A Proceedings of the Court of First Instance in 2001

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

. A feature of the statistics relating to the judicial activity of the Court of First Instance of the European Communities in 2001 is their consistency with those of the previous year.

In general the number of cases registered, cases determined and cases pending was, to within a few cases, the same as in 2000.

In 2001, 327 cases were brought before the Court of First Instance. [1] That figure is lower than that for 2000, which was 387, chiefly because there were no series of cases.

The number of cases determined, excluding special forms of procedure, was 325 (or 216 after the joinder of cases) compared with 327 in 2000 . It is interesting that the number of cases decided in the field of intellectual property has increased significantly, from seven in 2000 to 30 the following year.

The number of judgments delivered by Chambers of five Judges was 14 (compared with 24 in 2000 and 39 in 1999), while 96 judgments (82 in 2000 and 74 in 1999) were delivered by Chambers of three Judges. The Court of First Instance sitting as a single judge delivered 10 judgments (11 in 2000).

No case was referred to the Court sitting in plenary session, nor was an Advocate General designated in any case.

There was again a significant number of applications for interim relief: 37 applications were made (43 in 2000 and 38 in 1999) and 41 sets of proceedings for interim relief were disposed of (45 in 2000).

The total number of cases pending at the end of the year, excluding special forms of procedure, came to 786 (compared with 784 in 2000).

The average duration of proceedings fell from 23.5 months in 2000 to 19.5 months.

. On 1 February 2001 amendments to the Rules of Procedure of the Court of First Instance intended to expedite proceedings (OJ 2000 L 322 p. 4) came into force. It is still too soon to assess the practical impact of those amendments on the average length of proceedings. However, it can be recorded that 12 applications for expedited procedure were lodged in 2001 and that 2 of them were granted as at 31 December of that year.

The Conference of Representatives of the Governments of the Member States adopted a Decision on 6 June 2001 appointing members of the Court of First Instance for the period 1 September 2001 to 31 August 2007. By that decision the terms of office of Judges J.D. Cooke, N.J. Forwood, R. García-Valdecasas y Fernández, P. Lindh, P. Mengozzi and J. Pirrung were renewed.

The representatives of the governments of the Member States also appointed Mr Hubert Legal a member of the Court to succeed Judge Potocki whose term of office had come to an end.

[1] That figure does not include the 18 special forms of procedure, *inter alia* applications for legal aid and taxation of costs.

Mr Vesterdorf was re-elected President of the Court of First Instance for the period from 20 September 2001 to 3 August 2004.

Developments in the case-law [2]

The principal advances in the case-law in 2001 are set out below, the cases grouped into proceedings concerning the legality of measures (I), into which group the vast majority of the cases decided by the Court of First Instance fall, actions for damages (II) and applications for interim relief (III).

I. Proceedings concerning the legality of measures

A. *Admissibility of actions for annulment under Article 230 EC*

The developments in the case-law concern the concept of a reviewable act, possession of a legal interest in bringing proceedings and standing to bring proceedings.

1. Concept of a reviewable act

It is well-established case-law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action for annulment under Article 230 EC.

. In its judgment of 18 September 2001 in Case T-112/99 *M6 and Others* v *Commission* (not yet published in the ECR), the Court of First Instance held that any natural or legal person may bring an action for annulment of a decision of a Community institution which does not allow, in whole or in part, a clear and precise request from that person which falls within the competence of that institution. In such a situation the total or partial rejection of the request produces binding legal effects capable of affecting the interests of its maker. In that case it held that the operative part of a Commission decision which granted negative clearance (relating to a clause of the notified agreement) and an exemption (relating to other clauses of that agreement) under the competition rules for only part of the duration of the notified agreement produced, as regards the parties to that agreement, binding legal effects capable of affecting their interests.

. In the case of acts or decisions which are prepared in several stages, including on completion of an internal procedure, in principle only those measures definitively laying down the position of the institution on the conclusion of that procedure, and not intermediate measures intended for preparation of the final decision, constitute reviewable acts.

. In its order of 20 March 2001 in Case T-59/00 *Compagnia Portuale Pietro Chiesa* v *Commission* [2001] ECR II-1019, the Court of First Instance recalled that an institution which is empowered to find that there has been an infringement and inflict a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in competition law, necessarily adopts a measure producing legal effects when it terminates an investigation following such a complaint. In this case it was held that an act cannot be regarded as terminating such a procedure if, in that act, the Commission is merely informing

[2] To assist the reader, articles of the EC and ECSC Treaties are cited in the version in force since 1 May 1999.

the person concerned of the state of progress in the procedure initiated against a Member State for the purposes of establishing whether or not there has been a breach of Article 82 EC in conjunction with Article 86 EC and giving its preliminary observations regarding its investigation of the latter. Such an act constitutes an intermediary measure.

. In Case T-186/98 *Inpesca* v *Commission* [2001] ECR II-557 (under appeal, Case C-170/01 P), it was held that, if a request for reconsideration by a Community institution of a decision which has become definitive is based on substantial new facts, the institution concerned is bound to comply with that request. After reconsidering the decision, the institution must take a new decision, the legality of which may, where necessary, be challenged before the Community judicature. If, on the other hand, the request for reconsideration is not based on such facts, the institution is not required to comply with it. It follows that an action brought against a decision refusing to reconsider a decision which has become definitive will be declared admissible if it appears that the request is actually based on substantial new facts. On the other hand, if it appears that the request is not based on such facts, an action against the decision refusing to reconsider it will be declared inadmissible. In its judgment, the Court of First Instance pointed out that a reconsideration, based on substantial new facts, of a previous decision which has become final is governed by the general principles of administrative law, as defined in the case-law of the Court of Justice and the Court of First Instance, and went on to find that the applicant had not established the existence of any facts of that nature which would imply an obligation to reconsider the decision rejecting its request for financial aid.

. It is also settled case-law that an action for annulment of an act which merely confirms another decision which has become definitive is inadmissible. The concept of a confirmatory act has been developed in case-law *inter alia* in order to prevent the bringing of an action which has the effect of recommencing the time-limits for bringing an action once they have expired. Where there has been no such circumvention of the time-limits for bringing an action, the Community judicature has on some occasions acknowledged the admissibility of claims made against both a confirmed decision and a confirmatory decision in the same action. However, in its order of 25 October 2001 in Case T-354/00 *M6* v *Commission* (not yet published in the ECR), the Court of First Instance held that this solution cannot be applied where the two decisions are contested in two separate actions and the applicant can make his point of view and put his arguments in the action concerning the first decision.

. The first paragraph of Article 230 EC provides that the Community judicature is to review the legality of 'acts of the European Parliament intended to produce legal effects in regard to third parties.' By their action for annulment, several Members of the European Parliament, the *Front national* and the *Lista Emma Bonino* disputed the legality of the act of 14 September 1999 whereby the Parliament decided to adopt the general interpretation of Rule 29(1) of its Rules of Procedure [3] proposed by the Committee on Constitutional Affairs and the view expressed by it on the conformity with that Rule of the statement of formation of the 'Technical Group of Independent Members Mixed Group' (TDI Group) and to declare the non-existence *ex tunc* of that group.

According to the Court of First Instance such an act is open to challenge before the Community judicature if the legal effects it produces go beyond the internal organisation of the work of the Parliament (judgment of 2 October 2001 in Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament*, not yet published in the ECR (under appeal, Cases C-486/01 P and C-488/01 P)). In that regard, it held, as a preliminary point, that while the

3 Rule 29(1) ('Formation of political groups') of the Rules of Procedure of the European Parliament, in the version in force as from 1 May 1999 (OJ 1999 L 202, p. 1), provides: 'Members may form themselves into groups according to their political affinities'.

purpose of the rules of procedure of a Community institution is to organise the internal functioning of its services in the interests of good administration and the rules laid down have therefore as their essential purpose to ensure the smooth conduct of the procedure, that alone does not preclude an act of the Parliament such as that mentioned above from having legal effects in regard to third parties and thus from being capable of forming the subject-matter of an action for annulment. As regards the case under discussion the Court of First Instance held, first, that the act of 14 September 1999 affects the conditions under which the parliamentary functions of the Members concerned are exercised *inter alia* because they cannot form a political group, and thus produces legal effects in their regard. It went on to observe that, as representatives of the peoples of the States brought together in the Community, such Members must, in regard to an act emanating from the Parliament and producing legal effects as regards the conditions under which the electoral mandate is exercised, be regarded as third parties within the meaning of the first paragraph of Article 230 EC.

2. Legal interest in bringing proceedings

While a legal interest in bringing proceedings is not expressly required by Article 230 EC, it is none the less a condition which must be satisfied if an action for annulment brought by a natural or legal person is to be admissible. Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (see *inter alia* judgments of the Court of First Instance in Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, and of 22 November 2001 in Case T-9/98 *Mitteldeutsche Erdoel-Raffinerie* v *Commission*, not yet published in the ECR). The interest in bringing proceedings for annulment is assessed as at the date when the action is brought (judgment in *Mitteldeutsche Erdoel-Raffinerie* v *Commission*) and the natural or legal person who brings that action must have a personal interest in bringing proceedings.

According to the Court of First Instance, the latter criterion is not fulfilled where an action brought by a legal person seeks the annulment of a decision addressed to another person refusing that person access to documents. In such a case, the applicant — here the parent company of the addressee of the contested decision — cannot be considered to have an interest in seeking the annulment of such a decision, since it does not affect its own rights. The Court held that the applicant did not itself make a request for access to documents and that the possibility of making such a request was not in question (order of 30 April 2001 in Case T-41/00 *British American Tobacco International (Holdings)* v *Commission* [2001] ECR II-1301).

3. Standing to bring proceedings

The fourth paragraph of Article 230 EC provides that 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is *of direct and individual concern to the former*'.

In 2001 the Court of First Instance dismissed as inadmissible for lack of standing to bring proceedings several actions seeking annulment either of decisions which were not addressed to the applicants or of acts of a legislative nature. In some cases the action was dismissed by judgment (judgments of the Court of First Instance in Joined Cases T-38/99 to T-50/99 *Sociedade Agrícola dos Arinhos and Others* v *Commission* [2001] ECR II-585, in Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, in Case T-166/99 *Andres de Dios and Others* v *Council* [2001] ECR II-1857 and in Joined Cases

T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975), and in others, by order.

(a) Direct concern

The condition that an individual must be directly concerned by the contested Community measure means that the measure must directly affect his legal situation and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules alone without the application of other intermediate rules. The same applies where the opportunity for addressees of the measure not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt.

. There was a finding that the legal situation of a trader was not directly affected in the order in Case T-244/00 *Coillte Teoranta* v *Commission* [2001] ECR II-1275. According to the Court of First Instance, a trader is not directly concerned by a Commission decision addressed to the Member States excluding from Community financing, on the ground of failure to comply with the Community rules, various items of expenditure on the part of the paying agencies which were declared under the European Agricultural Guidance and Guarantee Fund (EAGGF), including those relating to aid paid to that trader. The decision concerns only the financial relations between the EAGGF and the Member States and does not include any provision requiring the national bodies concerned to recover the sums indicated from their recipients. Its proper execution requires only that the Member State concerned refund to the EAGGF the sums corresponding to the expenditure excluded from Community financing. In those circumstances, reimbursement of the Community aid paid to that trader in the financial years concerned would be the direct consequence, not of that decision, but of the action which would be taken for that purpose by the competent authorities on the basis of their national legislation in order to fulfil obligations under the Community rules on the subject. In that regard, it cannot be excluded that particular circumstances may lead the national authorities concerned to decide not to claim repayment of the aid granted from the recipient and themselves to bear the burden of reimbursing to the EAGGF the sums which they had wrongly considered themselves authorised to pay.

. On the other hand, in the field of State aid, the Court of First Instance held that an undertaking in receipt of an investment premium was directly concerned by a Commission decision addressed to a Member State declaring incompatible with the common market a provision of that State's annual tax law prolonging the period within which the investment project had to have been executed in order to benefit from the premium, since the obligation to repeal that provision contained in the decision necessarily had the consequence of requiring the national authorities to recover the amount of the premium from the undertaking concerned (judgment in *Mitteldeutsche Erdoel-Raffinerie* v *Commission*, cited above).

