

A — Proceedings of the General Court in 2009

By Mr Marc Jaeger, President of the General Court

The growth in this Court's membership as enlargements have taken place means that it is becoming rare for a year to pass without a change in the Court's composition, even disregarding any partial renewal of its membership. Thus, 2009 saw the departure of two members, Ms Virpi Tiili, a Judge at the Court since 1995, and Mr Daniel Šváby, a Judge at the Court since 2004, who were replaced by Mr Heikki Kanninen and Mr Juraj Schwarcz respectively.

From a statistical point of view, the past year has been one of continuity. A large number of new cases were brought (568); although this figure shows a slight reduction compared with 2008, it remains well above the figures recorded in previous years. Consequently, although the significant improvement in the number of cases disposed of has also been confirmed (with 555 cases completed), the number of cases pending could not be reduced despite sustained efforts to achieve this.

In addition, 2009 was marked by two exceptional events.

First, this Court celebrated the completion of its first 20 years. The colloquium 'From 20 to 2020 — Building the CFI of tomorrow on solid foundations', which was organised to mark this anniversary, gave rise to outstanding discussions and contributions on the part of participants from a wide variety of backgrounds⁽¹⁾. Avenues concerning important matters related to the Court's future, its tasks and its operation were explored, strengthening the Court's conviction that it is necessary to pursue reforms, including of a structural nature, in order to ensure an ever increasing level of judicial protection.

Second, 2009 was the year in which the Treaty of Lisbon entered into force. While the major impact of this Treaty concerning the European project does not concern the Courts of the European Union first and foremost, mention should nevertheless be made of certain aspects that will not fail to affect this Court. First, the Court has a new name: the 'Court of First Instance of the European Communities' has been renamed the 'General Court of the European Union' in order to take account of its appellate jurisdiction in staff cases. Next, the conditions governing the admissibility of actions brought by individuals for the annulment of regulatory acts have been relaxed. Also, this Court's jurisdiction has been extended to cover certain actions brought by individuals in the fields of, first, common foreign and security policy and, second, police and judicial cooperation in criminal matters. Finally, the Charter of Fundamental Rights of the European Union has been elevated to the rank of the Treaties. These changes, which constitute important steps forward for judicial protection, could have a significant impact on both the number and the nature of cases brought before the General Court.

The following account is intended to provide an overview of this Court's diverse, and sometimes complex, field of activity when it exercises its jurisdiction in proceedings concerning the legality of measures (I), actions for damages (II), appeals (III) and applications for interim measures (IV).

⁽¹⁾ Those contributions are available on the website <http://www.curia.europa.eu> and the colloquium papers will be published in the course of 2010.

I. Proceedings concerning the legality of measures

Admissibility of actions brought under Article 230 EC

1. Measures against which an action may be brought

Measures against which an action may be brought under Article 230 EC are those producing binding legal effects of such a kind as to affect the applicant's interests by significantly altering his legal position ⁽²⁾.

In Case T-437/05 *Brink's Security Luxembourg v Commission* (judgment of 9 September 2009) the applicant had challenged the award of a public contract to one of its competitors and, in the course of that challenge, had made an application for access to certain documents. In its judgment the Court broke new ground, introducing some flexibility in relation to the definition of measures against which an action may be brought.

In the case in point the contested measure was the Commission's letter informing the applicant of its refusal to disclose the composition of the committee evaluating the tenders submitted. The procedure for obtaining access to Commission documents, which is governed by Articles 6 to 8 of Regulation (EC) No 1049/2001 ⁽³⁾, takes place in two stages. First, the applicant must send the Commission an initial application for access to documents. Second, in the event of a total or partial refusal, the applicant may make a confirmatory application to the Secretary-General of the Commission. In the event of a further total or partial refusal, the applicant may institute court proceedings against the Commission under the conditions laid down in Article 230 EC. Thus, only the measure adopted by the Secretary-General is capable of producing legal effects of such a kind as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment.

The Court concluded that the action for annulment, brought in respect of the refusal of the initial application, was in principle inadmissible. However, the Court noted that in its letter refusing the initial application the Commission had omitted to inform the applicant of its right to make a confirmatory application, although it was required to do so by Regulation No 1049/2001. Such an irregularity had the consequence of rendering admissible, exceptionally, an action for the annulment of the refusal of the initial application. If it were otherwise, the Commission might be able to avoid judicial review by reason of a breach of procedure attributable to it. As is apparent from the case-law, since the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty, the procedural rules governing actions for judicial review must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented so as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under European Union law.

2. Standing to bring proceedings

Under the fourth paragraph of Article 230 EC actions brought by individuals against acts of which they are not the addressees are admissible subject to the twofold condition that the applicants be directly and individually concerned by the contested act. According to the case-law, natural or

⁽²⁾ Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9.

⁽³⁾ 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).

legal persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of those factors distinguishes them individually just as in the case of the person addressed⁽⁴⁾. Furthermore, in order to be of direct concern to an individual, the contested measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from the rules alone without the application of other intermediate rules⁽⁵⁾.

In Case T-420/05 *Vischim v Commission* (judgment of 7 October 2009), the applicant sought annulment of Commission Directive 2005/53/EC of 16 September 2005⁽⁶⁾, which amended Directive 91/414/EEC⁽⁷⁾ by including, in Annex I thereto (which lists the substances whose placing on the market is authorised by the Member States), the active substance chlorothalonil produced by the applicant, whilst imposing certain conditions, in particular in relation to the maximum hexachlorobenzene (HCB) content in that substance. Under that legislation, the Member States were obliged to amend or withdraw existing authorisations for plant protection products containing chlorothalonil which failed to comply with those conditions.

As the directive concerned was a measure of general application, the Court pointed out that, although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by natural or legal persons for annulment of a directive, it is clear from the case-law that that fact in itself is not sufficient to render such actions inadmissible. The institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which they are afforded by that provision of the Treaty, as the fact that the contested measure is of general application does not preclude it from being of direct and individual concern to certain natural and legal persons. In those circumstances, a European Union measure can be of a general nature and, at the same time, vis-à-vis some traders, in the nature of a decision. Noting that Directive 91/414 provides that the assessment procedure concerning active substances already on the market is initiated by notification made by an interested producer, who submits a dossier containing the data necessary for that purpose and is associated with the various stages of examination of his dossier, the Court held that the applicant, in its capacity as notifier, enjoyed procedural safeguards and, on that basis, was individually concerned by the contested directive.

With regard to the condition relating to direct concern, the Court found that through adoption of the contested directive the Commission had brought the assessment of chlorothalonil to an end, when it decided to include it in Annex I to Directive 91/414 subject to certain conditions. Moreover, by virtue of the directive, the Member States were obliged to review authorisations for plant protection products containing chlorothalonil and to verify compliance with the condition as to maximum HCB content, an action in respect of which they had no discretion. The contested directive was therefore of direct concern to the applicant, as an undertaking manufacturing the active substance in question, and consequently the action for annulment was admissible.

⁽⁴⁾ Case 25/62 *Plaumann v Commission* [1963] ECR 95, at p. 107.

⁽⁵⁾ Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43.

⁽⁶⁾ OJ 2005 L 241, p. 51.

⁽⁷⁾ Council Directive of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1). Under the directive, placing on the market may be authorised only if, in the light of scientific and technical knowledge, it may be expected that the plant protection products containing the active substance concerned will fulfil certain conditions relating to the products not being harmful for human or animal health or the environment.

3. Period within which proceedings must be commenced

In Case T-257/04 *Poland v Commission* (judgment of 10 June 2009, under appeal) and Joined Cases T-300/05 and T-316/05 *Cyprus v Commission* (judgment of 2 October 2009, not published), the Court ruled on the question of determining the starting point of the period of two months provided for in the fifth paragraph of Article 230 EC in the case of an action for annulment brought by an acceding State against a regulation concerning transitional measures to be adopted in the agricultural sphere which has been adopted and published before the accession of that State. In the cases in point, the Republic of Poland and the Republic of Cyprus claimed that the period allowed for commencing proceedings could not begin to run before their accession to the European Union, which was a condition of the entry into force of the regulation at issue.

In that connection, the Court recalled that, under the fifth paragraph of Article 230 EC, an action for annulment must be instituted within two months of the date of publication of the measure and that the strict application of rules concerning procedural time limits meets the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. In the circumstances of the cases before it, the Court thus concluded that the actions in question were out of time as the arguments of the States concerned did not call that conclusion into question. First, the Court considered to be irrelevant the question whether the entry into force of the regulations at issue was subject to the accession of the States concerned, since that question confused the challengeability of a measure, which is connected with the completion of all the requisite formalities as to publicity and causes the period for bringing proceedings to start running, with the entry into force of that measure, which may be delayed. Second, the Court held that, as the period laid down in Article 230 EC is of general application, that article did not require the States concerned to have the status of Member States and applied in any event to those States as legal persons. Third, the Court pointed out that the States concerned had not been deprived of their right to effective judicial protection, since non-member countries (including States before their accession to the European Union), although they cannot claim the status of litigant conferred on the Member States, may nevertheless bring proceedings by virtue of the right of action conferred on legal persons under the fourth paragraph of Article 230 EC. The Court noted that although the regulation in question was a measure of general application, it directly prevented the States concerned from exercising their own powers as they saw fit, by imposing various obligations on them concerning the establishment and implementation of a system, specifically a charging system, intended to eliminate surplus sugar stocks. Drawing an analogy with the case-law applicable to sub-State bodies⁽⁸⁾, the Court concluded that, before they became Member States, the Republic of Poland and the Republic of Cyprus were directly and individually concerned by the contested regulation and consequently the strict application of the periods within which proceedings had to be brought, starting from the date of publication of the regulation, did not prevent them from asserting their rights.

In addition, the Republic of Cyprus claimed that its action was in any event admissible in so far as it was brought within the period allowed for commencing proceedings against a regulation that amended the original regulation. The Court observed that, although the definitive nature of a measure which has not been challenged within the time limit concerns not only the measure itself but also any later measure which is merely confirmatory (an approach which is justified by the requirement of legal stability and applies to individual measures as well as to those which have a legislative character), where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against those which, even if not amended,

⁽⁸⁾ Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraph 29.

form a whole with it⁽⁹⁾. Considering that conclusion in its context, however, the Court qualified it, stating that the fact that the action is out of time must be accepted in an action for annulment of an amended provision not only where the provision in question reproduces the provision contained in the act in respect of which the period allowed for commencing proceedings has expired but also where, although the new wording is different, the substance is not affected. Conversely, where a provision of a regulation is, at least in part, substantially amended, a fresh right of action arises against that provision and also against all the provisions which, even if not amended, form with it an indivisible and substantial whole. Here, as the regulation at issue made ancillary and procedural amendments, seeking solely to extend the periods prescribed by the original regulation, annulment of the provisions of the original regulation could not be sought by means of an action for annulment brought against the amending regulation.

