examiner to register the term "Baby-Dry" for "disposable diapers made out of paper or cellulose" and "diapers made out of textile", on the ground that that term was not capable of constituting a Community trade mark. The Court confirmed that analysis. Like the Board of Appeal, it took the view that the sign was composed exclusively of words which could serve in trade to designate the intended purpose of the goods.

On the other hand, the Court found that the Board of Appeal had been wrong to declare that one of the applicant's lines of argument was inadmissible. The Court held that it followed from the provisions and the scheme of Regulation No 40/94 that it was not open to the Board of Appeal simply to reject the line of argument, as it had done in this instance, solely on the ground that it had not been raised before the examiner. Having considered the appeal, it should either have ruled on the substance or have remitted the matter to the examiner.

Finally, this judgment makes it clear that it is not for the Court, in an action challenging a decision of a Board of Appeal, to rule on a claim concerning the possible application of a provision of Regulation No 40/94 (in this instance Article 7(3), which relates to establishing whether a trade mark has become distinctive after the use which has been made of it) where the merits of the claim have not been considered by the Office.

11. *Staff cases*

A large number of judgments were again delivered in staff cases. Three judgments in particular are worth noting.

The first concerns the extent of the freedom of expression enjoyed by Community officials (Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission* [1999] ECR-SC II-463; under appeal, Case C-274/99 P). Mr Connolly, a Commission official who held the post of Head of Unit in the Directorate-General for Economic and Financial Affairs, published a book during a period of leave taken on personal grounds. On his return to work, he was subject to disciplinary proceedings for infringement of the obligations imposed by the Staff Regulations of Officials of the European Communities. Those proceedings resulted in his being removed from his post, in particular because he had failed to ask for permission to publish his work, whose content, according to the Commission, was prejudicial to the realisation of economic and monetary union, which he had the task of bringing about, and to the institution's image and reputation. In addition, his conduct as a whole was considered to have harmed the dignity of his post.

Mr Connolly applied to the Court for annulment of the opinion of the Disciplinary Board and of the decision to remove him from his post. First, the Court confirmed that, as laid down in Article 11 of the Staff Regulations, officials could not accept payment (in this instance royalties) from a source outside the institution without permission. The reason for this prohibition was the need to guarantee the independence and loyalty of officials.

Next, it held that freedom of expression, a fundamental right also enjoyed by Community officials, had not been infringed. The provision requiring an official to abstain from any action and, in particular, any public expression of opinion which might reflect on his position (Article 12 of the Staff Regulations) did not constitute a bar to the freedom of expression of officials, but placed reasonable limits on the exercise of that right in the interests of the service. The Court also referred to the aims pursued by Article 12 of the Staff Regulations, namely to ensure a dignified image in keeping with the particularly correct and respectable behaviour one was entitled to expect from members of an international civil service and to preserve the loyalty of officials to the institution employing them, loyalty which was all the more vital where the official had a high grade.

Nor was the freedom of expression of officials impaired by the need to obtain permission before publication (Article 17 of the Staff Regulations), which was required only where the text dealt with the work of the Communities. The Court pointed out that such permission could be refused only where publication was liable to prejudice the interests of the Communities, and that the assessment of the institution concerned was subject to review by the Community judicature.

Since the truth of the matters alleged was proved and the penalty imposed was appropriate, the Court dismissed the action.

The second judgment confirmed a decision rejecting a request for maternity leave to be shared between the father and the mother (judgment of 26 October 1999 in Case T-51/98 *Burrill and Noriega Guerra* v *Commission*, not yet reported in the ECR). Article 58 of the Staff Regulations essentially provides that pregnant women are entitled to 16 weeks' leave. In its judgment, the Court held that the interpretation under which the leave entitlement provided for by Article 58 is expressly reserved to women is not contrary to the principle of equal treatment for men and women. In accordance with the case-law of the Court of Justice, maternity leave meets two specific types of need of the woman: first, to protect her biological condition during and after pregnancy until her physical and mental functions have returned to normal following childbirth and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the burdens resulting from working at the same time. Article 58 accordingly pursues an objective of equal treatment between male and female workers.