(b) Individual concern

Since the judgment of the Court of Justice in Case 25/62 *Plauman* v *Commisssion* [1963] ECR 197, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 230 EC if that decision affects their legal position by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. The question whether that

condition is fulfilled has been specifically addressed in a number of decisions, only some of which are of note. [4]

. Portuguese breeders of fighting bulls sought annulment of a provision of a Commission decision prohibiting them from dispatching such bulls from Portugal to Spain and France for cultural and sporting events. [5] However, since the applicants failed to establish that the contested measure was of individual concern to them, their action was dismissed as inadmissible by judgment of 7 February 2001 in *Sociedade Agrícola dos Arinhos and Others* v *Commission*, cited above. In that regard, the Court of First Instance held that the fact that the bulls bred by the exporters were intended to fight at cultural and sporting events, that the export and transportation of those animals were subject to specific rules which ensure strict control of all the animals exported and that those exporters were entered in herd books of fighting bulls did not constitute a particular situation differentiating the applicants, in respect of the contested decision, from any other breeder or exporter of bovine animals affected by the prohibition on dispatch laid down by that decision. It also held that the decision concerned them only by reason of their objective status as exporters of bovine animals, by the same token as all other operators exercising the same activity of dispatching from the Member State concerned. Moreover, the fact that a person intervenes, in one way or another, in the procedure leading to the adoption of a Community measure is not such as to differentiate him from any other person in respect of the measure in question except where the Community legislation applicable grants him certain procedural safeguards. However, that is not the case with the provisions of Directives 89/662 and 90/425 concerning veterinary and zootechnical checks applicable in intra-Community trade. [6]

. By order of 19 September 2001 in Joined Cases T-54/00 and T-73/00 *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* (not yet published in the ECR), the Court of First Instance declared inadmissible actions for annulment brought by owners of fishing vessels established in Spain against part nine of Annex I D to Regulation No 2742/1999, [7] which, by way of exchanges of catch quotas between the French Republic and the Portuguese Republic, allowed 3 000 tonnes of the anchovy quota of 5 220 tonnes allocated to Portugal in ICES zones IX and X and CECAF area 34.1.1 to be fished in the waters of ICES zone VIII, which is under the sovereignty or within the jurisdiction of the French Republic. [8] The applicants were not affected by the contested provision, which is of general application, by reason of certain attributes peculiar to them or by reason of a factual situation which

4 For an assessment of individual concern, see also the orders of the Court of First Instance in Joined Cases T-112/00 and T-122/00 *Iberotam and Others* v *Commission* [2001] ECR II-97, in Case T-49/00 *Iposeca* v *Commission* [2001] ECR II-163, in Case T-215/00 *La Conqueste* v *Commission* [2001] ECR II-181 (under appeal, Case C-151/01 P) and the order of 11 September 2001 in Case T-270/99 *Tessa and Tessas* v *Council* (not yet published in the ECR, under appeal, Case C-461/01 P); and the judgments in *Martinez and Others* v *Parliament*, cited above, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above, the judgments of 19 September 2001 in Case T-58/99 *Mukand and Others* v *Council*, and of 6 December 2001 in Case T-43/98 *Emesa Sugar* v *Council*, not yet published in the ECR.

5 Commission Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1998 L 311, p. 23).

6 Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13).

7 Council Regulation (EC) No 2742/1999 of 17 December 1999 fixing for 2000 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required, and amending Regulation (EC) No 66/98 (OJ 1999 L 341, p. 1).

8 The ICES Zone is the statistical zone identified by the International Council for the exploration of the sea. CECAF is the acronym for the Fishery Committee for the Eastern Central Atlantic.

differentiated them, as regards that provision, from all other persons. In particular, when it adopted that provision, the Council was under no obligation to take account of the particular situation of the applicants.

Despite the inadmissibility of the actions for annulment, the Court of First Instance pointed out that the contested measure could always be called into question by the persons concerned if they considered themselves the victims of damage caused directly by that measure under the procedure for non-contractual liability laid down in Articles 235 EC and 288 EC. It concluded that the general principle of Community law according to which any person whose rights and freedoms have been infringed has the right to an effective remedy, which is inspired by Article 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, was respected in this case.

. The case leading to the judgment of 27 June 2001 in *Andres de Dios and Others* v *Council*, cited above, gave the Court of First Instance the opportunity to observe that the term 'decision' in the fourth paragraph of Article 230 EC has the technical meaning employed in Article 249 EC. Since it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged generally and in the abstract, Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (OJ 1999 L 119, p. 49), despite being entitled a 'decision', is an act of a legislative nature. Turning to the question of the applicants' standing to seek annulment of the act of which they were not the addressees the Court of First Instance held that they were not individually concerned by that act. In response to the argument that they were individually distinguished as a result of the Council's failure to establish a recruitment procedure consistent with the relevant provisions of the Staff Regulations of officials of the European Communities, in which they could have taken part, the Court of First Instance held that such an argument, by which the applicants complained that the institution deprived them of procedural rights, was irrelevant for the purpose of assessing the admissibility of an action brought against a legislative measure unless the institution's choice was shown to constitute an abuse of procedure. However, no evidence of this had been adduced in this case. It also pointed out that for the existence of a closed class of individuals to be a relevant factor distinguishing the persons in question individually in relation to a legislative act, the institution adopting the contested act must have been under an obligation to take account, at the time of adoption of the act, of the particular circumstances of those individuals. As no evidence was adduced which would support a finding that the applicants were individually concerned, their action was dismissed as inadmissible.

. In the field of State aid, it is clear from the judgment in *Hamburger Hafen- und Lagerhaus and Others* v *Commission*, cited above, that a party must be a competitor of the beneficiary of State aid to have standing as a party concerned within the meaning of Article 88(2) EC. As it was not in direct competition with the beneficiary of the aid, the applicant company was not deemed to have standing as a party concerned and its action for annulment of the Commission decision approving State aid without initiating the formal assessment procedure provided for by that provision was declared inadmissible.

However, the Court of First Instance ruled admissible an action for annulment, brought by one of the beneficiaries of a general aid scheme, of a Commission decision declaring a provision of a finance law incompatible with the common market and ordering recovery from undertakings in receipt of aid granted under that provision. In the judgment in *Mitteldeutsche Erdoel-Raffinerie* v *Commission*, cited above, the applicant was held to be individually concerned by the contested decision. The Court of First Instance observed that several factors, demonstrating that account was specifically taken of the applicant's investment project, placed it in a situation which differentiated it from all other operators.

. Several cases gave the Court of First Instance an opportunity to recall the conditions under which a professional association is deemed to have standing to bring an action under Article 230 EC (orders in *Iberotam and Others* v *Commission* and *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council*, cited above; judgment in *Hamburger Hafen- und Lagerhaus and Others* v *Commission*, cited above). None of the applicant associations could be considered to represent one or several of its members (following the solution devised in the judgment in Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971) or to have the capacity of negotiator within the meaning of the judgments of the Court of Justice in Joined Cases 67/85, 68/85 and 70/85 *Van de Kooy and Others* v *Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125.

4. Time-limit for bringing an action

In its order of 14 February 2001 in Case T-3/00 *Pitsiorlas* v *Council and ECB* [2001] ECR II-717 (under appeal, Case C-193/01 P), the Court again made the point that an excusable error may, in exceptional circumstances, have the effect of not making the applicant out of time. It pointed out that this is so, in particular, when the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person. However, in this case, since the circumstances put forward by the applicant were not regarded as exceptional circumstances giving rise to an excusable error, the action for annulment, to the extent that it impugned the Council's decision, was dismissed as inadmissible.

B. Review of legality

1. Competition rules applicable to undertakings

The *case-law on competition rules applicable to undertakings* was developed by judgments concerning the rules of the EC Treaty and the ECSC Treaty.

The lessons to be drawn from the case-law in 2001 cover a wide variety of issues: the scope of the Community competition rules; agreements and concerted practices prohibited by Article 81 EC and Article 65 CS; abuses of dominant position prohibited by Article 82 EC; observance of the rights of the defence; examination of complaints of infringements of the competition rules; and determining the applicable penalties.

(a) Scope of the Community competition rules

(a.1) Scope *ratione materiae*

Do the rules which organise the exercise of a liberal profession fall within the scope *ratione materiae* of Article 81 EC? That is, in essence, the question on which the Court of First Instance ruled in its judgment in Case T-144/99 *Institut des mandataires agréés* v *Commission* [2001] ECR II-1087, holding that rules which organise the exercise of a profession cannot be considered to fall as a matter of principle outside the scope of Article 81(1) EC merely because they are classified as 'rules of professional conduct' by the competent bodies. In so holding

it endorses the approach taken by the Commission in the decision [9] which prompted the action. It follows that an examination on a case-by-case basis is essential in order to assess the validity of such rules under that provision of the Treaty, in particular by taking account of their impact on the freedom of action of the members of the profession and on its organisation and also on the recipients of the services in question.

In this case that approach yielded real results as the Court of First Instance confirmed, on one point, the Commission's finding that a simple prohibition, under a code of conduct, of comparative advertising between professional representatives restricts competition in that it limits the ability of more efficient professional representatives to develop their services. This has the consequence, *inter alia*, that the clientele of each professional representative is crystallised within a national market.

(a.2) Rule of reason

In an action for annulment of a Commission decision of 3 March 1999 [10] the applicant companies (Métropole télévision (M6), France Télécom, Suez-Lyonnaise des eaux and Télévision française 1 SA (TF1)) submitted that the application of a 'rule of reason' would have shown that Article 81(1) EC did not apply to the exclusivity clause and to the clause relating to the special-interest channels agreed on when Télévision par satellite (TPS) was set up, with the result that those two clauses should not have been examined under Article 81(1) EC and still less exempted as they were by the Commission.

According to the Court of First Instance (judgment in *M6 and Others* v *Commission*, cited above), the existence of a rule of reason in the application of Article 81(1) EC cannot be upheld. It took the view that an interpretation of Article 81(1) EC requiring in accordance with a rule of reason the pro and anti-competitive effects of an agreement to be weighed in order to determine whether it is caught by the prohibition laid down in Article 81(1) EC is difficult to reconcile with the rules prescribed by Article 81 EC. That article expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed. Otherwise Article 81(3) EC would lose much of its effectiveness.

Citing certain judgments in which the Court of Justice and the Court of First Instance favoured a more flexible interpretation of the prohibition laid down in Article 81(1) EC, the Court of First Instance none the less took the view that those judgments could not be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) EC. In assessing the applicability of that article to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic and legal context in

9 Commission Decision 1999/267/EC of 7 April 1999 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/36.147 EPI code of conduct) (OJ 1999 L 106, p. 14).

10 Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/36.237 TPS) (OJ 1999 L 90, p. 6).

which the undertakings operate, the nature of the products or services covered by the agreement and the actual operation and structure of the market concerned.

(a.3) Ancillary restrictions

The same judgment, *M6 and Others* v *Commission*, gave the Court of First Instance an opportunity to clarify the concept of ancillary restriction in Community competition law and the implications of such a definition. In essence the applicants submitted that the Commission should have classified the exclusivity clause and the clause relating to special-interest channels (which were the subject of an exemption under Article 81(3) EC) as ancillary restrictions on the creation of the TPS (with regard to which the Commission took the view that it did not need to intervene under Article 81(1) EC).

As regards the concept of an 'ancillary restriction' the Court of First Instance took the view that it covers any restriction which is directly related and necessary to the implementation of a main operation.

A restriction 'directly related' to implementation of a main operation must, according to this judgment, be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it. The condition that a restriction be necessary implies a two-fold examination, establishing, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it. Examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation. However, if the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 81(3).

As regards the consequences, the Court of First Instance took the view that the compatibility of that restriction with the competition rules must be examined with that of the main operation. Thus, if the main operation does not fall within the scope of the prohibition laid down in Article 81(1) EC, the same holds for the restrictions directly related to and necessary for that operation. If, on the other hand, the main operation is a restriction within the meaning of that provision but benefits from an exemption under Article 81(3) EC, that exemption also covers those ancillary restrictions. In this case the Court of First Instance held that the Commission did not commit a manifest error of assessment in not classifying the above clauses as restrictions that were ancillary to the creation of TPS and therefore making a separate analysis of their compatibility with the competition rules.

(b) Prohibited agreements

(b.1) Agreements prohibited by Article 81(1) EC

. Several cases gave the Court of First Instance an opportunity to review the legality of Commission decisions finding infringements of Article 81(1) EC. In its judgment in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035 (under appeal, Case C-359/01 P), it held that the conditions for prohibiting an

agreement had been correctly applied by the Commission in its decision of 14 October 1998 [11] and, therefore, dismissed the application on that point.

. The problem of restrictions of competition generated by the cumulative effect of similar vertical agreements was dealt with in depth in the judgment in Case T-25/99 *Roberts* v *Commission* [2001] ECR II-1881.

In that case, the operators of a pub in the United Kingdom claimed, in a complaint under Article 3(2) of Regulation No 17 of the Council of 6 February 1992, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), that the lease used by the local brewery, Greene King, from which, as tenants, they were subject to an obligation to obtain beer, was contrary to Article 81(1) EC. Their complaint was rejected by the Commission on the ground that the standard lease used by Greene King did not fall within the scope of that article. The action which they brought before the Court of First Instance sought the annulment of that decision.