Competition rules applicable to undertakings

1. General

(a) Duration of the infringement

In Case T-58/01 *Solvay v Commission* (judgment of 17 December 2009) the Court held that, even were particular circumstances to arise such as to reverse the burden of proof with regard to the duration of the infringement, the Commission would not on that account be released from its obligation to substantiate, in a decision establishing an infringement of Article 81(1) EC, its findings with regard to the duration of the infringement and to provide the information that it has available concerning such duration. Stating that the contested decision contained contradictory aspects regarding the end of the infringement, the Court held that the Commission, on which the burden of proof primarily fell, had not shown that the infringement in question had continued until the end of 1990. The Court therefore concluded that the contested decision should be varied by reducing by 25% the fine imposed on the applicant.

(b) Limitation

Case T-405/06 *ArcelorMittal Luxembourg and Others v Commission* (judgment of 31 March 2009, under appeal) gave the Court an opportunity to confirm its earlier decision⁽¹⁰⁾ concerning the scope *ratione personae* of the effects of actions which interrupt the limitation period. In the case in point, the parent company of a subsidiary which had participated in a cartel on the market for steel beams asserted that the actions which interrupted the five-year limitation period had effect only as against the undertakings which had participated in the infringement. Since it had neither been identified as such during the administrative procedure (during which the action interrupting the limitation period had been taken) nor been an addressee of the statement of objections, the parent company thus contended that the Commission could not raise that interruption against it. The Court rejected that interpretation, explaining that it entailed an objective fact, namely participation in the infringement, which is distinct from a subjective and contingent element such as an undertaking being identified during the administrative procedure as having so participated. An undertaking may have participated in the infringement without the Commission being aware that it has done so at the time when it takes an action interrupting the limitation period. That period is interrupted not only with respect to the undertakings which were the subject of an action taken for the purpose of the preliminary investigation or proceedings, but also with respect to those

⁽⁹⁾ Case C-299/05 *Commission v Parliament and Council* [2007] ECR I-8695, paragraphs 29 and 30.

⁽¹⁰⁾ Case T-276/04 *Compagnie maritime belge v Commission* [2008] ECR II-1277.

which, having participated in the infringement, are still unknown to the Commission and, accordingly, have not been the subject of any measure of investigation or are not the addressees of any procedural act.

As regards suspension of the limitation period, the Court stated that, whereas Regulation (EC) No 1/2003⁽¹¹⁾ specifically provides that interruption of the limitation period applies with regard to all undertakings which have participated in the infringement, no such specific statement is made as regards suspension. The Court therefore considered whether initiation of an action before it had an effect in relation to the applicant undertaking alone or an *erga omnes* effect with respect to all the undertakings which had participated in the infringement, whether or not they had brought an action. In that connection, it stated at the outset that, as is the case with interruption of the limitation period, suspension of that period, which constitutes an exception to the principle of a five-year limitation period, must be interpreted restrictively. Therefore it could not be presumed that the legislature intended to apply the same rules in both situations. Furthermore, unlike interruption of the limitation period, which is intended to enable the Commission to take proceedings and impose effective sanctions in respect of infringements of the competition rules, suspension of the limitation period concerns, by definition, a situation in which the Commission has already adopted a decision. The fact that judicial proceedings have effect *inter partes* and the consequences which necessarily follow from that preclude in principle an action brought by one undertaking to which the contested decision was addressed from having any effect whatsoever on the situation of the other addressees. Lastly, the Court rejected the Commission's argument that the suspension of the limitation period resulting from the initiation by an undertaking of proceedings before it or the Court of Justice applies both to the legal entity which is party to the proceedings and to all the other legal entities forming part of the same economic unit, no matter which legal entity initiated those proceedings. While it is true that the competition rules are addressed to 'undertakings', understood as economic units, the fact remains that, for the purposes of the application and implementation of Commission decisions in such matters, it is necessary to identify, as the addressee, an entity having legal personality, which alone is able to initiate an action against the decision adopted at the close of the administrative procedure and of which it is an addressee. The Court concluded that the 10-year limitation period had been exceeded in relation to one of the applicants and annulled the contested decision in so far as it concerned that undertaking.

(c) Rights of the defence

In Case T-24/07 *ThyssenKrupp Stainless v Commission* (judgment of 1 July 2009, under appeal), the Court recalled that, in order to allow the Commission to balance, on the one hand, the need to preserve the parties' rights of defence by granting as much access as possible to the file and, on the other, the concern to protect confidential information of other parties or third parties, those other parties and third parties had to provide the Commission with all relevant details. It pointed out that, if a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. In that regard, the Court held that a request which is in general terms and does not go into detail in respect of each document does not amount to a reasoned request and does not answer any question that the Commission has as to the apparent relevance of the information that was not accessible for the applicant's own defence.

⁽¹¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

Furthermore, the Court observed that, in order to respect the rights of defence of undertakings, the Commission must give the parties concerned the right to be heard before it takes any of the decisions provided for in Articles 7, 8, 23 and 24(2) of Regulation No 1/2003. Where documents are provided to the applicant after adoption of one of the abovementioned decisions, such as a statement of objections, there is none the less no infringement of the applicant's rights of defence if the Commission has not amended the objections set out in the decision in question and, consequently, does not rely on facts on which the applicant has not been given an opportunity to explain itself.

2. Points raised on the scope of Article 81 EC

(a) Temporal application of the law

Applying the principles laid down in the cases concerning the 'reinforcing bars' cartel⁽¹²⁾, the Court recalled in *ArcelorMittal Luxembourg and Others v Commission* and *ThyssenKrupp Stainless v Commission* and in Case T-122/04 *Outokumpu and Luvata v Commission* (judgment of 6 May 2009) that, although the succession of the legal framework of the EC Treaty to that of the ECSC Treaty had led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that succession was part of the unity and continuity of the Community legal order and its objectives. In addition, the meaning of agreement and concerted practices under Article 65(1) ECSC corresponded to that of agreement and concerted practices for the purposes of Article 81 EC and those two provisions have been interpreted in the same way by the Community judiciary. Thus the continuity of the Community legal order and the objectives governing its functioning required that, in so far as it succeeded the European Coal and Steel Community and in its own procedural framework, the European Community ensured, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals under the ECSC Treaty and the rules adopted for its application. That requirement applied all the more in so far as the distortion of competition resulting from non-compliance with the rules in the field of cartels was liable, under the EC Treaty, to expand its effects over time after the expiry of the ECSC Treaty. Regulation No 1/2003 had therefore to be interpreted as enabling the Commission, after 23 July 2002, to identify, and to impose penalties in respect of, cartels in the fields falling within the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*.

(b) Fines

The applicants in Case T-450/05 *Peugeot and Peugeot Nederland v Commission* (judgment of 9 July 2009) challenged, *inter alia*, the Commission's assessment of the gravity of the infringement. On the one hand, the infringement had been categorised as 'very serious' within the meaning of Point 1 A of the 1998 Guidelines⁽¹³⁾, as the aim of the bonus system put in place by Peugeot in the Netherlands between 1997 and 2003 had been to encourage dealers to restrict parallel imports. To reach its conclusion that the Commission, in the exercise of its discretion, had not erred in characterising the infringement as very serious, the Court stated, *inter alia*, that the infringement was, by nature, especially serious, in view of the particularly deceitful methods used to perpetuate the remuneration system until 2003, in a context in which the Commission's previous practice and the consistent case-law on parallel imports, in particular in the motor vehicle sector, gave clear

⁽¹²⁾ Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others v Commission* [2007] ECR II-4331.

⁽¹³⁾ 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).

warnings as to the unlawfulness of such a system. It also pointed out that the applicants were members of a large industrial group with an important position on the relevant markets and that they had legal departments perfectly capable of gauging the anti-competitive nature of the conduct in question. On the other hand, so far as the actual impact of the infringement on the market was concerned, the Court found that the Commission had not paid sufficient attention to the role played by the change in price differentials in the decline in exports. Thus, the Court, exercising its unlimited jurisdiction, considered it appropriate to reduce by 10% the amount of the fine determined for the gravity of the infringement.

In Case T-13/03 *Nintendo and Nintendo of Europe v Commission* (judgment of 30 April 2009), the Court accepted that in the case of a complex of agreements and concerted practices of a vertical nature with the object and effect of restricting parallel exports in game consoles and cartridges, the respective shares held by the parties in the distribution of the relevant products were representative of the specific weight of each undertaking in the distribution system in question. The Commission was therefore held to be justified in referring to that criterion for the purposes of the differential treatment applied when establishing the basic amounts of the fines.

In the same judgment, the Court, considering whether the Commission had erred in determining the deterrent effect of the fine, made clear that the position of manufacturer of the products may, in the case of vertical infringements, also be a factor which is representative of its actual capacity to cause significant damage to competition. The manufacturer of the relevant products, which occupies a central position in the distribution system of those products, must display special vigilance and ensure that it observes the competition rules when concluding distribution agreements.

Further clarification concerning the question of the deterrent effect of fines was given in one of the judgments dealing with the monochloroacetic acid cartel. In Case T-168/05 *Arkema v Commission* (judgment of 20 September 2009, not published, under appeal), the Court pointed out that, although the Commission had applied a multiplier for deterrence in earlier cases involving the applicant, that could not call into question the use of the multiplier in later cases in which a penalty was imposed on the applicant for its participation in a cartel operating in the same period. As each infringement was different and was the subject of a different decision, the Commission could take into account the size of the undertakings concerned and apply a multiplier to the starting amount of the fine.

Following an examination of the extent to which the applicants had cooperated, the Court also varied one of the decisions concerning anti-competitive practices on the market for Nintendo game cartridges and consoles. In its judgment in *Nintendo and Nintendo of Europe v Commission*, it compared Nintendo's cooperation, on the one hand, with that of its exclusive distributor for Ireland and the United Kingdom, on the other, and did so first of all from a chronological point of view. On that basis it found that Nintendo and its distributor had provided relevant documents at the same stage of the procedure and the fact that Nintendo had begun to cooperate a few days later than the distributor was not decisive in that respect. Next, the Court compared the degree of cooperation from a qualitative point of view, taking into account both the circumstances in which those undertakings had cooperated and the intrinsic value of the information provided. In that connection, the Court noted that both undertakings had submitted information spontaneously and that the information provided by them was equally helpful to the Commission. The Court therefore concluded that, in accordance with the principle of equal treatment, Nintendo's cooperation had to be regarded as comparable to that of its distributor. Accordingly, the Court granted Nintendo the same rate of reduction of the fine as that which had been granted to the distributor.