The Court also held that Article 58 of the Staff Regulations does not disadvantage women: it does not prohibit the mother from working for a period of 16 weeks since she may, subject to certain conditions, resume work before the expiry of that period.

The third judgment laid down that it is possible to obtain a refund of that part of pension rights transferred to the Community scheme which is not taken into consideration in the calculation of the years of pensionable service (judgment of 10 November 1999 in Joined Cases T-103/98, T-104/98, T-107/98, T-113/98 and T-118/98 *Kristensen and Others* v *Council*, not yet reported in the ECR). The Court held that, in the absence of express provisions in the Staff Regulations, the Council cannot require, solely on the basis of the principle of solidarity, that any surplus which may result from the transfer of pension rights acquired under national pension schemes be paid into the Community budget. The plea alleging that the Communities were unjustly enriched was upheld and the contested decisions were annulled.

12. *Applications for interim relief*

Applications for interim relief in staff cases and in competition cases [30] accounted for 40% and 20% respectively of the applications lodged in 1999. However, three orders made in other fields are dealt with here.

By orders of 30 June 1999 in Case T-13/99 R *Pfizer Animal Health* v *Council* and Case T-70/99 R *Alpharma* v *Council*, not yet reported in the ECR, the President of the Court dismissed two applications for suspension of the operation of the Council regulation of 17 December 1998 removing virginiamycin and bacitracin zinc from the list of antibiotics authorised as additives in animal feed. Those antibiotics are respectively produced by Pfizer Animal Health SA/NV, a company incorporated under Belgian law, and Alpharma Inc., a company established in the United States. The regulation, whose annulment is also sought, prohibits the marketing of both antibiotics in all the Member States from 1 July 1999 at the latest. It may be noted that, in *Pfizer Animal Health* v *Council*, the applicant was supported by four associations and two stock farmers and that the Council was supported by the Commission and three Member States.

In each of the orders, the President of the Court found first of all that the contested regulation, despite its legislative nature, might be of direct and individual concern to Pfizer and Alpharma and therefore declared that the applications for interim relief were admissible.

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30 These applications were lodged in connection with Commission decisions imposing fines for breach of competition rules: see, in particular, the orders of 21 June 1999 in Case T-56/99 R *Marlines* v *Commission*, not yet reported in the ECR; of 9 July 1999 in Case T-9/99 R *HFB Holding and Others* v *Commission*, not yet reported in the ECR (the appeal against that order was dismissed by order of the President of the Court of Justice of 14 December 1999 in Case C-335/99 P(R) *HFB and Others* v *Commission*, not yet reported in the ECR); of 20 July 1999 in Case T-59/99 R *Ventouris* v *Commission*, not yet reported in the ECR; and of 21 July 1999 in Case T-191/98 R *DSR-Senator Lines* v *Commission*, not yet reported in the ECR (the appeal against that order was dismissed by order of the President of the Court of Justice of 14 December 1999 in Case C-364/99 P(R) *DSR-Senator Lines* v *Commission*, not yet reported in the ECR).

As regards the condition relating to the existence of a prima facie case, the President of the Court found in both orders that each of the companies and the Council disagreed fundamentally as to the circumstances in which the competent authorities might adopt a measure withdrawing authorisation in respect of an antibiotic as a precautionary step. That question required very thorough examination, which could not be undertaken in the context of proceedings for interim relief.

With regard, next, to the condition relating to *urgency*, the President of the Court examined whether implementation of the regulation risked causing serious and irreparable damage to the applicants. In both cases, the suspension sought could be justified only if it appeared that, in the absence of such relief, Pfizer and Alpharma would be placed in a situation which could endanger their very existence or irremediably affect their market share. The President of the Court found at the end of his appraisals that this was not the case. In reaching the conclusion that the financial loss which Pfizer (Case T-13/99 R) would suffer was not such as to prevent it from remaining able to continue its operations until the main proceedings were disposed of, the President of the Court pointed out that, for the purposes of assessing the economic circumstances of the applicant, consideration could be given, in particular, to the characteristics of the group of which, by virtue of its shareholding structure, it formed part.