Having ascertained in detail that the contested decision correctly defined the relevant market as that of the distribution of beer in establishments selling alcoholic beverages for consumption on the premises the same as that identified by the Court of Justice in Case C-234/89 *Delimitis* [1991] ECR I-935 the Court considered whether the Commission was right to find that Greene King's network of agreements, consisting of the leases with a purchasing obligation concluded between that brewery and its tenants, did not make a significant contribution to that foreclosure of the relevant market, so that the agreements were not caught by the prohibition in Article 81(1) EC. The Court of First Instance endorsed that conclusion.

In that connection it recalled, first, that in order to assess whether a standard beer supply agreement contributes to the cumulative effect of closing off the market produced by all such agreements, it is necessary, as held in the case-law of the Court of Justice, to take into consideration the position of the contracting parties in the market. The contribution also depends on the duration of the agreements. If it is manifestly excessive in relation to the average duration of agreements generally concluded in the relevant market, the individual agreement falls under the prohibition laid down in Article 81(1) EC. A brewery holding a relatively small share of the market which ties its sales outlets for many years may contribute to foreclosure of the market as significantly as a brewery with a comparatively strong position in the market which regularly frees its outlets at frequent intervals. In this case neither the market share of the brewer nor the duration of the beer supply contracts were held to contribute significantly to the foreclosure of the market.

The Court of Justice went on to consider whether a network of agreements of a wholesaling brewery, here Greene King, which does not in itself significantly contribute to the foreclosure of the market, may be linked to networks of agreements of supplying breweries, which do contribute significantly to such foreclosure, and may thus fall within the scope of Article 81(1) EC. Two conditions must be met in that regard. First, it must be considered whether the beer supply agreements concluded between that wholesaling brewery and the supplying breweries, known as 'upstream' agreements, may be regarded as forming part of the supplying breweries' networks of agreements. That condition is satisfied if the upstream agreements contain terms which may be analysed as a purchasing obligation (commitments to purchase minimum quantities, stocking obligations or non-competition obligations). Second, for not only the 'upstream' agreements but also the agreements concluded between the wholesaling brewery

[11] Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty Case IV/F-3/33.708 British Sugar plc, Case IV/F-3/33.709 Tate & Lyle plc, Case IV/F-3/33.710 Napier Brown & Company Ltd, Case IV/F-3/33.711 James Budgett Sugars Ltd (OJ 1999 L 76, p. 1).

and the establishments tied to it the 'downstream' agreements to be attributed to the supplying breweries' networks of agreements, it is also necessary for the agreements between the supplying breweries and the wholesaling brewery to be so restrictive that access to the wholesaling brewery's network of 'downstream' agreements is no longer possible, or at least very difficult, for other breweries. If the restrictive effect of the 'upstream' agreements is limited, other breweries are able to conclude supply agreements with the wholesaling brewery and so enter the latter's network of 'downstream' agreements. They are thus in a position to have access to all the establishments in that network without it being necessary to conclude separate agreements with each outlet. The existence of a network of 'downstream' agreements thus constitutes a factor which can promote penetration of the market by other breweries. Concluding its analysis, the Court of First Instance held that the Commission did not make a manifest error of assessment in concluding in the contested decision (point 106) that Greene King's network of 'downstream' agreements could not be attributed to those of the supplying breweries which had concluded beer supply agreements with Greene King.

(b.2) Agreements prohibited by Article 65 CS

. Wirtschaftsvereinigung Stahl, the German steel industry trade association, and 16 of its members had notified the Commission of an agreement on an information exchange system which was declared contrary to Article 65(1) CS by decision of 26 November 1997. [12] That decision was annulled (judgment in Case T-16/98 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [2001] ECR II-1217), the Court of First Instance having pointed out that the Commission wrongly took account in its assessment of matters which were not notified to it. In that regard it recalled that information exchange agreements are not generally prohibited automatically but only if they have certain characteristics relating, in particular, to the sensitive and accurate nature of recent data exchanged at short intervals. Where the Commission based its assessment on the combined effect of the exchange of the three ECSC questionnaires 2-71, 2-73 and 2-74, whereas the notified agreement does not provide for the exchange of ECSC questionnaire 2-73, which specifically furnishes the most accurate and detailed data and is accordingly likely to reveal the strategy of the various producers, that fact has the effect of completely invalidating the analysis made by the Commission. If the Commission had taken account of the real scope of the notified agreement, it is not inconceivable that its evaluation would have been different and that it would have considered that the agreement was not contrary to Article 65(1) CS.

. By its decision of 21 January 1998 [13] the Commission found that a number of undertakings had reached an agreement to use with effect from the same date identical reference values in the method for calculating the alloy surcharge (the alloy surcharge is a price supplement calculated on the basis of the prices of alloying materials used by stainless steel producers (nickel, chromium and molybdenum), which is added to the basic price for stainless steel) with a view to securing an increase in the price of stainless steel. It imposed penalties on them on that basis.

In its judgment of 13 December 2001 in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen and Acciai speciali Terni* v *Commission* (not yet published in the ECR), the Court of First Instance upheld that decision, holding that the two applicants had committed an infringement deriving from their participation in an agreement concerning the introduction and application, in a

12 Commission Decision 98/4/ECSC of 26 November 1997 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/36.069 Wirtschaftsvereinigung Stahl) (OJ 1998 L 1, p. 10).

13 Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 Alloy Surcharge) (OJ 1998 L 100, p. 55).

concerted manner, of the same reference values for alloys in the formula for calculating the alloy surcharge. In its findings it recalled that the Commission is not obliged, in order to establish an infringement of Article 65(1) CS, to demonstrate that there was an adverse effect on competition, provided that it has established the existence of an agreement or concerted practice intended to restrict competition, even though the agreement related only to one component of the final price of stainless steel flat products.

(c) Exemptions from prohibition

The duration of an exemption must be sufficient to enable the beneficiaries to achieve the benefits justifying such exemption. However, some applicants disputed the legality of decisions addressed to them on the ground that they considered the duration of the individual exemption granted to them to be too short (judgments in *Institut des mandataires agréés* v *Commission* and *M6 and Others* v *Commission*, cited above). However, neither of those two actions was upheld in that regard.

In its findings in *M6 and Others* v *Commission* the Court of First Instance held that the applicants had not adduced sufficient evidence that the Commission had made a manifest error of assessment in determining the duration of the exemption under Article 81(3) EC, pointing out that, with regard to complex evaluations on economic matters, judicial review of those evaluations must confine itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces from them.

(d) Abuse of dominant position

In its judgment of 22 November 2001 in Case T-139/98 *AAMS* v *Commission* (not yet published in the ECR), the Court of First Instance upheld the Commission decision [14] finding that Autonoma dei Monopoli di Stato, a body forming part of the financial administration of the Italian State which, in particular, engages in the production, import, export and wholesale distribution of manufactured tobaccos, in taking advantage of its dominant position on the Italian market had engaged in improper behaviour in order to protect its position on the Italian market for cigarettes, in breach of Article 82 EC.

(e) Rights of the defence

. Mannesmannröhren-Werke brought an action before the Court of First Instance for annulment of a Commission decision taken pursuant to Article 11(5) of Regulation No 17 requiring it to reply to certain questions within the period prescribed on penalty of a fine. The applicant claimed that the decision infringed its rights of defence.

In its judgment in Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, the Court of First Instance partially upheld that claim, basing its findings on the reasoning of the Court of Justice in *Orkem.* [15] In so ruling, the Court of First Instance asserted that there is no absolute right to silence in Community competition proceedings but confirmed that an undertaking to which a decision requesting information is addressed has the right to refuse to

[14] Commission Decision 98/538/EC of 17 June 1998 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/36.010-F3 Amministrazione Autonoma dei Monopoli di Stato) (OJ 1998 L 252, p. 47).

[15] Judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

give replies in which it would be forced to admit the existence of an infringement. In this case, the Court of First Instance partially annulled the Commission decision in so far as it contained questions calling upon the undertaking to describe the purpose of certain meetings and the decisions adopted during them.

As regards the arguments to the effect that Article 6(1) and (2) of the ECHR enables a person in receipt of a request for information to refrain from answering the questions asked, even if they are purely factual in nature, and to refuse to produce documents to the Commission, the Court of First Instance pointed out that the applicant cannot directly invoke the ECHR before the Community court.

However, it emphasised that Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process. It is in application of those principles, *which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that guaranteed by Article 6 of the ECHR*, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation No 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission. It added that the fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process. There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission.

As regards the possible implications for the assessment of this case of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1), proclaimed on 7 December 2000 in Nice and cited by the applicant, the Court of First Instance confined itself to observing that the Charter had not yet been proclaimed on the date of the adoption of the contested decision (15 May 1998) and could therefore have no implications for the legality of that decision.

. In its judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited above, the Court of First Instance held that Krupp Thyssen Stainless, although it had made a statement by which it agreed to be held liable for conduct imputed to Thyssen Stahl since the latter's business in the product sector concerned by the infringement had been transferred to it, had not waived its right to be heard as to the facts. In that regard, while such a statement takes account *inter alia* of economic considerations specific to concentrations of undertakings and constitutes an exception to the principle that a natural or legal person may be penalised only for acts imputed to it individually, it must be interpreted strictly. In particular, unless he gives some indication to the contrary, the person making such a statement cannot be presumed to have waived the right to exercise his rights of defence. In the light of those considerations, the Court of First Instance partially annulled Article 1 of the contested decision.

(f) Examination of complaints by the Commission

While it has been settled case-law since the judgment in Case 125/78 *Gema* v *Commission* [1979] ECR 3173 that Article 3(2) of Regulation No 17 does not entitle the applicant within the meaning of that article to require from the Commission a final decision within the meaning of Article 249 EC as regards the existence or non-existence of an infringement of Article 81

EC and/or Article 82 EC, the Commission is obliged nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States (judgment in Case T-206/99 *Métropole télévision* v *Commission* [2001] ECR II-1057), and inform the complainant of the reasons why it decides, if it does, to close the file.

A number of cases gave the Court of First Instance an opportunity to ascertain whether the obligations incumbent upon the Commission in the processing of complaints referred to it were respected (judgments in Joined Cases T-197/97 and T-198/97 *Weyl Beef Products and Others* v *Commission* [2001] ECR II-303, Case T-26/99 *Trabisco* v *Commission* [2001] ECR II-633, Case T-62/99 *Sodima* v *Commission* [2001] ECR II-655, Case T-115/99 *SEP* v *Commission* [2001] ECR II-691 and *Métropole télévision* v *Commission*, cited above; order in *Compagnia Portuale Pietro Chiesa* v *Commission*, cited above). One case also concerned the obligations of the Commission in respect of a complaint relating to infringements of the ECSC Treaty (Case T-89/98 *NALOO* v *Commission* [2001] ECR II-515 (under appeal, Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P).

. One of the obligations incumbent upon the Commission is the obligation to state reasons for the measures it adopts. In two judgments, *Métropole télévision* v *Commission* and *NALOO* v *Commission*, cited above, the Court of First Instance raised of its own motion the Commission's failure to state reasons for the contested decisions and annulled them.

In *Métropole télévision* v *Commission* the contested decision rejected a complaint in which Métropole télévision criticised the practices of the European Broadcasting Union (EBU) in refusing its application for admission several times.

To understand the Court's ruling, it is necessary to bear in mind that, by its judgment in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole and Others* v *Commission* [1996] ECR II-649, the Court of First Instance annulled the decision granting an exemption under Article 81(3) EC *inter alia* for the EBU's statutes.

Following that judgment annulling the decision, in which the Court of First Instance did not rule on the application to the case in point of Article 81(1) EC, the Commission went back on its position concerning the application of that provision to the EBU's membership rules, expressing the view in the decision rejecting the complaint that those rules did not fall within the scope of that provision of the Treaty. Although the Court allowed such a substantial change in the Commission's position, it took the view that it required a statement of reasons. No reasons were stated in the case in point.

. The Court of First Instance also reviewed the merits of decisions rejecting complaints. It was essentially a matter of ascertaining whether the Commission was justified in rejecting a complaint on the ground of insufficient Community interest in pursuing examination of the case or because the conditions for the application of the Community competition rules in the EC Treaty were not satisfied.

For instance, in *Métropole télévision* v *Commission*, the Court of First Instance found not only that there was no statement of reasons, which in itself made the act voidable, but also that the Commission had infringed the obligations incumbent upon it when examining a complaint for infringement of Article 81 EC in failing to assess the possible persistence of anti-competitive effects and their impact on the market in question, even if those practices had ceased since the matter was referred to it.