Outokumpu and Luvata v Commission afforded the Court an opportunity to explain its earlier decisions concerning aggravating circumstances, particularly repeated infringement. The Court recalled that the concept of repeated infringement involves only a previous finding of infringement. The fact that the first infringement was committed under the ECSC Treaty and that, because of the particular circumstances of the case, no fine was imposed is not a bar on the principle that once the Commission has established, by a decision, that an undertaking has participated in a cartel, that decision may serve as a basis for a subsequent assessment of the propensity of the undertaking to infringe the rules relating to cartels.

The taking into account of a previous infringement was also specifically addressed in Case T-161/05 *Hoechst v Commission* (judgment of 30 September 2009, not published). Here, the applicant had maintained that the Commission was not able to take into account an earlier decision because the latter had become final only after the end of the infringement at issue. The Court pointed out, however, that, for it to be possible to take such a decision into account, it is sufficient that an undertaking has been found previously to be a perpetrator of an infringement of the same type, even if the decision is still subject to judicial review.

(c) Imputability of the infringement

In its judgments concerning the cartel in the market for monochloroacetic acid, the Court made some interesting points on the imputability to the parent company of the unlawful conduct of its subsidiaries.

In particular, in *Hoechst v Commission*, the Court held that the applicant could not claim that its liability was transferred by a contract with one of its subsidiaries whereby its area of business was transferred. First, such a contract could not be relied upon against the Commission in order to escape the penalties incurred under competition law inasmuch as it sought to apportion liability between the companies for participating in a cartel. Second, the alleged transfer of liability effected in the case in point under the terms of the contract of transfer had no bearing on the determination of the applicant's liability, since that contract was concluded between the applicant and one of its wholly-owned subsidiaries, whose unlawful conduct could therefore be imputed to it in its capacity as parent company.

Likewise, in *Arkema v Commission*, the applicant denied that it was possible for the Commission to attribute the infringement of the subsidiary to the parent company, since the latter was only a non-operational holding company, playing very little role in the management of the subsidiary. The Court made clear that that fact was not sufficient to prevent the parent company from exercising decisive influence over the conduct of its subsidiary by coordinating financial investments within the group concerned. Indeed, in a group of companies, a holding company which coordinates, amongst other things, financial investments within the group is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one, in particular by means of budgetary control. In addition, the Court stated that no conclusion could be drawn from the fact that the two companies were operating on separate markets and had no supplier–customer relationship. In a group such as the group in question, the fact that there was a division of tasks was not unusual and did not reverse the presumption that the parent company and its subsidiary constituted a single undertaking within the meaning of Article 81 EC. Lastly, the Court recalled that the presumption that a parent company is liable for infringements committed by subsidiaries in which it holds all or nearly all the shares is based on an objective criterion which applies regardless of the size or legal structure of the undertaking. Therefore, if the application of that criterion has different consequences depending on the size of the group and its legal structure, that is merely an objective consequence of the differences between undertakings.

3. Points raised on the scope of Article 82 EC

In Case T-301/04 *Clearstream v Commission* (judgment of 9 September 2009), the Court ruled on the lawfulness of a Commission decision finding that the applicants had infringed Article 82 EC, first, by refusing to supply their services and, second, by applying discriminatory prices.

The Court stated that the Commission was correct in finding those abuses of a dominant position. In particular, the Court confirmed that the refusal to grant access and the unjustified discrimination in that regard were not two separate infringements but two manifestations of the same behaviour, as the unjustified discrimination stemmed from the refusal to provide comparable customers with the same or similar services.

In that connection, since the period of time required to obtain access considerably exceeded that which could be considered reasonable and justified and thus amounted to an abusive refusal to provide the service in question, that period of time was capable of causing a competitive disadvantage on the relevant market. The Court also confirmed that the application to a trading partner of different prices for equivalent services, continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market, could not fail to cause that partner a competitive disadvantage.

In Case T-57/01 *Solvay v Commission* (judgment of 17 December 2009), the Court found that documents seized solely for the purpose of verifying whether undertakings had participated in cartels and/or concerted practices under Article 81 EC could be used in support of allegations of infringements of Article 82 EC, since the practices which the Commission had considered to be at the root of the abuse of a dominant position and those which it had authorised its officials to investigate were substantially the same.

The Court held inter alia that a system of discounts was an abuse where, amongst other conditions, differentiated discounts were granted as soon as the customer ordered additional quantities from the applicant as compared with those agreed contractually, irrespective of the volumes, in absolute terms, of the latter. On that account, the unit price for those quantities was markedly lower than the average price paid by the customer for the basic quantities agreed contractually and was thus an incentive to the customer also to buy volumes in excess of the contractual quantities, since other suppliers would have had difficulty in offering, in respect of those volumes, prices which competed with the applicant's.

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

(a) Duty of care

In Case T-151/05 *NVV and Others v Commission* (judgment of 7 May 2009), the Court stated that in view of the need for rapid action and the very tight deadlines to which the Commission is subject in the procedure for the control of concentrations, the Commission cannot be required, in the absence of evidence indicating that information provided to it is inaccurate, to verify all the information it receives. Although the diligent and impartial examination which the Commission is obliged to carry out in the context of that procedure does not permit it to take as its basis facts or information which cannot be regarded as accurate, the need for rapid action presupposes that it cannot itself verify down to the last detail the authenticity and reliability of all the information it receives, since the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust.

(b) Requests for information

In Case T-145/06 *Omya v Commission* (judgment of 4 February 2009), the Court defined the scope of the Commission's power in relation to requests for information. As regards the request for information in itself, the Court stated, first, that the need for the information requested must be assessed by reference to the view that the Commission can reasonably have at the time the request is made and not by reference to the actual need for the information in the subsequent procedure. Second, it stated that, since the period of suspension of the time limits set in Article 10 of Regulation No 139/2004⁽¹⁴⁾ resulting from the adoption of a decision under Article 11 thereof depends on the date on which the necessary information is communicated, the Commission does not infringe the principle of proportionality by suspending the procedure until such information has been communicated to it.

As regards the correction of information communicated by a party which proves to be incorrect, the Court pointed out, first, that the Commission is entitled to request correction if there is a risk that the errors identified could have a significant impact on its assessment of whether the concentration at issue is compatible with the common market. Second, the Court stated that legitimate expectation cannot be pleaded in order to avoid the consequences of infringing the obligation to provide complete and correct information on the sole ground that the infringement was not identified by the Commission in the course of its verifications.

(c) Period within which proceedings must be commenced

In Case T-48/04 *Qualcomm v Commission* (judgment of 19 June 2009), the Commission maintained that Qualcomm's action against a decision declaring compatible with the common market the acquisition by two undertakings of joint control of Toll Collect, an automatic toll collection system, was inadmissible since, although Qualcomm had not been the addressee of that decision, the transmission of the decision to it constituted notification for the purposes of the fifth paragraph of Article 230 EC and, accordingly, the period allowed for commencing proceedings began to run from that time. The Court rejected the Commission's arguments. It recalled, first, that Article 20(1) of Regulation (EEC) No 4064/89⁽¹⁵⁾ requires there to be publication in the *Official Journal of the European Union* of decisions taken pursuant to that regulation and, accordingly, as regards persons who are not addressees identified in the contested decision, the period for instituting proceedings must be calculated by reference to the first of the cases set out in the fifth paragraph of Article 230 EC, namely from the time of publication. The Court pointed out that to accept the Commission's broad interpretation of the term addressee, which encompassed both the addressee(s) identified in a decision and any other persons designated as such by the Commission although they have not been so designated in the decision, would be to diminish the obligation provided for by Article 20(1) of Regulation No 4064/89, conferring on the Commission a discretion for the purpose of identifying from among persons who are not expressly named as addressees in a decision those who may bring an action from notification of a decision and not from its publication. The conferral of such a discretion could, however, entail a breach of the principle of equal treatment inasmuch as, among the persons who are not specifically named as addressees in a decision, those to whom that decision has been 'notified' will be able to challenge it from 'notification', whilst other

⁽¹⁴⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

⁽¹⁵⁾ The case in point concerned Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

persons to whom the decision has not been 'notified' will be able to challenge it from publication. Furthermore, it is not always possible for the Commission to identify at the outset the persons who may bring an action as from notification of a decision. Such discrimination cannot therefore be justified by the objective of ensuring legal certainty as swiftly as possible.

State aid

Cases concerning State aid accounted for a large part of the Court's activity in 2009: 70 cases were disposed of and 46 cases were brought. It is possible only to give an overview of the Court's decisions concerning (i) questions of admissibility, (ii) questions of substance and (iii) procedural questions.

1. Admissibility

The case-law this year has further clarified, amongst other matters, the concept of an act producing binding legal effects and that of a legal interest in bringing proceedings.

As regards an act producing binding legal effects, the Court rejected in Case T-354/05 *TF1 v Commission* (judgment of 11 March 2009) the Commission's argument that it takes no decision in the case of a procedure for review of existing aid leading to acceptance by the Member State of the appropriate measures proposed or seeking to limit that procedure to a quasi-contractual process. It is true that the Commission and the Member States may discuss the proposed appropriate measures but it is only where the Commission decides to accept the State's commitments as answering its concerns that the procedure for investigation of existing aid is brought to an end by a decision which is open to appeal.

In Case T-152/06 *NDSHT v Commission* (judgment of 9 June 2009, under appeal) the Court held that the obligation on the Commission to adopt a decision in response to a complaint arises only in the situation envisaged in Article 13 of Regulation (EC) No 659/1999⁽¹⁶⁾. Under the second sentence of Article 20(2) of that regulation, the Commission need only inform the complainant in writing that there are insufficient grounds for taking a view on the case. The latter situation arises, in particular, where Article 13 of that regulation does not apply because, in reality, the aid referred to in the complaint is not unlawful aid, but existing aid.

It follows from the Commission's exclusive right of initiative in the case of existing aid that a complainant cannot, by means of a complaint, require the Commission to assess the compatibility of existing aid. If, following an initial assessment, the Commission finds that the complaint relates not to unlawful aid but to existing aid, it is under no obligation to address a decision under Article 4 of Regulation No 659/1999 to the Member State concerned and cannot be compelled to apply the procedure provided for in Article 88(1) EC. Thus, a letter which categorises the aid complained of as existing aid does not have the characteristics of a decision which produces binding legal effects such as to affect the interests of the applicant.