Although the President of the Court found that there were no grounds of urgency justifying suspension of the operation of the regulation, he proceeded to balance the various interests at stake. He found that the balance of interests favoured the maintenance of the contested regulation, since damage to commercial and social interests of the kind that would be sustained by the applicants and the parties supporting Pfizer could not outweigh the damage to public health which would be liable to be caused by suspension of the contested regulation, and which could not be remedied if the main action were subsequently dismissed. In the light of that consideration, *there could be no question but that the requirements of the protection of public health had to take precedence over economic considerations* (see, in particular, the order of 12 July 1996 in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903). He also pointed out that, where there was uncertainty as to the existence or extent of risks to human health, the institutions could take protective measures without having to wait until the reality and seriousness of those risks became fully apparent. Having regard to the information placed before him, the President of the Court found that it was not impossible that bacteria which had become resistant due to the feeding to livestock of antibiotic additives such as virginiamycin and bacitracin zinc could be transmissible from animals to humans and the risk of increased antimicrobial resistance in human medicine on account of their use in animal feed therefore could not be ruled out. If increased antimicrobial resistance in human medicine were to occur, the potential consequences for public health would be very serious, since, if they developed resistance, certain bacteria could no longer be effectively combated by certain medicines used in the treatment of humans, in particular those of the family including virginiamycin and bacitracin. On the basis of the risk found by him, the President of the Court dismissed the applications for suspension of the operation of the regulation. The appeal brought against the order in *Pfizer Animal Health* v *Commission* was dismissed by the President of the Court of Justice (order of 18 November 1999 in Case C-329/99 P(R) *Pfizer Animal Health* v *Council*, not yet reported in the ECR).

A dispute of a constitutional nature led the President of the Court to order suspension of the implementation of a measure of the European Parliament preventing a political group from being set up (order of 25 November 1999 in Case T-222/99 R *Martinez and de Gaulle* v *Parliament*, not yet reported in the ECR). Article 29 of the Rules of Procedure of the Parliament provides that Members may form themselves into groups according to their political affinities. Following the European elections in June 1999, the Technical Group of Independent Members Mixed Group, whose constitutional rules provided that the Members within it were to be totally independent politically *vis-à-vis* one another, was set up. Since the Parliament took the view that the conditions laid down for the setting up of a political group were not satisfied, it adopted on 14 September 1999 a measure interpreting Article 29 of the Rules of Procedure, which prevented the Technical Group of Independent Members from being set up. Two Members, Mr Martinez and Mr de Gaulle, brought an action for annulment of that measure and applied in parallel for its implementation to be suspended.

In his order, the President of the Court was required first of all to deal with the issue of the admissibility of the application for interim relief. While the Community judicature reviews the legality of measures of the European Parliament intended to produce legal effects with regard to third parties, measures which relate only to the internal organisation of its work, on the other hand, cannot be challenged in an action for annulment. In this instance, the President of the Court found that it was possible for the contested measure to amount to a measure producing legal effects beyond the framework solely of the internal organisation of the Parliament's work, since it denied certain Members of that institution the possibility of exercising their parliamentary mandate in the same conditions as Members belonging to a political group and therefore prevented them from participating as fully as such Members in the process for the

adoption of Community measures. In addition, he held that the contested measure was, prima facie, of direct and individual concern to the members seeking its annulment, in particular since it prevented them from belonging to the Technical Group of Independent Members. The application for interim relief was therefore declared admissible.

As regards the pleas establishing a prima facie case for the grant of the relief sought, the President of the Court stated that an infringement of the principle of equal treatment could not be ruled out. While Article 29 of the Rules of Procedure of the Parliament did not prevent it from making different assessments, in the light of all the relevant facts, in relation to the various statements for the setting up of a political group submitted to the President of the Parliament, a difference in treatment of that kind nevertheless amounted to unlawful discrimination if it appeared arbitrary. In this instance, it could not be ruled out that the Parliament arbitrarily discriminated against the Members wishing to set up the Technical Group of Independent Members. In this connection, the President of the Court recorded that the Parliament, as constituted following the last elections, did not oppose the setting up of another political group presented by the applicants as a mixed group.

Since the condition relating to urgency was also met and suspension of the implementation of the contested measure until the Court ruled on the main proceedings could not prejudice the organisation of the departments of the defendant institution, the President of the Court ordered implementation of the measure to be suspended.