. Finally, in its judgments in *Trabisco* v *Commission* and *Sodima* v *Commission*, cited above, the Court of First Instance held that, although it is true that the Commission is required to adopt, within a reasonable time, a decision on a complaint under Article 3 of Regulation No 17, the fact that it exceeds a reasonable time, even if proven, does not necessarily in itself justify annulment of the contested decision. It observed that, as regards application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding an infringement, where it has been proved that infringement of that principle has adversely affected the ability of the undertakings concerned to defend themselves. Except in that specific circumstance, failure to comply with the principle that a decision must be adopted within a reasonable time cannot affect the validity of the administrative procedure conducted under Regulation No 17. Accordingly, the plea alleging the unreasonable duration of the administrative procedure was ineffective in that connection.

(g) Determining the amount of fines

. In 1998 the Commission adopted guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3). The first cases involving the application of those guidelines have come before the Court of First Instance.

Having been fined ECU 39.6 million, by a Commission decision, [16] for infringement of Article 81(1) EC on the industrial and retail sugar markets, British Sugar argued before the Court of First Instance that the concept of aggravating circumstances introduced by the guidelines is not in conformity with Article 15(2) of Council Regulation No 17. In its judgment in *Tate & Lyle and Others* v *Commission*, the Court held that that argument was without foundation. The procedure followed by the Commission to fix the amount of the fine, in the first stage assessing the gravity solely by reference to factors relating to the infringement itself, such as its nature and its impact on the market, and in the second, modifying the assessment of the gravity by reference to circumstances relating to the undertaking concerned, which, moreover, leads the Commission to take into account not only possible aggravating circumstances but also, in appropriate cases, attenuating circumstances, is far from being contrary to the letter and the spirit of Article 15(2) of Regulation No 17. It allows the Commission, particularly in the case of infringements involving many undertakings, to take account in its assessment of the gravity of the infringement, of the different role played by each undertaking and its attitude towards the Commission during the course of the proceedings.

. An undertaking may adopt a cooperative attitude towards the Commission. Such cooperation may be rewarded pursuant to the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).

The extent of the cooperation, its classification as such and whether it is actually taken into account by the Commission in fixing the amount of the fine are, however, subject to dispute, as the cases of *Tate & Lyle* v *Commission* in which the Court of First Instance did not correctly assess the extent of the cooperation by Tate & Lyle and *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited above, and Case T-48/98 *Acerinox* v *Commission* (judgment of 13 December 2001, not yet published in the ECR) show.

In the latter two judgments, the Court of First Instance held that the Commission had breached the principle of equal treatment in applying one of the criteria laid down in the above notice in a discriminatory manner.

[16] See footnote 11.

The dispute on this point arose because the Commission allowed a reduction in the amount of the fines imposed on the applicants which was less than that allowed to Usinor, the first undertaking to reply to the Commission's questions regarding the alleged infringement, on the ground that the applicants had provided no further evidence than that in the first reply received. In reply to a question from the Court, the Commission confirmed that it had sent the same questionnaire to all the undertakings.

Since the Commission did not show that the applicants had had any knowledge of the answers given by Usinor, the mere fact that one of those undertakings was the first to acknowledge the facts could not constitute an objective reason for treating the undertakings concerned differently. The appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission.

(h) Concentrations

Only one case on the subject of concentrations of undertakings was decided by the Court of First Instance. It fell within the rules of the ECSC Treaty (Case T-156/98 *RJB Mining* v *Commission* [2001] ECR II-337 (under appeal, Joined Cases C-157/01 P and C-169/01 P)). The case arose from the Commission decision of 29 July 1998 [17] authorising, under Article 66 CS, the merger of three German coal producers, RAG Aktiengesellschaft (RAG), Saarbergwerke AG (SBW) and Preussag Anthrazit GmbH. The price to be paid by RAG for the acquisition of SBW was fixed at one German mark. That merger formed part of an agreement ('the Kohlekompromiß') concluded between those three companies and the German authorities, which provided for the grant of State aid by the German Government.

In annulling the contested decision, the Court of First Instance held that in adopting a decision on the compatibility of a concentration between undertakings with the common market the Commission must take into account the consequences which the grant of State aid to those undertakings has on the maintenance of effective competition in the relevant market. The Court explained that although the Commission was not required to assess the legality of the supposed aid, namely the price paid for the acquisition of SBW, it could not, in its analysis of the competitive situation under Article 66(2) CS, refrain from assessing whether, and if so to what extent, the financial and thus the commercial strength of the merged entity was strengthened by the financial support provided by that supposed aid.

2. State aid

The Court decided actions seeking the annulment of decisions taken under the rules of the EC Treaty (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587 (under appeal, Case C-321/01 P) and of the ECSC Treaty (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523 and Joined Cases T-12/99 and T-63/99 *UK Coal* v *Commission* [2001] ECR II-2153).

(a) Examination by the Commission

[17] Commission decision of 29 July 1998 authorising the acquisition by RAG Aktiengesellschaft of control of Saarbergwerke AG and Preussag Anthrazit GmbH (Case No IV/ECSC.1252-RAG/Saarbergwerke AG/Preussag Anthrazit).

By decision of 1 October 1997, the Commission decided that the extension by the German authorities of the aid scheme for investment projects in the new *Länder*, a scheme which it had previously approved, constituted State aid incompatible with the common market. One company which stood to benefit from that extension, Mitteldeutsche Erdoel-Raffinerie, which had been unable to complete its investment project in the time allowed by the original aid scheme for reasons beyond its control, brought an action which gave rise to the judgment in *Mitteldeutsche Erdoel-raffinerie* v *Commission*, cited above, annulling, *in respect of the applicant*, the contested decision. The Court of First Instance held that the Commission was not justified in concluding *as far as the applicant was concerned*, that the legal provision at issue introduced *additional* State aid or was incompatible with the common market.

In its findings the Court stated that, in the decision it adopts following its examination, the Commission can consider that some specific applications of the aid scheme notified constitute aid while others do not, or can declare certain applications only to be incompatible with the common market. In the exercise of its wide discretion, it may differentiate between the beneficiaries of the aid scheme notified by reference to certain characteristics they have or conditions they satisfy. It is even possible that the Commission should not confine itself to carrying out a general, abstract analysis of the aid scheme notified, but should also be obliged to examine the specific case of one of the undertakings benefitting from the aid. In the case in point, such an examination was required not only in view of the particular features of the case, but also because, during the administrative procedure, the Government of the Member State concerned had expressly asked for that to be done.

(b) Opening of the formal examination procedure

On account of its failure to initiate the procedure under Article 88(2) EC, the Commission was censured by the Court of First Instance which annulled the decision of the Commission to raise no objection to the grant of aid by the Federal Republic of Germany to Chemische Werke Piesteritz GmbH (judgment in *Prayon-Rupel* v *Commission*, cited above). The conditions under which that procedure must be initiated were defined.

In that regard, it is settled case-law that the procedure under Article 88(2) EC is obligatory if the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary procedure under Article 88(2) EC and take a favourable decision on a State measure which has been notified unless it is in a position to reach the firm view, following an initial investigation, that the measure cannot be classified as aid within the meaning of Article 87(1) EC, or that the measure, whilst constituting aid, is compatible with the common market. On the other hand, if the initial analysis results in the Commission taking the contrary view of the aid's compatibility with the common market or does not enable all the difficulties raised by the assessment of the measure in question to be overcome, the Commission has a duty to gather all necessary views and to that end to initiate the procedure under Article 88(2) EC. When the Commission decides, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of that procedure, that decision must satisfy three requirements.

Firstly, under Article 88 EC the Commission's power to find aid to be compatible with the common market upon the conclusion of the preliminary procedure is restricted to aid measures that raise no serious difficulties. That criterion is thus an exclusive one. The Commission may not, therefore, decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative convenience.

Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard. Whilst its powers are circumscribed as far as initiating the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of good administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered.

Thirdly, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content, conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market. It follows that judicial review by the Court of First Instance of the existence of serious difficulties will, by nature, go beyond simple consideration of whether or not there has been a manifest error of assessment.

In this case the applicant succeeded in proving the existence of serious difficulties. That proof was furnished by reference to a body of consistent evidence, namely that the Commission did not possess sufficient information and the fact that the procedure conducted by the Commission significantly exceeded, both in terms of the duration of the administrative procedure and in terms of the circumstances under which it was conducted, the normal parameters of a preliminary examination carried out pursuant to Article 88(3) EC.

(c) Distinction between new and existing aid

. By its judgment in *Regione autonoma Friuli-venezia Giulia* v *Commission*, cited above, the Court of First Instance confirmed the solution it had adopted in its judgment in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319 (under appeal, Case C-298/00 P). [18]

Laws of the Friuli-Venezia Giulia Region (Italy) of 1981 and 1985 provide for financial aid measures for local road haulage firms, but those measures were not notified to the Commission. In a decision adopted in 1997, the Commission declared the aid granted to international road haulage firms and that granted, from 1 July 1990 to firms carrying out exclusively local, regional or national haulage incompatible with the common market and ordered its recovery.

Upholding the solution originally devised in the judgment in *Alzetta and Others* v *Commission*, the Court of First Instance held that a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, in so far as at the time of its establishment it did not come within the scope of Article 87(1) EC, which applies only to sectors open to competition.

In this case, as the cabotage market was only liberalised from 1 July 1990, aid granted to undertakings engaged solely in local, regional or national transport, under systems set up in 1981 and 1985, must be classified as existing aid and can be the subject, if at all, only of a decision finding it incompatible as to the future.

[18] This judgment was commented on in the 2000 Annual Report.

Conversely, since the international road haulage sector was opened up to competition from 1969 onwards, the systems of aid established in 1981 and 1985 in that sector should have been regarded as new systems of aid which were subject, as such, to the obligation of notification laid down by Article 88(3) EC.

The contested decision was therefore annulled in so far as in it the Commission declared aid granted with effect from 1 July 1990 to undertakings engaged solely in local, regional or national transport to be illegal and required recovery of that aid.

As the Court of Justice now has before it an action for annulment of the decision at issue in the case under consideration, brought by the Italian Republic (Case C-372/97), and appeals against those two judgments of the Court of First Instance, the Court of Justice will give a final ruling on the issue of law thus decided.

. The judgment in *Agrana Zucker und Stärke* v *Commission*, cited above, recalls that if the Commission has not responded within two months of full notification of a new aid plan the Member State concerned may put the proposed aid into effect provided, however, that it has given prior notice to the Commission, and that aid will then come under the scheme for existing aid. Compliance with that obligation to give notice is designed to establish, in the interest of the parties concerned and of the national courts, the date from which the aid falls under the scheme for existing aid. Where that obligation has not been met the aid concerned cannot be regarded as existing aid.

(d) Derogations from the prohibition

The Court's findings as to derogations from the prohibition laid down by the EC Treaty (*inter alia* the judgment in *Agrana Zucker und Stärke* v *Commission*, cited above) confirm previous, well-established decisions.

However, in connection with the ECSC Treaty, the interpretation of the rules applicable to State aid in the coal sector gave rise to some more precise definitions in the proceedings between UK Coal, formerly RJB Mining, and the Commission.

On 9 September 1999 the Court had delivered an *interlocutory judgment* in Case T-110/98 *RJB Mining* v *Commission* [1999] ECR II-2585, [19] confined to two questions of law, raised by RJB Mining in its action for annulment of the Commission decision authorising financial aid from the Federal Republic of Germany for the coal industry in 1997. Those two questions were whether the Commission is authorised by Decision No 3632/93/ECSC [20] to give *ex post facto* approval to aid which has already been paid without its prior approval and whether the Commission has power under Article 3 of that decision to authorise the grant of operating aid provided only that the aid enables the recipient undertakings to reduce their production costs and achieve degression of aid, without their having any reasonable chance of achieving economic viability within the foreseeable future.

The Court of First Instance gave the same replies to those questions, raised in actions for annulment of Commission decisions authorising financial aid from the Federal Republic of Germany for the coal industry in 1998 and 1999, in its judgment in *UK Coal* v *Commission*,

19 That judgment was commented on in the 1999 Annual Report.

20 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).

cited above. Thus, it took the view that the plea based on the alleged prohibition on authorising *ex post facto* aid paid without prior authorisation was unfounded. It also dismissed the plea based on the Commission's alleged lack of authority by reason of late notification by the Federal Republic of Germany of certain financial aid, the Court taking the view that the time-limit for notification provided for by Decision No 3632/93 is a purely procedural time-limit of an indicative nature.