As regards a legal interest in bringing proceedings, the Court held in *TF1 v Commission* that the applicant could not be regarded as having no such interest on the ground that the contested decision, in imposing conditions concerning aid to a competitor, was favourable to the applicant. Such an argument was based on the premiss that the applicant's objections regarding the substance

⁽¹⁶⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

of the decision, in particular concerning the manifestly unsuitable nature of the commitments to render the aid scheme compatible with the common market, were incorrect. However, annulment of the contested decision, either because of a manifest error by the Commission in determining appropriate measures to be implemented or because of an inadequate statement of reasons concerning the appropriateness of those measures to the problems identified, would not place the applicant in a less favourable situation than that resulting from the contested decision. Such annulment would thus mean that the contested decision was either characterised, or liable to be characterised, by inadequate commitments and was therefore unfavourable to the applicant.

In Case T-388/03 *Deutsche Post and DHL International v Commission* (judgment of 10 February 2009, under appeal), the Court made clear that concerned parties within the meaning of Article 88(2) EC had a legal interest in securing the annulment of a Commission decision, taken at the end of the preliminary examination procedure, since such an annulment would require the formal investigation procedure to be opened, permitting them to present their observations and thus exert an influence on the new decision. In that situation it was not for the Court to compare the pleas raised with the arguments in defence presented by the applicants in a separate case.

2. Substantive rules

(a) Granting of an economic advantage

In Case T-25/07 *Iride and Irede Energia v Commission* (judgment of 11 February 2009, under appeal), the Court ruled on whether the liberalisation of a market was among the developments which are only to be expected by operators or whether, on the contrary, normal market conditions implied the stability of the legislative framework. It observed that in a democratic State the legislative framework could be changed at any time — all the more so where the previous framework provided for the partitioning of a market along national or regional lines, so that monopoly situations arose. It followed that the opening-up of a previously partitioned market could not be regarded as anomalous in relation to normal market conditions.

Economic operators are in that respect entitled to protection of their legitimate expectations. Nevertheless, where they have in fact received that protection, they cannot be allowed to claim that it should be implemented by one means rather than another, that is to say, by means of the exclusion from the concept of aid within the meaning of Article 87(1) EC of aid compensating for loss sustained by reason of the legislative changes, rather than by a declaration of the compatibility of that measure with the common market, in accordance with Article 87(3) EC.

The Court also applied the principle stated in the judgment of the Court of Justice in *TWD v Commission*⁽¹⁷⁾, according to which the Commission does not exceed the limits of its discretion when, in the case of aid which a Member State proposes to grant to an undertaking, it takes a decision declaring that aid to be compatible with the common market, but subject to the condition of prior repayment by the undertaking of unlawful aid received earlier, by reason of the cumulative effect of the aid in question. The fact that the earlier unlawful aid was not granted as individual aid but as part of an aid scheme and that the exact benefit for the recipient undertakings could not, because of the lack of cooperation from the Member State concerned, be determined by the Commission was not justification for not applying the principle in question, since any other approach would be tantamount to rewarding a failure to comply with the duty to cooperate in good faith and would deprive the system for the review of State aid of effectiveness.

⁽¹⁷⁾ Case C-355/95 P [1997] ECR I-2549, paragraphs 25 to 27.

In that connection, the obligation on the Member State and on the undertaking that is the potential recipient of new aid to provide the Commission with information to show that the aid is compatible with the common market also entails the need to show that there is no cumulative effect of the new aid and earlier unlawful aid. If the Commission has not been able — because of the failure of the Member State and the potential recipient of the aid to comply with that obligation — to assess the effects on competition which that cumulative effect might have, it cannot be criticised for a lack of definition or analysis of the market at issue.

(b) Services of general economic interest

In *Deutsche Post and DHL International v Commission*, the Court stated that the dicta of the Court of Justice in *Altmark*⁽¹⁸⁾ were fully applicable to earlier Commission decisions. Thus, the fact that the Commission had not been in a position, during the preliminary examination procedure under Article 88(2) EC, to carry out a complete examination of whether the level of compensation awarded to a service of general economic interest was appropriate constituted evidence of the existence of serious difficulties in establishing whether aid was compatible with the common market.

In *TF1 v Commission*, the Court confirmed that the conditions laid down in *Altmark*, seeking to determine the existence of State aid within the meaning of Article 87(1) EC, are not to be confused with the Article 86(2) EC test, which is used to determine whether a measure constituting State aid may be regarded as compatible with the common market.

The Court also pointed out that — as the assessment of existing aid can lead only to measures which produce effects for the future — although any over-compensation in the past may possibly be relevant to an assessment of the compatibility of existing aid with the common market, the fact nevertheless remains that an examination as to whether there has been such over-compensation is not, in itself, absolutely necessary for a proper assessment of the need to propose appropriate measures for the future and determination of what those measures should be. The risk or otherwise of over-compensation for the future ultimately depends essentially on the specific detailed arrangements of the financing scheme itself, and not on the fact that the scheme has, in practice, led to over-compensation in the past.

(c) Private investor in a market economy test

In Case T-156/04 *EDF v Commission* (judgment of 15 December 2009), the Court recalled that investment by public authorities in the capital of an undertaking, in whatever form, can constitute State aid. However, by virtue of the principle that the public and private sectors are to be treated equally, that cannot be the case where capital is placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions. In situations where the intervention does not form part of the exercise of public powers the private operator test applies in order to determine whether a private operator with a view to profit would have been likely to make the investment. In that regard, the Court pointed out that it is settled case-law that, in order to determine whether measures taken by the State represent the exercise of public powers or whether they are the consequence of obligations that the State must assume as shareholder, it is important to look not at the form of those measures, but at their nature, their subject matter and the rules to which they are subject, while taking into account the objective which they pursue.

⁽¹⁸⁾ Case C-280/00 [2003] ECR I-7747.

In the case in point, the Court observed that the Commission had not examined whether the capital increase in *Électricité de France (EDF)*, carried out by the French Republic by means of the waiver of a tax claim, constituted a legal measure in the light of the private investor test. In the Commission's view, that test could not apply to a tax advantage since the waiver stemmed from the exercise by the State of its regulatory powers or even of its rights and powers as a public authority. The Court rejected the Commission's interpretation, stating that the application of the private investor test could not be dismissed solely on the ground that EDF's capital increase stemmed from the waiver by the State of a tax claim which it held against EDF. In such circumstances, it was for the Commission to determine whether a private investor would have invested a comparable amount in similar circumstances, irrespective of the form of the intervention by the State to increase EDF's capital and the possible use of tax resources to that end, with a view to ascertaining the economic rationale for that investment and to comparing it with the actions such an investor would have taken with respect to the same undertaking in the same circumstances. The Court also stated that such an obligation on the part of the Commission to determine whether the capital was provided by the State in circumstances corresponding to normal market conditions existed irrespective of the form in which the capital was provided by the State, regardless of whether it was similar to that which a private investor could have used.

Lastly, the Court stated that the very purpose of the private investor test is to establish whether, despite the fact that the State has at its disposal means which are not available to a private investor, the latter would, in the same circumstances, have taken an investment decision comparable to that taken by the State. The nature of the claim converted into capital and, therefore, the fact that a private investor cannot hold a tax claim are therefore irrelevant to the issue of whether or not the private investor test must be applied. Accordingly, the Court concluded that the Commission, by refusing to examine the contested measure in its context and to apply the private investor test, had erred in law. It therefore annulled the contested decision in part.

(d) Obligation to recover aid

In Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* (judgment of 30 November 2009), the Court confirmed the line of case-law according to which it must be possible, having regard to the information given in the decision, to calculate the amount of the aid to be recovered without overmuch difficulty. It held that the Commission is justified in confining itself to finding that there is an obligation to repay the aid in question and leaving it to the national authorities to calculate the exact amount of aid to be repaid, particularly where that calculation requires tax and social security systems, the detailed rules of which are laid down in the applicable national legislative provisions, to be taken into account. In the case in point attention must be drawn to the fact that the Commission had used a range of amounts.

In that connection, the Court pointed out that the Commission had stated, in the contested decision, that the amount of aid in question was between EUR 798 million and EUR 1 140 million. It followed that the amount of EUR 798 million had to be considered to be the minimum aid amount to be recovered. As the amounts comprising the range in which the amount of the aid fell were not indicative, the contested decision thus contained appropriate information which should have enabled the French Republic to determine itself, without too much difficulty, the final aid amount to be recovered. The Court also confirmed the line of cases stating that it must be possible to calculate the amount of the aid to be recovered, having regard to the information given in the Commission decision, without overmuch difficulty. In view of the Court of Justice's interpretation of the

contested decision⁽¹⁹⁾, this Court held that the aid amount to be recovered here could be calculated without overmuch difficulty and was at least equal to the minimum amount within the range given by the Commission.

3. Procedural rules

(a) Formal investigation procedure

In Case T-375/04 *Scheucher-Fleisch and Others v Commission* (judgment of 18 November 2009), the Court recalled that the Commission is required to initiate the formal investigation procedure if, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. When the Commission examined the compatibility of the aid in question with the common market, it was aware that one of the paragraphs of the national law in question did not comply with the condition set out in the Guidelines for State aid for advertising that a national quality control scheme cannot be restricted to products of a particular origin. That provision therefore raised doubts as to the compatibility of the aid in question with the Guidelines for State aid for advertising and should have led to the initiation of the procedure referred to in Article 88(2) EC. The Court therefore annulled the contested decision.

On another point, in *France and France Télécom v Commission*, the Court stated that the fact that the Commission had, in the contested decision, altered its analysis by comparison with the decision to initiate a formal investigation procedure would lead, in the case of the State concerned, to infringement of the rights of the defence only if the information contained in that decision or subsequently provided during the exchange of arguments in the administrative procedure had not enabled the State to comment properly on all the matters of law or fact contained in the contested decision. By contrast, differences between the contested decision and the opening decision which resulted from the Commission accepting, in whole or in part, the arguments put forward by the Member State, could not, by definition, give rise to an infringement of the rights of the defence of that State.

Similarly, in Case T-211/05 *Italy v Commission* (judgment of 4 September 2009), the Court held that the formal investigation procedure allows there to be a more in-depth examination and clarification of the questions raised in the decision to initiate the procedure, so that any difference between that decision and the final decision cannot be regarded in itself as constituting a defect rendering the final decision unlawful. The provisions relating to the review of State aid do not require the Commission to inform the Member State concerned of its position before adopting its decision, where the Member State has been given notice to submit its comments.