The answer given to the second question makes it justifiable to point out again that Article 3 of Decision No 3632/93 provides that Member States which intend to grant *operating aid* for 1994 to 2002 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 that, contrary to the interpretation put forward by the applicant, 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.*

Moreover, this case gave the Court an opportunity to define the term 'degression of aid', one of the objectives set by Decision No 3632/93. In that regard, it pointed out that, as provided in Article 3(1) of Decision No 3632/93, operating aid is intended solely to cover the difference between production costs and the selling price on the world market. By virtue of Article 3(2) of that decision, that aid may be authorised only if there is at least a trend towards a reduction in the production costs of the undertakings receiving it. In that context, the first indent of Article 2(1) of the decision sets as 'one of the ... objectives' to be attained that of 'achieving degression of aids', an aim to be achieved in the light of coal prices on international markets. The economic realities, namely the structural unprofitability of the Community coal industry, in the light of which the decision was taken, must be taken into account when interpreting Article 2(1) of that decision. As neither the Community institutions, the Member States or the undertakings concerned have a significant influence on the price on the world market, the Commission cannot be reproached for having attached overriding importance, in terms of a degression of aid to the coal industry, to reducing production costs, since any reduction necessarily means that the volume of aid is smaller than if the reduction had not occurred, irrespective of movements in world market prices.

Finally, the claim that the Commission did not take sufficient account in its assessment of aid from the Federal Republic of Germany to the coal industry in 1998 and 1999 of the question whether the merger of the three German coal producers [21] entailed aid which was not notified was rejected, as the Court of First Instance took the view that the Commission did not make a manifest error of assessment in authorising State aid.

(e) Obligation to recover aid

The obligation to recover aid declared incompatible with the common market was examined in *Regione autonoma Friuli-Venezia Giulia* v *Commission* and *Agrana Zucker und Stärke* v *Commission*. However, as regards the obligation to recover, the judgment in *ESF Elbe-Stahlwerke Feralpi* v *Commission* is most worthy of attention. In that case, the Court held, in

[21] The decision authorising that merger was annulled by the judgment in *RJB Mining* v *Commission*, cited above.

a finding sufficiently rare to be noteworthy, that the principle of legitimate expectations precluded the recovery of one element of aid from its beneficiary.

In that judgment the Court of First Instance held that the principle of legitimate expectations precluded the Commission from ordering the recovery of aid, when, according to information from third parties, it considered its compatibility with the common market in coal and steel *several years after approval of the aid concerned*, and held it incompatible with that market. [22]

3. Trade protection measures

The Court of First Instance delivered several judgments on the anti-dumping rules (judgment in Case T-82/00 *Bic and Others* v *Council* [2001] ECR II-1241, and *Euroalliages* v *Commission*, cited above) and the anti-subsidy rules (*Mukand and Others* v *Council*, cited above).

In its judgment in *Euroalliages* v *Commission*, the Court of First Instance, which dismissed the action for annulment of a Commission decision terminating an anti-dumping proceeding, [23] interpreted the provisions of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 056, p. 1), governing the conditions under which anti-dumping measures can be maintained after expiry of the five year period following their introduction (Article 11(2)).

It stated that the rule that information relating to a period subsequent to the investigation period is not, normally, to be taken into account applies also to investigations relating to expiry reviews. In that regard, it pointed out that the exception to that rule, allowed by the Court in its judgment in Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, concerns only the case in which data relating to a period after the investigation period disclose new developments which make the introduction or maintenance of anti-dumping duty manifestly inappropriate. That implies that factors arising after the investigation period cannot be taken into account in order for duties to be retained.

. By its judgment in *Mukand and Others* v *Council*, cited above, the Court of First Instance annulled Council Regulation (EC) No 2450/98 of 13 November 1998 imposing a definitive countervailing duty on imports of stainless steel bars originating in India and collecting definitively the provisional duty imposed (OJ 1998 L 304, p. 1), in so far as it concerned imports into the European Community of products manufactured by the four applicant companies.

Under Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1) and the Agreement on Subsidies and Countervailing Measures concluded within the World Trade Organisation in the context of the Uruguay Round of Negotiations (OJ 1994 L 336, p. 156), countervailing duties may be imposed only if the subsidised imports cause material injury to a Community industry and no account is taken of factors other than the imports in question in assessing whether there is such injury.

22 In the judgment, the Court of First Instance also defined the scope of the rules on State aid under the ECSC Treaty.

23 Commission Decision 1999/426/EC of 4 June 1999 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Poland (OJ 1999 L 166, p. 91).

In this case, the Court of First Instance held that the assessment of the injury and of the causal link between the injury and the subsidised imports set out in the contested regulation was vitiated by a manifest error. It pointed out that the Commission and the Council disregarded a known factor, other than the subsidised imports — that is to say, a uniform, consistent industrial practice of Community producers, the objective effect of which was automatically to mirror, in the markets for those products, artificial price increases — which might have been a concurrent cause of the injury sustained by the Community industry.

4. Trade mark law

The case-law on trade marks was developed by a number of judgments concerning assessment of the conditions for registration of a Community mark laid down by Regulation (EC) No 40/94, [24] whether verbal, [25] three-dimensional [26] or figurative. [27] The decided cases concerned decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market ('OHIM') refusing to register the trade marks applied for. The applications were refused on the grounds of lack of distinctive character (Article 7(1)(b) of Regulation No 40/94) or of the descriptive nature (Article 7(1)(c)) of the trade marks whose registration was applied for. Those two *absolute grounds for refusal* can only be assessed in relation to the products and services concerned in respect of which registration was applied for.

These cases cannot be covered exhaustively but it is of note that the Court upheld decisions of Boards of Appeal of the OHIM in which they had refused registration as a Community trade mark, on the basis of the descriptive nature of the terms, 'Cine Action' in relation to services specifically and directly concerning the product 'action film' or its production or broadcasting, 'Cine Comedy' in relation to services specifically and directly concerning the product 'comedy in film form' or its production or broadcasting, 'Giroform' for a product consisting of a paper compound forming a duplication medium and 'UNIVERSALTELEFONBUCH' and

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

25 Judgments in Case T-135/99 *Taurus-Film* v *OHIM (Cine Action)* [2001] ECR II-379, Case T-136/99 *Taurus-Film* v *OHIM (Cine Comedy)* [2001] ECR II-397, Case T-193/99 *Wrigley* v *OHIM (DOUBLEMINT)* [2001] ECR II-417 (under appeal, Case C-191/01 P), Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, Case T-24/00 *Sunrider* v *OHIM (VITALITE)* [2001] ECR II-449, Case T-87/00 *Bank für Arbeit und Wirtschaft* v *OHIM (EASYBANK)* [2001] ECR II-1259, Case T-359/99 *DKV* v *OHIM (EuroHealth)* [2001] ECR II-1645 and Joined Cases T-357/99 and T-358/99 *Telefon & Buch* v *OHIM (UNIVERSALTELEFONBUCH and UNIVERSAL-KOMMUNIKATIONSVERZEICHNIS)* [2001] ECR II-1705 (under appeal, Case C-326/01 P), and judgments of 3 October 2001 in Case T-14/00 *Zapf Creation* v *OHIM (New Born Baby)* (under appeal, Case C-498/01 P), and of 11 December 2001 in Case T-138/00 *Erpo Möbelwerk* v *OHIM (DAS PRINZIP DER BEQUEMLICHKEIT)*, not yet published in the ECR.

26 Judgments of 19 September 2001 in the so-called 'tablets' cases, Case T-335/99 *Henkel* v *OHIM (rectangular red and white tablet)* (under appeal, Case C-456/01 P), Case T-336/99 *Henkell* v *OHIM (rectangular green and white tablet)* (under appeal, Case C-457/01 P), Case T-337/99 *Henkel* v *OHIM (round red and white tablet)*, Case T-117/00 *Procter & Gamble* v *OHIM (square white and pale green tablet)* (under appeal, Case C-468/01 P), Case T-118/00 *Procter & Gamble* v *OHIM (square white tablet with green and pale green speckles)* (under appeal, Case C-469/01 P), Case T-119/00 *Procter & Gamble* v *OHIM (square white tablet with yellow and blue speckles* (under appeal, Case C-470/01 P), Case T-120/00 *Procter & Gamble* v *OHIM (square white tablet with blue speckles)* (under appeal Case C-471/01 P), Case T-121/00 *Procter & Gamble* v *OHIM (square white tablet with green and blue speckles)* (under appeal, Case C-472/01 P), Case T-128/00 *Procter & Gamble* v *OHIM (square tablet with inlay)* (under appeal, Case C-473/01 P), Case T-129/00 *Procter & Gamble* v *OHIM (rectangular tablet with inlay)* (under appeal, Case C-474/01 P), not yet published in the ECR.

27 Judgment of 19 September 2001 in Case T-30/00 *Henkel* v *OHIM (image of a detergent product)*, not yet published in the ECR, one of the so-called 'tablets' cases.

'UNIVERSALKOMMUNIKATIONSVERZEICHNIS' for telephone or communications directories intended for universal use.

However, the Court of First Instance disagreed with the Boards of Appeal of OHIM in holding that no descriptive function could be ascribed to the term VITALITE, for food for babies or mineral and aerated waters, the term DOUBLEMINT, for certain mint-flavoured products, the term EASYBANK, for on-line banking services, the term EuroHealth, for services falling within the category of 'financial affairs' or the sign New Born Baby, for dolls to play with and accessories for such dolls in the form of playthings, and the term DAS PRINZIP DER BEQUEMLICHKEIT, for land vehicles and household and office furniture.

The 'tablets' cases gave the Court an opportunity, for the first time, to review the legality of decisions of the Boards of Appeal of OHIM finding that, in addition to one figurative trade mark (Case T-30/00), the three-dimensional trade marks applied for consisting of the shape and, in some cases, the arrangement of the colours or the design of laundry or dishwasher products were devoid of distinctive character.

In that regard, it held that it is clear from Article 4 of Regulation No 40/94 that both a product's shape and its colours fall among the signs which may constitute a Community trade mark, while pointing out that the fact that a category of signs is, in general, capable of constituting a trade mark does not mean that signs belonging to that category necessarily have distinctive character in relation to a specific product or service.

It also held, in ten of the judgments in question, that Article 7(1)(b) of Regulation No 40/94 does not distinguish between the different categories of trade marks. The criteria for assessing the distinctive character of three-dimensional trade marks consisting of the shape of the product itself are therefore no different from those applicable to other categories of trade marks. It went on to hold that, nevertheless, when those criteria are applied, account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to a three-dimensional mark consisting of the shape and the colours of the product itself as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of the shape of the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself.

Finally, in the judgment in *Henkel* v *OHIM (image of a detergent product)*, cited above, which concerned a figurative mark consisting of a faithful representation of the product itself, the Court held that an assessment of distinctive character cannot result in different outcomes for a three-dimensional mark consisting of the design of the product itself and for a figurative mark consisting of a faithful representation of the same product.

. It should be noted, at this point in the commentary, that the proceedings brought by Mrs Kik, supported by the Hellenic Republic, against OHIM, challenging the legality of the rules governing languages in Regulation No 40/94, ended in the dismissal of the action (judgment in Case T-120/99 *Kik* v *OHIM* [2001] ECR II-2235 (under appeal, case C-361/01 P). The Court, sitting with five judges, held that the obligation incumbent on the applicant for registration of a Community trade mark to indicate a 'second language' (German, English, Spanish, French and Italian) as a possible language of proceedings for opposition, revocation or invalidity proceedings, did not involve an infringement of the principle of non-discrimination.

. The last item of note under this heading is the judgment of 15 November 2001 in Case T-128/99 *Signal Communications* v *OHIM (TELEYE)*, not yet published in the ECR, which is unusual in that it concerns an aspect of the registration procedure and a claim for priority of

a previously filed application. In this case, the Court of First Instance annulled the decision of the Board of Appeal of OHIM refusing a claim for correction of an application for a Community trade mark on the ground that the correction sought was in no way abusive and did not entail substantial alteration of the trade mark.

5. Access to Council and Commission documents

The Court ruled on three occasions on the conditions governing public access to documents of the Council and the Commission (judgments in Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265 (under appeal, Case C-353/01 P), of 10 October 2001 in Case T-111/00 *British American Tobacco International (Investments)* v *Commission* and of 11 December 2001 in Case T-191/99 *Petrie and Others* v *Commission*, not yet published in the ECR) as laid down in the legislation in force *before* the adoption of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). [28] It must be remembered that, on 6 December 1993, the Council and Commission approved a Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41). To implement the principles laid down by that code, the Council adopted, on 20 December 1993, Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43). Similarly, on 8 February 1994, the Commission adopted Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 046, p. 58).

. By its judgment in *British American Tobacco International (Investments)* v *Commission*, cited above, the Court of First Instance annulled the Commission's decision partially to reject an application for access to certain minutes of the Committee on Excise Duties, chaired by the Commission and made up of representatives of the Member States. In that case the Court was required to rule on the question whether the Commission was entitled not to disclose the identity of the delegations which gave their views on the tax treatment of expanded tobacco at the meetings recorded in the minutes at issue, on the basis of the non-mandatory exception relating to the confidentiality of its proceedings.