(b) Legitimate expectations

The applicants in Joined Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 *Diputación Foral de Álava and Others v Commission* (judgment of 9 September 2009, under appeal) had argued, inter alia, that the Commission's conduct had constituted an exceptional circumstance capable of justifying their legitimate expectation that the aid schemes at issue were lawful, on the ground that there had been a failure to publish a notice to potential aid recipients, as provided for in the 1983 Communication on illegal aid.

⁽¹⁹⁾ Case C-441/06 *Commission v France* [2007] ECR I-8887.

Although the Court found it regrettable that the notice had not been published in the Official Journal, it stated that it remained the case that the information contained in that Communication was wholly unambiguous. Moreover, to adopt the construction proposed by the applicants was to give the 1983 Communication on illegal aid a significance which is contrary to Article 88(3) EC. The risk attaching to illegally granted aid was a consequence of the practical effect of the obligation to notify laid down in Article 88(3) EC and did not depend on whether or not the notice provided for in the 1983 Communication on illegal aid was published in the Official Journal.

In particular, if the system of monitoring State aid established by the Treaty were to be maintained, the recovery of illegally granted aid could not be rendered impossible merely because there had been no publication of such a notice by the Commission. The Court concluded that the failure to publish the notice provided for in the 1983 Communication on illegal aid did not constitute an exceptional circumstance capable of justifying any expectation whatever that the illegally granted aid was lawful.

In addition, in *France and France Télécom v Commission*, the Court stated that very aim of the obligation to notify measures which were liable to grant undertakings State aid was to enable any doubts to be dispelled as to whether those measures did in fact amount to State aid. At the date of adoption of the law which provided for the special tax regime applicable to France Télécom, there was some doubt as to whether that regime conferred an advantage on the undertaking. The Court thus held that France should have notified the Commission of the measure in question. Since it had failed to give that notification before the implementation of the tax regime in question, it could not rely on the principle of protection of legitimate expectations unless it could prove that there were exceptional circumstances.

(c) Procedure for adopting decisions

In *France and France Télécom v Commission*, the Court provided important clarification concerning the procedure for the adoption of Commission decisions on State aid. The Court held that it is possible, as provided in the second paragraph of Article 13 of the Rules of Procedure of the Commission⁽²⁰⁾, for the College of Commissioners to instruct one or more of its Members to adopt the definitive text of any decision the substance of which has already been determined in discussion. Where the College exercises that power, it is for the Court which is considering the question of whether that power was properly exercised to ascertain whether the College may be regarded as having adopted all the factual and legal elements of the decision in question. Since this Court found here that the technical differences between the version of the contested decision adopted on 2 August 2004 and the text which had been approved by the College of Commissioners on 19 and 20 July 2004 did not affect the scope of the contested decision, it did not uphold the plea.

Community trade mark

Decisions relating to the application of Regulation (EC) No 40/94, replaced by Regulation (EC) No 207/2009⁽²¹⁾ which is essentially limited however to codifying the rules on the Community trade mark which have been significantly amended on several occasions since 1994, continued to

⁽²⁰⁾ OJ 2000 L 308, p. 26.

⁽²¹⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1). However, in this Report, reference is made only to the numbering of the articles in Regulation No 40/94.

represent in 2009 a large number of the cases disposed of by the Court (168 cases, that is to say 30% of the total number of cases disposed of in 2009).

1. Absolute grounds for refusal and absolute grounds for invalidity

Article 7(1)(c) of Regulation No 40/94 prohibits the registration as a Community trade mark of signs which, by reason of their descriptiveness, are incapable of fulfilling the function of indicating the commercial origin of the goods and services in question. Furthermore, according to settled case-law, the descriptiveness of a sign must be assessed by reference, on the one hand, to the goods or services in question and, on the other, to the relevant public's perception of that sign⁽²²⁾.

In Case T-234/06 *Torresan v OHIM — Klosterbrauerei Weissenhohe (CANNABIS)* (judgment of 19 November 2009), the Court dismissed the appeal against the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) according to which, for the average consumer, the word sign CANNABIS was descriptive of the characteristics of beer, wine and other alcoholic beverages, which could contain among their ingredients cannabis as a flavouring in the manufacture thereof. The Court stated that such a finding is not affected by the fact that the word 'cannabis' is an evocative and allusive word which gives rise to the idea of pleasure, distraction or relaxation.

Furthermore, in Joined Cases T-200/07 to T-202/07 *Agencja Wydawnicza Technopol v OHIM (222, 333 and 555)*, Joined Cases T-64/07 to T-66/07 *Agencja Wydawnicza Technopol v OHIM (350, 250 and 150)* and Case T-298/06 *Agencja Wydawnicza Technopol v OHIM (1 000)* (judgments of 19 November 2009, not published), the Court stated that word signs consisting solely of figures are descriptive of goods such as brochures, periodicals, the daily press and games, in so far as they refer to the characteristics of those goods, in particular the number of pages, works, items of information and compiled games.

In the case of figurative signs consisting of numbers framed by a rectangle and accompanied by coloured decoration, the Court was also called upon to adjudicate, in Joined Cases T-425/07 and T-426/07 *Agencja Wydawnicza Technopol v OHIM (100 and 300)* (judgment of 19 November 2009), on the consequences of the refusal of an undertaking which made an application for registration of those signs as Community trade marks to state, in accordance with Article 38(2) of Regulation No 40/94, that it disclaimed any exclusive right to those numbers. Having recalled that, under that provision, where a trade mark contains an element which is not distinctive, and where the inclusion of that element could give rise to doubts as to the scope of protection afforded, OHIM may request, as a condition for registration, that the applicant state that he disclaims any exclusive right to that element, the Court explained that the function of such disclaimers is to make apparent the fact that the exclusive rights of the proprietor of a mark do not extend to the non-distinctive elements of that mark and that whether the elements of the marks applied for are distinctive, for the purposes of Article 38(2) of Regulation No 40/94, must be assessed not by reference to the overall impression given by those marks, but by reference to the elements comprising them.

In addition, the Court again adjudicated on the distinctiveness of very simple figurative signs, namely an exclamation mark, on its own or framed by a rectangle, in Case T-75/08 *Joop! v OHIM (!)* and Case T-191/08 *JOOP! v OHIM (!) (Representation of an exclamation mark in a rectangle)* (judgments of 30 September 2009, not published). The Court recalled that registration of a trade

⁽²²⁾ Case C-383/99 P *Procter & Gamble v OHIM* [2001] ECR I-6251, paragraph 39, and Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 43.

mark which consists of signs that are used as advertising slogans, indications of quality or incitements to purchase the goods or services in question is not excluded as such by virtue of such use. A sign which fulfils functions other than that of a trade mark in the traditional sense of the term is only distinctive, however, if it may be perceived immediately as an indication of the commercial origin of the goods or services in question. The Court went on to observe that, in the cases in point, consumers, including those with a higher degree of attention, were not able to determine the origin of the goods designated by reference to an exclamation mark, which would be viewed rather as a term of praise, even if the exclamation mark were positioned inside a rectangular frame — a secondary element giving the sign in question the appearance of a label. Furthermore, in Case T-424/07 *Pioneer Hi-Bred International v OHIM (OPTIMUM)* (judgment of 20 January 2009, not published), the Court stated that, precisely because it is commonly used in everyday language, as well as in trade, as a generic laudatory term, the sign OPTIMUM cannot be regarded as appropriate for the purpose of identifying the commercial origin of the goods which it designates and that the fact that the goods in question are intended for a specialised public in no way alters that assessment, given that the level of attention of such a public, which is generally high, is relatively low when it comes to promotional indications.

Under Article 7(3) of Regulation No 40/94, a trade mark may be registered if it has become distinctive in relation to the goods or services in question in consequence of the use which has been made of it. In this respect, in Case T-137/08 *BCS v OHIM — Deere (Combination of the colours green and yellow)* (judgment of 28 October 2009, under appeal), the Court first recalled that not every use of a sign, in the case in point a combination of the colours green and yellow, necessarily constitutes use as a trade mark. However, in the circumstances of this case, OHIM's decision not to declare the mark consisting of that sign invalid was based inter alia on statements from professional associations according to which the combination of the colours green and yellow referred to the intervener's agricultural machines and on the fact that the intervener had been using the same combination of colours on its machines for a considerable time. The Court also stated that, although it must be proved that the disputed mark has acquired distinctive character throughout the Union, the same types of evidence do not have to be provided in respect of each Member State.

2. Relative grounds for refusal and relative grounds for invalidity

The main contributions to the case-law in 2009 concern the assessment of similarity of signs and the evaluation of likelihood of confusion. First of all, in Case T-80/08 *CureVac v OHIM — Qiagen (RNAiFect)* (judgment of 28 October 2009), the Court found that the similarities between the signs RNAiFect and RNAiActive resulting from the identical nature of the first three letters is strongly mitigated by the differences between their last five letters. It stated that, while it is true that the consumer normally attaches more importance to the first part of words where it is more pronounced, the public will not consider a descriptive or weakly distinctive element forming part of a complex mark to be the distinctive and dominant element of the overall impression conveyed by that mark. In the case in point, the element 'rna' had limited distinctive character, and the consumer would assume that this was a reference to a chemical compound. Accordingly, that element could not be regarded by the public as being distinctive and dominant in the overall impression conveyed by the complex marks in question. On the other hand, in Case T-434/07 *Volvo Trademark v OHIM — Grebenshikova (SOLVO)* (judgment of 2 December 2009), the Court held that there is a certain degree of phonetic similarity between the signs SOLVO and VOLVO and, accordingly, that OHIM was wrong to believe that it could dispense with a global assessment of the likelihood of confusion.

Next, in Case T-230/07 *Laboratorios Del Dr. Esteve v OHIM — Ester C (ESTER-E)* (judgment of 8 July 2009, not published), the Court specified certain circumstances in which the conceptual

comparison between signs can counteract the visual and phonetic similarities between those signs. The Court observed that, although the sign ESTEVE has no meaning in any official Union language apart from Spanish, the sign ESTER-E will be associated with a well-known first name or with a chemical compound and that that conceptual difference between those signs means that there is no likelihood of confusion. On the other hand, in Case T-386/07 *Peek & Cloppenburg v OHIM — Redfil (Agile)* (judgment of 29 October 2009, not published), the Court stated that situations in which a sign whose meaning the relevant public is capable of grasping immediately has only limited distinctiveness in relation to the goods or services in question do not constitute such circumstances. It took the view that the conceptual difference between the signs Aygill's and Agile is not sufficient to counteract the visual and phonetic similarities between those signs. With regard to the goods at issue, sports equipment and clothing, the word 'agile' has a laudatory character, which, in light of those similarities, might also be attributed by consumers to the earlier mark. Also, in Case T-291/07 *Viñedos y Bodegas Príncipe Alfonso de Hohenlohe v OHIM — Byass (ALFONSO)* (judgment of 23 September 2009, not published), the Court upheld OHIM's assessment that the earlier mark PRINCIPE ALFONSO and the mark applied for ALFONSO are conceptually different for Spanish consumers, in particular in that, in so far as the 'príncipe' element singles out one person from among all those with the same first name, the mark applied for has a clear and specific meaning, so that the relevant public will be capable of grasping it immediately.

As regards comparison of goods or services, in Case T-316/07 *Commercy v OHIM — easyGroup IP Licensing (easyHotel)* (judgment of 22 January 2009), the Court, having recalled that goods and services are complementary where there is a close connection between them, such that one is indispensable or important for the use of the other, stated that that definition implies that those goods or services can be used together and therefore that they are intended for the same public.

Other significant case-law developments in 2009 concern Article 8(4) of Regulation No 40/94, in particular in the context of invalidity proceedings. In Joined Cases T-318/06 to T-321/06 *Moreira da Fonseca v OHIM — General Óptica (GENERAL OPTICA)* (judgment of 24 March 2009), the Court recalled that, in order to oppose the registration or apply for a declaration of invalidity of a Community trade mark under that provision, the sign relied on must satisfy all of four conditions: it must be used in the course of trade; it must be of more than mere local significance; the right to that sign must have been acquired in accordance with the law of the Member State in which the sign was used prior to the date of application for registration of the Community trade mark and it must confer on its proprietor the right to prohibit the use of a subsequent trade mark. The Court went on to state that the first two conditions must be interpreted in the light of European Union law alone, while the other two conditions must be assessed in the light of the criteria set by applicable national law. Lastly, as regards the second condition, the Court held, first, that the significance must be assessed in the light of both the geographical dimension and the economic dimension and, second, that the fact that a sign confers on its proprietor an exclusive right throughout the national territory is in itself insufficient to prove that it is of more than mere local significance. Moreover, in Joined Cases T-114/07 and T-115/07 *Last Minute Network v OHIM — Last Minute Tour (LAST MINUTE TOUR)* (judgment of 11 June 2009), the Court held that, when applying Article 8(4) of Regulation No 40/94, the Board of Appeal is required to take into consideration both the legislation of the Member State concerned, applicable by virtue of the reference made by that provision, and the relevant national case-law.

Furthermore, in Case T-165/06 *Fiorucci v OHIM — Edwin (ELIO FIORUCCI)* (judgment of 14 May 2009, under appeal), the Court ascertained whether the conditions for the application of Article 52(2) of Regulation No 40/94 had been observed by the Board of Appeal of OHIM. In the case in point, Mr Elio Fiorucci applied, inter alia, for a declaration of invalidity in respect of the mark ELIO FIORUCCI, relying on his right to a name protected by Italian law. Having recalled that, under that provision,

OHIM may declare a Community trade mark to be invalid if its use can be prohibited pursuant to, in particular, a right to a name protected by a national law, the Court held that the protection guaranteed by the relevant Italian provision is not precluded where the name of the person concerned has achieved renown on account of his commercial activity.

In addition, Case T-435/05 *Danjaq v OHIM — Mission Productions (Dr. No)* (judgment of 30 June 2009) enabled the Court to make it clear that the same sign may be protected as an original creative work by copyright and as an indicator of the commercial origin of the goods and services in question by trade mark law. The Court recalled that those two exclusive rights are based on distinct qualities, that is to say the original nature of a creation, on the one hand, and the ability of a sign to distinguish that commercial origin, on the other. Therefore, even if the title of a film can be protected by certain national laws as an artistic creation independently of the protection afforded to the film itself, it does not automatically enjoy the protection afforded to trade marks. Accordingly, even if the signs Dr. No and Dr. NO serve to distinguish the film bearing that title from the other films in the 'James Bond' series, that does not establish that such signs indicate the commercial origin of the goods and services in question.

Lastly, the Court clarified the rules concerning proof of genuine use of the earlier mark in the context of invalidity proceedings. It stated in Case T-450/07 *Harwin International v OHIM — Cuadrado (Pickwick COLOUR GROUP)* (judgment of 12 June 2009) that OHIM is required to examine the issue of proof of genuine use of the earlier mark even where the proprietor of the Community trade mark which is the subject matter of an application for a declaration of invalidity has not submitted a specific request to that effect, but has challenged the evidence submitted by the proprietor of the earlier mark to prove use.

3. Grounds for revocation

Under Article 50 of Regulation No 40/94, a Community trade mark is liable to revocation *inter alia* where the use of the trade mark may mislead the public as to the nature, quality or geographical origin of the goods or services in question.

In this respect, in *ELIO FIORUCCI* the Court found that the fact that a mark and a patronymic are identical is not sufficient to warrant the conclusion that the public concerned will think that the person whose patronymic constitutes the mark designed the goods bearing that mark, since that public is aware that, behind every trade mark consisting of a patronymic, there is not necessarily a fashion designer of that name. In order that Article 50 of Regulation No 40/94 may be applied, the person concerned must prove that the mark has been used in a deceptive manner or that a sufficiently serious risk of deception has been established, which was not demonstrated in the case in point.

In Case T-27/09 *Stella Kunststofftechnik v OHIM — Stella Pack (Stella)* (judgment of 10 December 2009), the Court also clarified the respective purpose and effects of revocation and opposition proceedings. It observed in particular that the relevant provisions do not provide that opposition proceedings brought on the basis of an earlier mark and still pending can influence in any way the admissibility or even the progress of revocation proceedings against that mark. Opposition proceedings and revocation proceedings are two distinct and autonomous types of proceedings: opposition is designed to frustrate, under certain conditions, an application for registration of a mark due to the existence of an earlier mark, and rejection of an opposition does not entail revocation of the mark concerned, whereas revocation can be brought about only where proceedings have been instituted for that purpose.

4. Formal and procedural issues

Since a large number of cases dealt with formal and procedural issues in 2009, it is necessary to limit these remarks to an outline of the main developments.

First, Case T-140/08 *Ferrero v OHIM — Tirol Milch (TiMi KiNDERJOGHURT)* (judgment of 14 October 2009, under appeal) is of particular importance, since it enabled the Court to specify the value, in the context of invalidity proceedings, of assessments made and conclusions reached by a Board of Appeal of OHIM in an earlier decision in opposition proceedings involving the same parties and the same Community trade mark. In particular, it was held that there was no room for application of either the principle of *res judicata*, since proceedings before OHIM are administrative and the relevant provisions lay down no rule to that effect, or the principles of legal certainty and the protection of legitimate expectations, since Regulation No 40/94 does not exclude the possibility of invalidity proceedings following the failure of opposition proceedings.

Second, as regards the consequences for OHIM of annulment of a decision of the Board of Appeal, the Court stated in Case T-402/07 *Kaul v OHIM — Bayer (ARCOL)* (judgment of 25 April 2009, under appeal) that OHIM has to ensure that the appeal brought by the applicant before the Board of Appeal, which again becomes pending following that annulment, leads to a new decision, possibly adopted by the same board. It stated that, if, as in the case in point, the judgment annulling the decision has not taken a position on whether or not the marks at issue are similar, the Board of Appeal must re-examine that question, independently of the position adopted in the earlier annulled decision.

Third, the Court clarified the scope of the duty to state the reasons on which decisions of the Boards of Appeal are based where a trade mark covers several different goods or services. In Case T-118/06 *Zuffa v OHIM (ULTIMATE FIGHTING CHAMPIONSHIP)* (judgment of 2 April 2009), the Court stated that it is possible to use general reasoning for a series of goods or services only where there exists between them a sufficiently direct and specific link as to enable the considerations constituting the grounds of the decision in question, first, to explain adequately the reasoning followed by the Board of Appeal for each of the goods and services belonging to that category and, second, to be applicable without distinction to each of the goods or services concerned. In Joined Cases T-405/07 and T-406/07 *CFCMCEE v OHIM (P@YWEB CARD and PAYWEB CARD)* (judgment of 20 May 2009 under appeal), the Court added that general reasoning must none the less enable it carry out its review. Moreover, where a decision offers no reason whatsoever as to why OHIM took the view that certain goods formed a homogenous group, it is not permitted to advance supplementary reasons in the course of the proceedings.

Fourth, in Case T-189/07 *Frosch Touristik v OHIM — DSR touristik (FLUGBÖRSE)* (judgment of 3 June 2009, under appeal), the Court stated that only the date of filing of the application for registration, and not that of registration, is relevant to the examination that OHIM must carry out during invalidity proceedings in which it is alleged that a Community trade mark does not fulfil the conditions of Article 7 of Regulation No 40/94. That approach avoids a situation in which the probability of the mark losing its registrability increases with the length of the registration procedure.

Fifth, in Case T-277/06 *Omnicare v OHIM — Astellas Pharma (OMNICARE)* (judgment of 7 May 2009), Case T-410/07 *Jurado Hermanos v OHIM (JURADO)* (judgment of 12 May 2009), Case T-136/08 *Aurelia Finance v OHIM (AURELIA)* (judgment of 13 May 2009) and Joined Cases T-20/08 and T-21/08 *Evets v OHIM (DANELECTRO and QWIK TUNE)* (judgment of 23 September 2009, under appeal), the Court adjudicated on the scope of application of Article 78 of Regulation No 40/94 relating to *resstitutio in integrum*, according to which the applicant for or proprietor of a mark or any other party

to proceedings before OHIM who has not observed a time limit may, under certain conditions, have his rights re-established. In particular, in the first and fourth judgments mentioned above, the Court stated that that provision is applicable to the time limit for challenging a decision before the Board of Appeal, but not to the time limit for bringing the application for *restitutio in integrum* itself. In addition, in the second judgment, it clarified the concept of a party to the proceedings while, in the third, it established that, if the proprietor of a mark delegates administrative tasks relating to the renewal of the mark to a company specialised in that field, it must ensure that the latter offers the assurance necessary to enable it to be assumed that those tasks will be carried out properly. In particular, where that company installs a computerised renewal reminder system, it must provide for a mechanism for detecting and correcting possible errors.

Lastly, as regards a revocation decision adopted by a department of OHIM in order to rectify an error affecting the costs section of a decision previously adopted by that department, the Court stated, in Case T-419/07 *Okalux v OHIM — Messe Düsseldorf (OKATECH)* (judgment of 1 July 2009), that, since that revocation could be only partial, the period for bringing proceedings had to be calculated by reference to the first decision.