In order to be able to rule in the case, the Court of First Instance ordered the Commission to produce the minutes in question so that it could consider their contents. In accordance with the third subparagraph of Article 67(3) of the Rules of Procedure, a provision invoked for the first time since its entry into force on 1 February 2001, the documents forwarded were not communicated to the applicant.

As regards the substance, the Court held that the deliberations of the Committee on Excise Duties should be regarded as being the deliberations of the Commission. However, the mere fact that the documents at issue relate to deliberations could not by itself justify application of the exception relating to confidentiality of proceedings. In each case, it is necessary to strike a balance between the interest of the citizen and that of the Commission with regard to the content of the document concerned.

The Court of First Instance held, in this case, that the minutes related to discussions which had been terminated by the time British American Tobacco International (Investments) made its request for access. Disclosure of the identities of the delegations referred to in those documents could no longer prejudice the proper conduct of the committee's proceedings, in particular, the free expression by the Member States of their respective positions regarding the tax treatment of expanded tobacco. Consequently, it held that the ground for refusal relied on

28 Regulation No 1049/2001 has been applicable since 3 December 2001.

could not cause the Commission's interest in protecting the confidentiality of the proceedings of the Committee on Excise Duties to prevail over the applicant's interest.

. Although the Council and Commission did not consider the possibility of granting partial access to the documents requested, pursuant to the rule laid down in the judgment in Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, upheld on appeal by the judgment of the Court of Justice of 6 December 2001 in Case C-353/99 P, not yet published in the ECR, the Court of First Instance, in its judgment in *Mattila* v *Council and Commission*, cited above, did not annul the decisions taken by those two institutions to refuse access to those documents. The Court of First Instance held as it did because it took the view that, given that the disclosure of parts of documents containing no real information would have been of no use to the applicant and given the nature of the documents in question, had those institutions considered the possibility, they would not in any event have agreed to partial access. Accordingly, the Court held that the fact that the defendant institutions failed to consider the question of granting partial access had no effect on the outcome of their examination in the particular circumstances of the case.

. Finally, in its judgment in *Petrie and Others* v *Commission*, cited above, the Court of First Instance again held that the Commission was entitled to rely on the authorship rule in refusing to grant access to documents written by third parties. It was also held that the refusal to disclose letters before action and reasoned opinions sent to a State in the course of an infringement procedure was justified by the need to protect the public interest as regards inspections and investigations and court proceedings. As the contested decision included a statement of reasons and was well-founded, the action was dismissed.

6. Customs cases

Apart from the question of the tariff classification of certain equipment (Joined Cases T-133/98 and T-134/98 *Hewlett Packard France and Hewlett Packard Europe* v *Commission* [2001] ECR II-613), it was the Community legislation laying down the conditions for the repayment or remission of import duties [29] which was, once again, at the heart of several cases.

It must be observed in this connection that, under Article 13(1) of Regulation No 1430/79 and Article 905(1) of Regulation (EEC) No 2454/93, a person is entitled to remission of import duties if he can establish both a special situation and the absence of any deception or obvious negligence on his part.

. The judgment in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission*, the 'Turkish television' cases, [2001] ECR II-1337, found in favour of thirteen European importers who had contested Commission decisions that the applications for remission of import duties submitted to that institution by several Member States were not justified. Those applications were made after the Commission had instructed the Member States concerned to seek payment of the customs duties laid down by the Common Customs Tariff from the companies which imported the colour television sets manufactured in Turkey, in which the components originating in third countries had been neither released for free circulation nor subject to the compensatory levy.

29 In particular, Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), subsequently replaced by Article 239(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as further defined *inter alia* by Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code (OJ 1993 L 253, p. 1).

The Court of First Instance found against the Commission on two counts.

First of all, it considered of its own motion whether the Commission had observed the applicants' rights of defence during the administrative procedure leading to the adoption of the contested decisions. It concluded that it had not, holding that it was clear that none of the applicants was placed in a position, before the contested decisions were adopted, to take a stance and make known its views adequately on the evidence relied upon by the Commission in deciding that remission was not justified. It emphasised, in particular, that in view of the power of assessment enjoyed by the Commission when it adopts a decision pursuant to the general equitable provision contained in Article 13 of Regulation No 1430/79, it is all the more important that observance of the right to be heard be guaranteed in procedures instituted under that regulation. That conclusion is particularly apt where, in exercising its exclusive authority under Article 905 of Regulation No 2454/93, the Commission proposes not to follow the opinion of the national authority as to whether the conditions laid down by Article 13 have been met, and in particular as to whether any obvious negligence can be attributed to the person concerned.

Secondly, it analysed whether the Commission was entitled to take the view, in the contested decisions, that the remission of duties was not justified on the ground that the conditions laid down by Article 13(1) of Regulation No 1430/79 (existence of a special situation and absence of any obvious negligence or deception on the part of the person concerned) were not met. In that connection, it held that, in order to determine whether the circumstances of the case constitute a special situation within the meaning of that article, the Commission must assess all the relevant facts. That obligation implies that, in cases in which the persons liable have relied, in support of applications for remission, on the existence of serious deficiencies on the part of the contracting parties in implementing an agreement binding the Community, the Commission must base its decision as to whether those applications are justified on all the facts relating to the disputed imports of which it gained knowledge in the performance of its task of supervising and monitoring the implementation of that agreement. Similarly, it cannot disregard relevant information of which it has gained knowledge in the performance of its tasks and which, although not forming part of the administrative file at the stage of the national procedure, might have served to justify remission for the interested parties. Moreover, although the Commission enjoys a discretionary power in applying Article 13, it is required to exercise that power by genuinely balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith in not suffering harm which goes beyond normal commercial risks. Consequently, when considering whether an application for remission is justified, it cannot take account only of the conduct of importers. It must also assess the impact on the resulting situation of its own conduct, which may itself have been wrongful.

On conclusion of its analysis, having taken account of all the documents relating to implementation of the provisions of the Association Agreement between the European Economic Community and the Republic of Turkey and the Additional Protocol as regards the importation of colour television sets from Turkey during the period in question (1991 to 1993 and early 1994) of which the Commission had knowledge at the time it took the contested decisions, the Court of First Instance held that *the serious deficiencies attributable to the Commission and the Turkish authorities had the effect of placing the applicants in a special position in relation to other traders carrying out the same activity.* Those deficiencies undoubtedly helped to bring about irregularities which led to customs duties being entered in the accounts post-clearance in respect of the applicants. It also held that in the circumstances of the case there was no obvious negligence or deception on the part of the applicants.

. By its judgment in Case T-330/99 *Spedition Wilhelm Rotermund* v *Commission* [2001] ECR II-1619, the Court of First Instance annulled a Commission decision that the remission

of customs duties applied for was not justified in the absence of a special situation within the meaning of Article 905(1) of Regulation No 2454/93.

According to the Court of First Instance, since the factual information sent to the Commission by the national authorities and deriving from fraudulent activity by third parties was not questioned or supplemented, the Commission not having asked for additional information, and since that information derived from internal operations of the administration of a Member State which the applicant had no right to monitor, and which it could not influence in any way, the Commission could not merely make a finding that the applicant was not in a special situation since those circumstances were beyond the normal commercial risk it would normally incur. In those circumstances the Commission was not entitled to limit the scope of its assessment to the possibility of active complicity by a particular customs official and require the applicant to supply, if necessary by producing a document from the competent Spanish authorities, formal and definitive proof of such complicity. By doing so the Commission failed to appreciate both its obligation to assess all the facts itself in order to determine whether they constituted a special situation, and the autonomous nature of the procedure laid down in Article 905 et seq of Regulation No 2454/93.

7. Community funding

Under this heading discussion will be limited to the judgment in Case T-143/99 *Hortiplant* v *Commission* [2001] ECR II-1665 (under appeal, Case C-330/01 P), in which it was held that, in accordance with the obligations incumbent on applicants for and recipients of Community financial assistance, they are, in particular, required to supply the Commission with reliable information which is not likely to mislead, as otherwise the system of supervision and rules of evidence introduced in order to check whether the conditions for granting assistance have been met cannot operate correctly.

In that case, the Court of First Instance upheld the Commission decision withdrawing the EAGGF aid it had granted to Hortiplant under Regulation (EEC) No 4256/88. [30] It held *inter alia* that the production of invoices and the charging of costs which were not genuine, together with failure to comply with the obligation to provide part-financing, established in the case, constituted serious infringements of the conditions for granting the financial assistance in question and of the obligation to provide information and act in good faith, which is incumbent upon the recipient of such assistance and, consequently, had to be regarded as irregularities for the purposes of Article 24 of Regulation (EEC) No 4253/88. [31]

8. Law governing the institutions

Rule 29 of the Rules of Procedure of the European Parliament provides that Members may form themselves into groups according to their political affinities. Following the European elections in June 1999 the 'Groupe technique des députés indépendants (TDI) Groupe mixte'

30 Council Regulation (EEC) No 4256/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25).

31 Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 (OJ 1993 L 193, p. 20).

(Technical Group of Independent Members Mixed Group), whose rules of constitution provided that the members had total political independence of one another, was set up. On 14 September 1999, the Parliament, taking the view that the conditions laid down for the constitution of a political group were not satisfied, adopted an interpretative note to Rule 29 of its Rules of Procedure, prohibiting the formation of the TDI group. [32]

By its judgment in *Martinez and Others* v *Parliament*, cited above, the actions brought by Members of the European Parliament, the Front national and la Lista Emma Bonino against that note were dismissed. [33] In holding thus, the Court of First Instance confirmed that the constitution of the TDI Group was not in conformity with Parliament's Rules of Procedure.

This demonstrates that the criterion relating to political affinities for the formation of political groups constitutes a mandatory requirement. In that connection, the Court of First Instance observed that the requirement of political affinity between the members of a group does not, however, preclude them in their day-to-day conduct from expressing different political opinions on any particular subject, in accordance with the principle of independence laid down in Article 4(1) of the 1976 Act [34] and Rule 2 of the Rules of Procedure. Accordingly, the fact that members of one and the same political group may vote differently must, under those circumstances, be regarded not as indicating a lack of political affinity amongst themselves but as illustrating the principle of a parliamentarian's independence.

In reply to the applicants' contentions, the Court of First Instance held, first, that the Parliament had competence to monitor, as it did in this case, compliance with Rule 29(1) by a group formation of which is declared by a number of Members.

Assessing the extent of the discretion which the Parliament must be allowed in exercising that competence, it held, second, that the concept of political affinity must be understood as having in each specific case the meaning which the Members forming themselves into a political group intend to give to it without necessarily openly so stating. It follows that Members declaring that they are organising themselves into a group under this provision are presumed to share political affinities, however minimal. However, that presumption cannot be regarded as irrebuttable. In that regard, under its supervisory competence the Parliament has the power to examine whether the requirement laid down in Rule 29(1) of the Rules of Procedure has been observed where the Members declaring the formation of a group openly exclude any political affinity between themselves, in patent non-compliance with the abovementioned requirement.

Third, it held that the assessment made by the Parliament as regards the failure by the TDI Group to meet the requirement as to political affinities was well-founded. Several matters, which find expression in the constitution rules of the TDI Group, show that the members of that group agreed to eliminate any risk of being perceived as sharing political affinities and refused to regard the group as a vehicle for articulating joint political action, restricting it solely to financial and administrative functions.

32 According to the interpretation adopted: 'The formation of a group which openly rejects any political character and all political affiliation between its Members is not acceptable within the meaning of this Rule.'

33 By order of 25 November 1999 in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, the President of the Court of First Instance granted suspension of operation of the act; that order was commented on in the 1999 Annual Report.

34 Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage (OJ 1976 L 278, p. 5).

Furthermore, having upheld the admissibility of the objection of illegality of the combined provisions of Rule 29(1) and Rule 30 in that they allow within the Parliament only the formation of groups founded on political affinities and provide that the Members not belonging to a political group are to sit as non-attached Members under the conditions laid down by the Bureau of the Parliament, rather than authorising them to form a technical group or to constitute a mixed group, the Court of First Instance held that those provisions constituted *measures of internal organisation which are warranted by the special characteristics of the Parliament, the constraints under which it operates and the responsibilities and objectives assigned to it by the Treaty.*

The difference in treatment between members of a political group and those who are not members, in terms of the rights which the Rules of Procedure confer on a political group, does not constitute discrimination since it is justified by the fact that the former satisfy, unlike the latter, a requirement under the Rules of Procedure dictated by the pursuit of legitimate objectives.

Finally, having taken the view that the rules in question breach neither the principle of democracy nor that of freedom of association, the Court of First Instance pointed out that a comparative analysis of the parliamentary traditions of the Member States does not point to the conclusion that the formation of a political group whose members expressly state that it is entirely unpolitical would be possible in the majority of national parliaments.

9. Association of overseas countries and territories

On 8 February 2000, the Court of Justice, which had been asked for a ruling under Article 234 EC, confirmed the validity of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community [35] (Case C-17/98 *Emesa Sugar* [2000] ECR I-675).

By its judgments of 6 December 2001 in Case T-43/98 *Emesa Sugar* v *Council* and in Case T-44/98 *Emesa Sugar* v *Commission* (not yet published in the ECR), the Court of First Instance ruled in the cases challenging the legality of Decision 97/803 those cases had been suspended until the Court of Justice ruled on the validity of that act [36] dismissing the actions.

After the Court of Justice had given its ruling, the parties were asked to submit their observations. The applicant submitted that the judgment was based on errors of fact. However, according to the Court of First Instance, none of the pleas raised by the applicant nor any of the arguments put forward in its observations, *inter alia* those concerning the appraisal by the Council of the need to limit sugar imports falling within the 'ACP/OCT cumulation of origin' rule, as upheld by the Court of Justice, pointed to the illegality of the contested decision.

10. Staff cases

35 OJ 1997 L 329, p. 50.

36 Note, however, that most of the grounds relating to the assessment of the legality of Decision 97/803, on which the Court of First Instance bases its findings in Case T-44/98, are set out in connection with the claims for damages in Case T-43/98.

Among the many judicial decisions made in this field of litigation, six judgments in particular merit attention.

. The judgment in Case T-118/99 *Bonaiti Brighina* v *Commission* [2001] ECR-SC II-97 should be mentioned as it clarifies the question of the point in time from which the time-limit for bringing proceedings starts to run where the decision rejecting a complaint is sent to an official in a language which is neither his mother tongue nor that in which the complaint was made. The Court of First Instance held that the notification of such a decision in those circumstances is lawful provided that the person concerned can take proper cognisance of it. If, on the other hand, the addressee of the decision considers that he is unable to understand it, it is up to him to ask the institution, with all due diligence, to provide him with a translation either into the language used in the complaint or into his mother tongue. If such a request is made without delay, the time-limit only starts to run from the date on which that translation is notified to the official concerned, unless the institution can show, without any room for doubt on that point, that the official was able to take proper cognisance of both the operative part and the grounds of the decision rejecting his complaint in the language used in the initial notification.

. Again on the question of admissibility, a clearer definition was provided of the term 'act adversely affecting' within the meaning of Article 90(2) of the Staff Regulations of officials of the European Communities ('the Staff Regulations') in Joined Cases T-95/00 and T-96/00 *Zaur-Gora and Dubigh* v *Commission* (order of 3 April 2001 [2001] ECR-SC II-379) and Case T-243/99 *Buisson* v *Commission* (judgment of 20 June 2001 [2001] ECR-SC II-601), in that the Court of First Instance made clear that, where a rule which an institution has undertaken to respect and which is, therefore, binding on it such as a provision of a notice of competition gives candidates the right to apply for review of decisions not to admit them, it is the decision following review, and not the initial decision not to admit, which must be considered to be the act adversely affecting the person concerned.

. The victim of a hang-gliding accident, to whom the benefits of Article 73 of the Staff Regulations on insurance against the risk of occupational disease and accident were not granted, disputed the legality of that decision. In his action, he called into question the legality of the provision which was the legal basis of the contested decision, namely Article 4(1)(b), third indent, of the rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, with the result that the Court of First Instance considered that an objection of illegality was before it.

According to that provision accidents due to 'practice of sports regarded as dangerous, such as boxing, karate, parachuting, speleology, underwater fishing and exploration with breathing equipment including containers for the supply of air or oxygen' are not covered by Article 73 of the Staff Regulations. By judgment of 20 September 2001 in Case T-171/00 *Spruyt* v *Commission*, not yet published in the ECR, the Court of First Instance held that, since that provision defines the concept of sports regarded as dangerous which are excluded from the risk cover provided for by Article 73 of the Staff Regulations by reference to an indicative list of sports considered to be dangerous, it breaches the principle of legal certainty and is, on that ground, illegal. The principle of legal certainty precludes a situation in which an official who plans to practise a sport not mentioned in the list in Article 4(1)(b), third indent, of the rules is obliged to assess, whether that sport, in terms of its possible similarity with one of those on that list, might be regarded as dangerous by the administration. Nor can that principle allow the administration, faced with a request for application of Article 73 of the Staff Regulations in the event of an accident suffered while practising a sport, a 'discretion' as to whether or not that sport belongs to the category of sports regarded as dangerous within the meaning of the rules.

. The Court of First Instance held in its judgment of 27 June 2001 in Case T-214/00 *X* v *Commission* [2001] ECR-SC II-663 that a decision by an institution to deduct from the salary of an official, without his consent, a sum equivalent to the amount he owes to that institution by way of costs awarded to it in earlier proceedings *has no legal basis.* The option for an institution, in its relations with staff under the Staff Regulations, to obtain payment by set-off, is liable to seriously restrict the rights of officials of the institutions to dispose of their salaries freely. In the absence, in the body of the Staff Regulations, of any express provision, within the meaning of the first paragraph of Article 62, authorising it to do so, an institution may not, without the consent of the person concerned, retain, by way of set-off, a part of the remuneration of an official whose right to remuneration is enshrined in Article 62 of the Staff Regulations.

. To conclude this brief survey of decided cases concerning staff of the institutions, mention must be made of the judgment of 6 March 2001 in Case T-192/99 *Dunnett and Others* v *EIB* [2001] ECR-SC II-313, which annulled the salary statements of the applicants, who were staff of the European Investment Bank, in so far as the system of special conversion rates for transfers in a currency other than the Belgian or Luxembourg franc up to a certain percentage of net monthly salary was not applied in them. In anticipation of the changeover to the Euro, the Management Committee of the EIB had decided, on 11 June 1998, to abolish the special conversion rates for all its staff from 1 January 1999. However, the Court of First Instance held that the staff representatives were not properly consulted in the procedure leading to the adoption of that decision. It pointed out *inter alia* that the EIB was obliged to consult staff representatives under a general principle of employment law common to the laws of the Member States according to which an employer can unilaterally withdraw a financial advantage which he has freely granted to his employees on a continuous basis only after consultation of those employees or their representatives. It made clear that such consultation must be such as to have an influence on the substance of the measure adopted, which implied that it must be 'timely' and 'bona fide'. In this case the Court of First Instance held that the Bank breached the general principle of employment law expressed in Article 24 of the agreement on representation of staff at the EIB in that it did not hold bona fide consultations with staff representatives.

II. Actions for damages

As regards the EC Treaty, almost all the judgments concluding proceedings for damages related to agriculture, whether problems connected with the rules on the importation of bananas [37] or fisheries products [38] in the Community, milk quotas [39] or fisheries quotas. [40] In only one

37 Judgments in Case T-1/99 *T. Port* v *Commission* [2001] ECR II-465 (under appeal, Case C-122/01 P), in Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, in Case T-30/99 *Bocchi Food Trade International* v *Commission* [2001] ECR II-943, in Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981 (under appeal, Case C-213/01 P), in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above, in Case T-2/99 *T. Port* v *Council* [2001] ECR II-2093, and in Case T-3/99 *Banatrading* v *Council* [2001] ECR II-2123.

38 Judgment of 23 October 2001 in Case T-155/99 *Dieckmann & Hansen* v *Commission*, not yet published in the ECR (under appeal, Case C-492/01 P).

39 Judgments in Case T-533/93 *Bouma* v *Council and Commission* [20019 ECR II-203 (under appeal, Case C-162/01 P), in Case T-73/94 *Beusmans* v *Council and Commission* [2001] ECR II-223 (under appeal, Case C-163/01 P), in Case T-76/94 *Jansma* v *Council and Commission* [2001] ECR II-243 and in Case T-143/97 *Van den Berg* v *Council and Commission* [2001] ECR II-277 (under appeal, Case C-164/01 P).

40 Judgment of 6 December 2001 in Case T-196/99 *Area Cova and Others* v *Council and Commission*, not yet published in the ECR.

judgment was it held that the set of conditions which triggers the non-contractual liability of the Community for damage caused by the institutions was fulfilled (*Jasma* v *Council and Commission*). In another case, under Article 34 CS, a provision which applies where the damage alleged derives from a Commission decision which is annulled by the Court of Justice, the Court of First Instance ordered the Commission to repay a sum unduly paid (judgment of 10 October 2001 in Case T-171/99 *Corus UK* v *Commission*, not yet published in the ECR).

. By that judgment, the Commission was ordered to pay to Corus UK a sum of more than EUR 3 million with interest. Following a judgment of the Court of First Instance reducing the amount of the fine imposed on that company, the Commission had repaid Euro 12 million which was the difference between the amount paid and that set by the Court of First Instance, but had refused to pay interest on the sum repaid. The Court of First Instance held that, in so doing, the Commission failed to take a step necessary to comply with that judgment. In the case of a judgment annulling or reducing the fine imposed on an undertaking for infringement of the ECSC Treaty competition rules, there is an obligation incumbent on the Commission to repay all or, in some cases, part of the fine paid by the undertaking in question, in so far as that payment must be described as a sum unduly paid following the annulment decision. That obligation applies not only to the principal amount of the fine overpaid, but also to default interest on that amount. It stressed, in that connection, that a failure to reimburse such interest could result in the unjust enrichment of the Community, which would be contrary to the general principles of Community law. As the claim under Article 34 CS, which was brought after a reasonable time had passed, was well founded in principle, compensation to the applicant corresponding to the amount of interest that should have been reimbursed together with the principal sum was awarded to the applicant.

. It is settled case-law that the non-contractual liability of the Community under the second paragraph of Article 288 EC may be incurred only if a set of conditions relating to the illegality of the conduct of which the Community institutions are accused, the occurrence of actual damage and the existence of a causal link between the unlawful conduct and the harm alleged is fulfilled. As regards the liability of the Community for damage caused to individuals, the Court of Justice held in Case C-352/98 P *Bergaderm and Goupil* [2000] ECR I-5291 that the conduct alleged against the Commission must involve *a sufficiently serious breach of a rule of law intended to confer rights on individuals.* In the cases which it decided in 2001, the Court of First Instance had to assess whether those two aspects of illegality, that is to say, that the rule breached is intended to confer rights on individuals and that the breach is sufficiently serious, were proven.

For instance it was required to determine whether the rules allegedly breached were of the type intended to confer rights on individuals. The principle of proportionality and the principle of the protection of legitimate expectations are rules of that type (*Emesa Sugar* v *Council*, cited above). On the other hand, no rights are conferred on individuals by the Agreement establishing the WTO and its annexes (judgments in *Cordis* v *Commission*, *Bocchi Food Trade International* v *Commission* and *T. Port* v *Commission* (T-52/99), cited above), by Article 253 EC (*Emesa Sugar* v *Council*), or by the principle of relative stability this principle, laid down by the fisheries legislation, is intended to ensure for each Member State a share of the Community's total allowable catches (*Area Cova and Others* v *Council and Commission*, cited above).

As regards the question whether a breach of Community law is sufficiently serious, the Court of First Instance applied a test which turned on the question whether the Community institution concerned had manifestly and gravely disregarded the limits on the discretion available to the institution, bearing in mind that where the institution in question had only a considerably reduced or even no discretion, the mere infringement of Community law might be sufficient to establish the existence of a sufficiently serious breach.

In its judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above, the Court of First Instance held that, where an institution has a considerably reduced discretion, a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed, will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 288 EC. Given the facts of the case, it held that the mistakes made by the Commission when it adopted the contested regulations [41] did not constitute mistakes which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

In its judgment in *Dieckmann & Hansen* v *Commission*, cited above, the Court of First Instance, first, recognised that the Commission has a wide discretion where it adopts measures implementing arrangements for the supervision of importations of fishery products, such as whether a third country is to be entered in or removed from the list of third countries authorised to export such products to the Community. It went on to hold that the institution did not overstep the bounds of its discretion in the present case when it reconsidered its assessment of Kazakhstan's ability to ensure that, so far as concerns caviar, health conditions at least equivalent to those provided for by Directive 91/493 [42] were met and when it decided to withdraw its decision to authorise imports of the aforementioned product into the Community. The Court observed *inter alia* that, by adopting the contested decision, the Commission fully observed its obligations to take account of requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, in its efforts to achieve objectives of the common agricultural policy and to accord to the protection of public health precedence over economic considerations.

. Finally, in its judgment in *Area Cova and Others* v *Council and Commission*, cited above, the Court of First Instance observed that in the event of the principle of no-fault liability of the Community being recognised in Community law, a precondition for such liability would be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and *the unusual and special nature of that damage*. In order to assess whether the damage in question, consisting in a reduction in the applicants' fishing opportunities, was unusual in character, the Court assessed whether it exceeded the limits of the economic risks inherent in the activities of the fishing industry and concluded that it did not.