Environment — System for greenhouse gas emission allowance trading

In Case T-263/07 *Estonia v Commission* (judgment of 23 September 2009, under appeal) and Case T-183/07 *Poland v Commission* (judgment of 23 September 2009, under appeal), the Court set out important case-law regarding the distribution of competence between the Member States and the Commission when the Member States' national allocation plans for emission allowances ('NAPs') are drawn up and the Commission checks whether they are compatible with the criteria laid down by Directive 2003/87/EC⁽²³⁾.

Here, the Commission had found in the contested decisions that the NAPs of the Republic of Poland and the Republic of Estonia were incompatible with certain criteria laid down by Directive 2003/87, while indicating that no objections would be raised against those NAPs provided that certain amendments were made. The Member States concerned contended before the Court that, by setting a ceiling for greenhouse gas allowances above which their NAPs would be rejected and by substituting, in this context, its method of analysis for that adopted by the relevant Member State, the Commission had infringed the distribution of competence provided for by Directive 2003/87. The Court upheld those claims and annulled the contested decisions.

The Court observed that the reduction of greenhouse gas emissions is of primary importance in the context of the fight against global warming, which represents one of the greatest social, economic and environmental threats which the world currently faces. Pursuit of that objective nevertheless cannot justify maintaining in force a decision rejecting a NAP if that measure was adopted in breach of the competences allocated by Directive 2003/87 to the Member States and the Commission respectively.

The Court pointed out that, in accordance with the third paragraph of Article 249 EC, Directive 2003/87 is binding upon the Member States to which it is addressed as to the result to be achieved, but leaves them freedom of action as to the choice of the forms and methods appropriate for that purpose. The Commission has the burden, when exercising its supervisory power, of proving that

⁽²³⁾ European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

the instruments used by a Member State in that respect are contrary to Community law. It is only by applying those principles that it is possible to ensure compliance with the principle of subsidiarity, according to which, in areas which do not fall within its exclusive competence, the Community is to take action only if and in so far as the objectives pursued cannot be sufficiently achieved by the Member States.

The Court further stated that it is clear from Directive 2003/87, first, that the Member State alone has the power to draw up the NAP and to take final decisions fixing the total quantity of allowances which it will allocate for each five-year period and the distribution of that quantity amongst economic operators and, second, that the Commission has power to review the NAP in light of the criteria laid down by the directive, the Member State being unable to allocate the allowances unless the amendments to the NAP that are proposed following the Commission's initial refusal are accepted by the latter. The Court also explained that the Commission is entitled to make criticisms concerning the incompatibilities found and to formulate proposals designed to allow the Member State to modify its NAP in a manner which would make it compatible with the criteria.

However, the Court found that, by specifying a specific quantity of allowances and by rejecting the NAPs of the Member States concerned in so far as the total quantity of allowances proposed exceeded that threshold, the Commission had exceeded the limits of the power of review conferred upon it by Directive 2003/87, since it is for Member States alone to set that quantity.

Likewise, while the Commission may draw up its own ecological and economic model in order to verify whether the NAPs of the various Member States are compatible with the criteria laid down by Directive 2003/87, an exercise in which it has a wide discretion, it cannot, on the other hand, claim to set aside the data in a NAP so as to replace them with data obtained from its own assessment method, as otherwise it would be acknowledged as having a veritable power of uniformisation which that directive does not confer upon it. The Court also observed that, when drawing up its NAP, the Member State is obliged to make choices concerning the policies to be adopted, the method to be used and the data to be taken into account in order to predict the expected evolution of emissions, while the Commission's review of those choices is limited to verifying whether the data and parameters upon which the choices are founded are credible and sufficient.

The Court therefore held that, by substituting its method of analysis for that used by the Member States concerned, instead of merely checking that their NAPs were compatible with the criteria laid down by Directive 2003/87, in the light, where appropriate, of the data resulting from its own method, the Commission exceeded the powers conferred upon it by that directive.

Common foreign and security policy

1. Combating of terrorism

In Case T-341/07 *Sison v Council* (judgment of 30 September 2009) the Court, first, recalled the principles resulting from the judgments in *Organisation des Modjahedines du peuple d'Iran v Council*⁽²⁴⁾ and *Sison v Council*⁽²⁵⁾ that concern the obligation to state reasons for decisions to freeze funds of persons linked to terrorist activities. Both the statement of reasons for an initial decision to freeze funds and the statement of reasons for subsequent decisions must refer not only to the

⁽²⁴⁾ Case T-228/02 [2006] ECR II-4665.

⁽²⁵⁾ Judgment of 11 July 2007 in Case T-47/03, not published.

legal conditions of application of Regulation No 2580/2001 ⁽²⁶⁾, in particular the existence of a national decision taken by a competent authority, but also to the actual and specific reasons why the Council considers that the person concerned must be made the subject of a measure freezing funds. Also, the broad discretion enjoyed by the Council with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds extends to the evaluation of the threat that may be presented by an organisation having in the past committed acts of terrorism, notwithstanding the suspension of its terrorist activities for a certain period. In those circumstances the Council cannot be required to state with greater precision in what way freezing the funds of the person concerned may in concrete terms contribute to the fight against terrorism or to produce evidence to show that that person might use his funds to commit or facilitate acts of terrorism in the future.

Secondly, after recalling the conditions for implementing a decision to freeze funds, the rules relating to the burden of proof incumbent on the Council in this context and the scope of judicial review in such matters, the Court stated that, having regard both to the wording, context and objectives of the provisions at issue and to the major part played by the national authorities in the fund-freezing process provided for, a decision to 'instigat[e] ... investigations or prosecut[e]' must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism. That requirement is not satisfied by a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity, in relation to a dispute concerning, for example, rights and duties of a civil nature.

The Court also explained that the Council, when contemplating adopting or maintaining, after review, a fund-freezing measure pursuant to Regulation No 2580/2001, on the basis of a national decision for the 'instigation of investigations or prosecution' for an act of terrorism, may not disregard subsequent developments arising out of those investigations or that prosecution. It may thus happen that police or security enquiries are closed without giving rise to any judicial consequences, because it proved impossible to gather sufficient evidence, or that measures of investigation ordered by the investigating judge do not lead to proceedings going to judgment for the same reasons. Similarly, a decision to prosecute may end in the abandoning of the prosecution or in acquittal in the criminal proceedings. It would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation. To decide otherwise would be tantamount to giving the Council and the Member States the excessive power to freeze a person's funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken.

2. Combating of nuclear proliferation

In Joined Cases T-246/08 and T-332/08 *Melli Bank v Council* (judgment of 9 July 2009, under appeal) and Case T-390/08 *Bank Melli Iran v Council* (judgment of 14 October 2009, under appeal), which were dealt with under an expedited procedure, the Court examined for the first time actions challenging measures to freeze funds adopted within the framework of the body of restrictive measures that have been introduced in order to apply pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems.

⁽²⁶⁾ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

The origin of the regime at issue is to be found in a resolution of the United Nations Security Council, given effect by Regulation (EC) No 423/2007⁽²⁷⁾ which provides for the freezing of the funds of the persons, entities or bodies designated by the Security Council and the freezing of the funds of entities owned or controlled by entities which have been identified as being engaged in, directly associated with or providing support for nuclear proliferation. On the basis of this regulation, an Iranian bank and its wholly-owned United Kingdom subsidiary were the subject of decisions freezing funds, having regard to their alleged role as a facilitator for the sensitive activities of the Islamic Republic of Iran, in connection with numerous purchases of sensitive materials for Iran's nuclear and missile programmes and in supplying financial services.

While the Court relied in these judgments upon the principles already set out in the case-law relating to the freezing of funds with regard to the combating of terrorism, it also introduced certain specific reasoning.

First, in response to the plea of illegality raised by Melli Bank plc in respect of Regulation No 423/2007 on the basis that it infringes the principle of proportionality, the Court recalled that the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued⁽²⁸⁾. The Court explained that the purpose of Regulation No 423/2007 is to stop nuclear proliferation and its funding and so to bring pressure to bear upon the Islamic Republic of Iran to put an end to the activities concerned. That objective forms part of a more general framework of endeavours linked to the maintenance of international peace and security and is, therefore, legitimate. In addition, the freezing of the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation is linked to that objective since there is a not insignificant danger that such an entity may exert pressure on the entities it owns or controls in order to circumvent the effect of the measures applying to it, by encouraging them either to transfer their funds to it, directly or indirectly, or to carry out transactions which it cannot itself perform by reason of the freezing of its funds. Finally, the case-law makes it clear that the right to property and the right to carry on economic activity are not absolute rights and that their exercise may be subject to restrictions justified by objectives of public interest pursued by the Community. According to the case-law, the importance of the aims pursued by the legislation at issue is such as to justify negative consequences, even of a substantial nature, for some operators⁽²⁹⁾. The Court noted that the freedom to carry on economic activity and the right to property of the banks concerned were to a considerable extent restricted by the freezing of their funds, since they could not dispose of their funds located in the Community or held by Community nationals, except under specific authorisations, and their branches in the Community could not enter into new transactions with their customers. None the less, the Court considered that, given the prime importance of the preservation of international peace and security, the difficulties caused were not disproportionate to the ends sought.

Second, in Case T-390/08 the Court provided important clarification regarding the obligation to apprise the persons concerned of the grounds for measures which, although general, are nevertheless of direct and individual concern to them and may restrict the exercise of their fundamental

⁽²⁷⁾ Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

⁽²⁸⁾ Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13.

⁽²⁹⁾ See, to this effect, Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraphs 21 to 23.

rights. It held that the Council is bound, in so far as may be possible, to apprise the entities concerned of the fund-freezing measures by making individual notification. The rule that ignorance of the law is no defence cannot be relied on where the measure in question has, in regard to the person concerned, the nature of an individual measure. In the case in point, the Council did not make individual notification, even though it knew the address of the applicant's headquarters. The Court thus considered that the Council did not fulfil its obligation to apprise the applicant of the grounds of the contested decision. However, it was clear from the case-file that the French banking commission informed the applicant's branch in Paris of the adoption of the contested decision and of its publication in the Official Journal that same day. Thus, the applicant was informed timeously and officially both of the adoption of the contested decision and of the fact that it could consult the statement of reasons for that decision in the Official Journal, and therefore, in those exceptional circumstances, the breach found did not justify annulment of the contested decision.