III. Applications for interim relief

The judge hearing applications for interim relief heard applications for interim measures in almost all fields of litigation, particularly those relating to competition, [43] State aid, [44] anti-

41 The mistakes recorded related to possible discrepancies, when the reduction/adjustment coefficients were fixed, for determining the quantity of bananas to be allocated to each operator in categories A and B under the tariff quotas, between the figures communicated by the competent national authorities and those from the Statistical Office of the European Communities (Eurostat) or other data concerning the quantities of bananas marketed or imported into the Community during the corresponding reference periods.

42 Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products (OJ 1991 L 268, p. 15) for human consumption.

43 Inter alia, orders of the President of the Court of First Instance of 17 January 2001 in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67, of 28 May in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, of 26 October 2001 in Case T-184/01 R *IMS Health* v *Commission* (under appeal, Case C-481/01 P(R)), of 15 November 2001 in Case T-151/01 R *Duales System Deutschland* v *Commission*, of 20 December 2001 in Case T-213/01 R *Österreichische Postsparkasse* v *Commission* and in

dumping measures, [45] Community funding [46] and institutional law. [47] There were also several applications to cancel or vary an interim order, which were all dismissed. [48]

. The applications for interim measures which were dismissed were dismissed either on the ground that they were inadmissible, [49] or because they did not fulfil one or other of the conditions required for the measure requested to be granted, that is to say, urgency and a *prima facie* case. Amongst the decisions dismissing such applications, that adopted in *Poste Italiane* v *Commission* is of note as the judge hearing an application for interim relief had to assess whether the condition of urgency was fulfilled in a case concerning the opening up to competition of services previously the preserve, in this instance, of Poste Italiane. By decision of 21 December 2000, [50] the Commission ordered the Italian Republic to end the infringement of Article 82 EC in conjunction with Article 86(1) EC consisting in the exclusion of competition, to the advantage of Poste Italiane, with respect to the day- or time-certain delivery phase of hybrid electronic mail services.

As the damage alleged by Poste Italiane was of a financial nature, the judge hearing the application for interim relief pointed out that such damage cannot, save in exceptional circumstances, be regarded as irreparable or even as reparable with difficulty, since it may ultimately be the subject of financial compensation. In accordance with these principles, the suspension requested would be justified if it appeared that, without such a measure, the applicant would be in a situation which might jeopardise its very existence. However, it added that, since Poste Italiane, as provider of the universal service, is entrusted with a task of general economic interest, within the meaning of Article 86(2) EC, performance of which is essential, the suspension requested would also be justified if it were proved that exclusion from the

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Case T-214/01 R *Bank für Arbeit und Wirtschaft* v *Commission*, not yet published in the ECR.

44 Order of the President of the Court of First Instance of 19 December 2001 in Joined Cases T-195/01 R and T-201/01 R *Government of Gibraltar* v *Commission*, not yet published in the ECR.

45 Order of the President of the Court of First Instance of 1 August 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* [2001] ECR II-2307 (annulled by Order of the President of the Court of Justice of 14 December 2001 in Case C-404/01 P(R)), not yet published in the ECR).

46 Orders of the President of the Court of First Instance of 15 January 2001 in Case T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, of 18 October 2001 in Case T-196/01 R *Aristoteleio Panepistimio Thessalonikis* v *Commission*, of 22 October 2001 in Case T-141/01 R *Entorn* v *Commission* and of 7 December 2001 in Case T-192/01 R *Lior* v *Commission*, not yet published in the ECR.

47 Orders of the President of the Court of First Instance of 15 January 2001 in Case T-236/00 R *Stauner and Others* v *Parliament and Commission* [2001] ECR II-15, and of 26 January 2001 in Case T-353/00 R *Le Pen* v *Parliament* [2001] ECR II-125.

48 Orders of the President of the Court of First Instance of 5 September 2001 in Case T-74/00 R *Artegodan* v *Commission* (under appeal, Case C-440/01 P(R)), of 12 September 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* and of 8 October 2001 in Case T-236/00 RII *Stauner and Others* v *Parliament and Commission*, not yet published in the ECR.

49 Inter alia, orders of the President of the Court of First Instance of 15 January 2001 in *Stauner and Others* v *Parliament and Commission*, cited above, and of 5 December 2001 in Case T-216/01 R *Reisebank* v *Commission* (under appeal, Case C-480/01 P(R)) and in Case T-219/01 R *Commerzbank* v *Commission*, not yet published in the ECR.

50 Commission Decision 2001/176/EC of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy (OJ 2001 L 63, p. 59).

reserved area of the day- or time-certain delivery phase of the hybrid electronic mail service would prevent the applicant from carrying out successfully the task entrusted to it until a ruling was given on the merits. Such proof would be furnished if it were shown, *in the light of the financial conditions in which the task of general economic interest has been performed successfully up to that point*, that the exclusive right concerned is absolutely necessary to the performance of that task by the holder of the right. Since the applicant failed to furnish such proof, and the balance of interests inclined in favour of maintaining the contested decision, the application could not be granted.

The case leading to the order in *Duales System Deutschland* v *Commission*, dismissing the application for suspension of operation, raised a problem of a different nature. By decision of 20 April 2001, [51] the Commission found that Der Grüne Punkt Duales System Deutschland (DSD), the only company operating throughout Germany a 'collective' system for the recovery of used sales packaging from the final consumer or from near the consumer's home, abused its dominant position within the meaning of Article 82 EC by imposing on undertakings participating in its system unfair prices and contractual conditions where the use of the 'Der Grüne Punkt' logo, which should appear on all the packaging of the participating undertaking, did not signify that DSD in fact discharged the obligation to dispose of waste. It should be pointed out that the 'Der Grüne Punkt' trade mark is a collective trade mark duly registered with the German authorities.

In its order, the judge hearing the application for interim relief first outlined the essential issue in the case before him. He took the view, in that regard, that the principal question it raised was whether the licensing scheme imposed by the owner of the trade mark was justified by the need to preserve the specific subject-matter of that right or, to put it another way, whether, in the circumstances of the present case, the trade mark was used by DSD as a means of abusing its dominant position. The in-depth study needed to resolve those questions could not, however, be carried out by the judge hearing the application for interim measures in an examination of the merits, *prima facie*, of the action in the main proceedings. Going on to consider whether the immediate operation of the decision in question would cause serious and irreparable damage to the applicant, he held that no proof had been adduced that immediate operation would jeopardise DSD's system. In any event, the judge stressed that the balancing of the applicant's interest in obtaining the interim measure sought, the public interest in the operation of a Commission decision adopted under Article 82 EC and the interests of the intervening parties in the interim proceedings, which would be directly affected by the possible suspension of the contested decision, called for the dismissal of this application. He took the view, on that point, that in those very particular circumstances, the public interest in compliance with property rights in general and intellectual property rights in particular, as expressed in Articles 30 EC and 295 EC, cannot prevail over the Commission's interest in bringing an immediate end to the infringement of Article 82 EC which it considers it has established and, accordingly, in introducing favourable conditions for the entry of DSD's competitors into the market concerned.

. Three orders for suspension of operation of measures were made in 2001 (orders in *Le Pen* v *Parliament*, *Euroalliages and Others* v *Commission* and *IMS Health* v *Commission*, cited above).

By order in *Le Pen* v *Parliament*, operation of the decision taken by the President of the European Parliament in the form of a declaration dated 23 October 2000 was suspended inasmuch as that declaration constituted a decision of the European Parliament by which the

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[51] Commission Decision 2001/463/EC of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/34493 DSD) (OJ 2001 L 166, p. 1).

Parliament took formal note of the termination of the term of office of Mr Le Pen as a member of the European Parliament. In his assessment of the condition that there must be a *prima facie* case, the judge hearing the application for interim relief took the view that one of the arguments put forward according to which the role of the Parliament in a procedure terminating the term of office of one of its Members on the basis of Article 12(2) of the 1976 Act, cited above, is not a matter of a merely dependent power was of a serious nature and could not, therefore, be dismissed *prima facie*.

In making the order in *Euroalliages and Others* v *Commission*, cited above, the judge hearing the application for interim relief ordered that imports of ferro-silicon originating in the People's Republic of China, Kazakhstan, Russia and Ukraine should be subject to registration without provision of security by importers. This case originated with Commission Decision 2001/230/EC terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in several countries, [52] suspension of the operation of which the applicants sought, primarily, as regards imports from certain of the countries in question. As the Commission did not question that there was a *prima facie* case, it was the condition relating to urgency which essentially fell to be considered. In that regard, the judge hearing the application recalled that damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation. Damage of a pecuniary nature, which would not disappear simply as a result of compliance by the institution concerned with the judgment in the main proceedings, constitutes economic loss which could be made good by the means of redress provided for in the Treaty, in particular in Articles 235 EC and 288 EC. On application of those principles, an interim measure is justified if it appears that, without that measure, the applicant would be in a situation that could imperil its existence before final judgment in the main action. In such a case the disappearance of the applicant before the decision on the substance of the case would make it impossible for that party to institute any judicial proceedings for compensation. In the present case the applicants had not succeeded in showing that the impairment of their economic viability was such that rationalisation measures would not be sufficient to enable them to continue producing ferro-silicon until final judgment in the main action. However, taking account of all the circumstances of the case, he observed *inter alia* that the injury suffered by the applicants would not disappear simply as a result of the Commission's compliance with a judgment annulling the contested decision and that, in that regard, reparation, at a later stage, of the damage sustained under Article 235 EC and the second paragraph of Article 288 EC, would, at the very least, be uncertain, given the difficulty of showing that the Commission had manifestly and gravely disregarded the limits on its discretion in assessing the Community interest. In the circumstances, the condition relating to urgency was held to be fulfilled. Finally, having balanced the interests involved, *inter alia* those of the importers, exporters and users, he limited the effects of the interim measure to the absolute minimum necessary to preserve the interests of the applicant until judgment in the main action.

However, by order of 14 December 2001 in Case C-404/01 *Commission* v *Euroalliages and Others*, cited above, the President of the Court of Justice did not uphold the finding of urgency made by the President of the Court of First Instance. He took the view that the irreparable nature of the damage could not be established given the uncertainty over the possibility of success of an action for damages. The case was referred back to the Court of First Instance.

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52 Commission Decision 2001/230/EC terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ 2001 L 84, p. 36).

This survey of the most significant judgments of 2001 concludes with the order in *IMS Health* v *Commission*, cited above, which suspended the operation of the *Commission decision imposing interim measures on* IMS Health (IMS). [53] By that decision, the Commission had instructed IMS, a company active in the field of compilation of data on sales and prescriptions of pharmaceutical products, to grant a licence for use of its '1 860 brick structure', a geographical analysis of the German market, which, according to the Commission, was a de facto industry standard on the relevant market. The Commission took the view that the refusal by IMS to grant such a licence constituted a *prima facie* abuse of a dominant position, prevented new competitors from entering or remaining on the market for sales data for pharmaceutical products and was liable to cause serious and irreparable harm to two competitors, NDC Health and AZYX.

Having expressed the view that the extent of its review of the condition relating to the need for a *prima facie* case did not vary according to whether the decision suspension of the operation of which was sought imposed interim measures or concluded an administrative procedure, the judge hearing the application for interim relief found that the case essentially raised the question whether the Commission was entitled to hold that IMS, the holder of a copyright on the 1 860 brick structure, abused its dominant position, within the meaning of Article 82 EC, where it invoked that copyright in refusing to license use by its competitors and whether the Commission could impose, by way of an interim measure, the issue of licences for use of copyright. Since the in-depth analysis required by such questions, which entailed an assessment of whether the 'exceptional circumstances' identified by the Court of Justice in *Magill* [54] and *Bronner* [55] were fulfilled in this case, could not be conducted in the course of interim proceedings, it was held that the condition relating to a *prima facie* case was fulfilled.

Similarly, it was held that the condition relating to urgency was fulfilled both because the licensing of use of the copyright could result in lasting and serious harm to the holder of that copyright and because the development of market conditions caused by the issue of those licences could no longer be altered by the annulment of the decision in question.

Finally, balancing the respective interests of the parties to the dispute, in particular those of the two competitors of IMS, the public interest in respect for property rights in general and intellectual property rights in particular, expressly cited in Articles 30 and 295 EC, was emphasised and it was pointed out that the mere fact that the applicant invoked and sought to protect its copyright over the 1 860 brick structure for economic reasons did not undermine its entitlement to rely on the exclusive right, guaranteed by national law to promote innovation.

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53 Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 EC (Case COMP D3/38.044 NDC Health/IMS Health: Interim measures).

54 Judgment of the Court of Justice in Case C-241/91 *RTE and ITP* v *Commission* [1995] ECR I-743.

55 Judgment of the Court of Justice in Case C-7/97 *Bronner* [1998] ECR I-7791.