Marketing authorisation for plant protection products

In 2009 the Court delivered a number of judgments concerning Commission decisions adopted on the basis of Directive 91/414 which lays down the Community rules on authorisation and withdrawal of authorisation for the placing of plant protection products on the market. Despite the particularly technical nature of such cases, it is appropriate to mention two judgments in which the Court based its reasoning on the conclusions to be drawn from the precautionary principle.

In Case T-326/07 *Cheminova and Others v Commission* (judgment of 3 September 2009), the Court noted that Article 5(1)(b) of Directive 91/414 provides that, for an active substance to be authorised, it must be possible to expect that, in the light of current scientific and technical knowledge, use of plant protection products containing that active substance, consequent on application consistent with good plant protection practice, will not have any harmful effects on human or animal health or any unacceptable influence on the environment. Interpreting that provision in the light of the precautionary principle, the Court stated that, in the domain of human health, the existence of solid evidence which, while not resolving scientific uncertainty, may reasonably raise doubts as to the safety of a substance justifies, in principle, the refusal to authorise that substance. Thus, the reference made by Directive 91/414 to 'current scientific and technical knowledge' cannot support the inference that undertakings which have notified an active substance and which are faced with the likelihood of a decision not to include that substance as an authorised substance should have the possibility of submitting new studies and data for as long as doubts persist regarding the safety of the active substance. Such an interpretation would run counter to the objective of a high level of protection of human and animal health and of the environment, in that it would be tantamount to granting to the notifier — on whom the burden of proof lies as regards the safety of the active substance and who has a better knowledge of that substance — a right of veto over the adoption of a decision not to authorise the substance.

In Case T-334/07 *Denka International v Commission* (judgment of 19 November 2009), the Court recalled that, in accordance with the precautionary principle, where there is scientific uncertainty as to the existence or extent of risks to human health the Community institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent⁽³⁰⁾. Moreover, in a situation in which there is scientific uncertainty, a risk assessment cannot be required to provide the Community institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality.

⁽³⁰⁾ Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 99, and Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, paragraph 139.

Pointing out that there were gaps in the dossier submitted by the applicant and thus no reliable conclusion could be drawn as regards the genotoxic and carcinogenic properties of dichlorvos, the Court concluded, in the light of the available toxicological data, the uncertainties relating to the safety of that substance and the gaps in the dossier, that the Commission did not make a manifest error of assessment in adopting the contested decision.

Access to documents of the institutions

Case T-121/05 *Borax Europe v Commission* (judgment of 11 March 2009, not published) and Case T-166/05 *Borax Europe v Commission* (judgment of 11 March 2009, not published) prompted the Court to provide explanation in respect of exceptions to the right of access to documents held by the institutions, namely those relating to the protection of the privacy and integrity of the individual and to the protection of the decision-making process.

Here, the applicant was refused disclosure of documents and sound recordings of meetings, relating, in particular, to comments and reports of experts and industry representatives provided in the context of a procedure for the classification of boric acid and borates. That procedure had resulted in the publication by the Commission of the final conclusions of those experts recommending that the products be classified as toxic substances. In order to justify the refusal of access, the Commission stated in particular that disclosure of those documents would infringe the right to protection of personal data resulting from Regulation (EC) No 45/2001⁽³¹⁾ and would permit identification of the experts, who would be at risk of being exposed to external pressure because of the economic interests at stake. The Court annulled the contested decisions in particular on the ground that the Commission had not explained how access to the documents at issue could concretely and effectively undermine the interests protected by the relevant exception.

Before doing so, the Court explained that the Commission could not base its refusal on the assurance which it contended it gave the experts that they could express themselves personally and that their identities and opinions would not be disclosed. The confidentiality undertaking, which according to the Commission bound it to the experts, was concluded between the latter and that institution and could not therefore be relied upon against Borax, whose rights of access to the documents were guaranteed subject to the conditions and within the limits laid down by Regulation No 1049/2001. Furthermore, a decision refusing access to documents held by an institution could be based only on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question could not make such a refusal in reliance on an undertaking to the participants at a meeting if that undertaking could not be justified by reference to one of those exceptions. The Commission did not explain why identification of the experts would undermine their privacy or infringe Regulation No 45/2001 and did not substantiate to the required legal standard a sufficiently foreseeable risk that revelation of their opinion would expose them to unjustified external pressure undermining their integrity, in particular as omission of the experts' names and countries of origin was in any event apt to remove any possible risk in this regard.

The Court also pointed out that, while the legislature had provided for a specific exception to the right of public access to the documents of the institutions as regards legal advice, it had not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. Since, according to the case-law, it could not correctly be held that there was a general

⁽³¹⁾ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

need for confidentiality in respect of advice from the Council's legal service relating to legislative matters⁽³²⁾, the same principle had to be applied to the advice at issue, for which the Community legislature had not laid down a specific exception and which remained subject to the general rules as regards the public right of access to documents. It followed that scientific opinions obtained by an institution for the purpose of the preparation of legislation had, as a rule, to be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions might deter experts from taking further part in its decision-making process was inherent in the rule which recognised the principle of access to documents containing opinions intended for internal use in the context of consultations and preliminary deliberations.

II. Actions for damages

1. Admissibility

According to case-law, the action for damages provided for in Article 235 EC is an independent form of action, and such an action seeking to challenge a measure cannot be inferred to be inadmissible from the fact that an action for annulment brought against that measure is inadmissible. Thus, individuals who would not be directly and individually concerned by a legislative measure do not, for this reason alone, lack entitlement to bring an action seeking to render the Community liable for the unlawfulness of that measure⁽³³⁾.

In Case T-166/08 *Ivanov v Commission* (order of 30 September 2009, not published, under appeal), the Court clarified the limits of the independence of actions for annulment and actions for damages, stating that it cannot be a consequence of the independence of those forms of action that an individual who has allowed the time limit for bringing an action laid down in the fifth paragraph of Article 230 EC to pass may escape being time-barred by seeking to obtain, through an action for damages, the benefit which he could have obtained if he had brought an action for annulment within the time limit. Consequently, the fact that an application for annulment is time-barred, which is a matter of public policy, means that an application for damages which is closely linked to the application for annulment is time-barred too. Thus, an action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of an individual decision which has become definitive and it would, if upheld, nullify the legal effects of that decision. The Court nevertheless pointed out that an applicant remains entitled to contest, by means of an action for damages, the wrongful acts or omissions resulting from the conduct of an institution where that conduct is subsequent to decisions whose legality he has not contested within the time limit.

In Case T-440/03 *Arizmendi and Others v Council and Commission* (judgment of 18 December 2009), the Court applied innovative reasoning to the question of the admissibility of an action seeking compensation for loss or damage allegedly suffered as a result of the Commission's sending to a Member State a reasoned opinion stating that it was failing to fulfil its obligations under the applicable Community legislation. In the case in point, following receipt of the reasoned opinion the French Republic had in fact repealed the statutory monopoly held by shipbrokers, who constituted

⁽³²⁾ Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 57.

⁽³³⁾ See, to this effect, Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975 and Case T-178/98 *Fresh Marine v Commission* [2000] ECR II-3331.

a body of persons enjoying a hybrid status combining that of holder of a professional office having a monopoly over certain operations and that of trader.

According to settled case-law, an action for damages founded on the fact that the Commission has not instituted infringement proceedings under Article 226 EC is inadmissible. Since the Commission is not bound to institute infringement proceedings under Article 226 EC, its decision not to institute such proceedings is not in any event unlawful, so that it cannot give rise to non-contractual liability on the part of the Community⁽³⁴⁾. The Commission considered that solution to be applicable by analogy to situations where it has not refrained from instituting infringement proceedings but, on the contrary, has issued a reasoned opinion, which constitutes a stage preliminary to infringement proceedings before the Court of Justice.

The General Court rejected that line of argument, recalling that the action for damages is an independent form of action, with a particular purpose to fulfil within the context of legal remedies in that it seeks compensation for damage resulting from a measure or unlawful conduct attributable to a Community institution. Accordingly, irrespective of whether it constitutes an act that can be challenged in an action for annulment, every measure of an institution, even if it has been adopted by the institution in the exercise of a discretion, is, in principle, capable of being the subject of an action for damages; that discretion does not have the effect of freeing the institution from its obligation to act in accordance with higher rules of law, such as the Treaty and general principles of Community law, and with the relevant secondary legislation. Consequently, while, within the framework of its powers under Article 226 EC, the Commission enjoys a discretion in deciding whether to send a reasoned opinion to a Member State, it is conceivable that, in quite exceptional circumstances, a person may demonstrate that such an opinion is vitiated by unlawfulness that constitutes a sufficiently serious breach of a rule of law such as to cause him loss or damage. The Court thus concluded that the action was admissible.

2. *Sufficiently serious breach of a rule conferring rights on individuals*

In order for the Community to incur non-contractual liability, the applicant must establish a sufficiently serious breach of a rule of law intended to confer rights on individuals⁽³⁵⁾.

In the context of an application seeking compensation for the damage allegedly caused to the applicants by the Commission's decision to withdraw authorisation for the import from Costa Rica of animals from aquaculture, the Court stated in Case T-238/07 *Ristic and Others v Commission* (judgment of 9 July 2009, not published) that, in order to ensure the practical effect of the condition relating to breach of a rule conferring rights on individuals, it is necessary for the protection offered by the rule invoked to be effective in relation to the person who invokes it and, therefore, that that person be among those upon whom the rule in question confers rights. A rule not protecting the person against the unlawfulness he invokes, but protecting another person, cannot be accepted as a source of damages. In the case in point, the applicants could not therefore invoke, in their application for damages, unlawfulness resulting from the alleged breach of Costa Rica's right to be heard and of the right of the Federal Republic of Germany to participate in the procedure.

⁽³⁴⁾ Orders in Case C-72/90 *Asia Motor France v Commission* [1990] ECR I-2181, paragraphs 13 to 15, Case T-201/96 *Smanor and Others v Commission* [1997] ECR II-1081, paragraphs 30 and 31, and Case T-202/02 *Makedoniko Metro and Michaniki v Commission* [2004] ECR II-181, paragraphs 43 and 44.

⁽³⁵⁾ Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 42 and 43.

Also, in *Arizmendi and Others v Council and Commission*, the Court observed that during an infringement procedure the Commission can only give an opinion regarding a Member State's failure to comply with Community law, since ultimately the Court of Justice alone has jurisdiction to find that a Member State has failed to fulfil its obligations under Community law. In so far as, in that opinion, the Commission merely sets out its view as to whether a Member State has failed to fulfil its Community law obligations, the adoption of the opinion cannot result in a sufficiently serious breach of a rule of law intended to confer rights on individuals. Therefore, even where the view as to the purport of Community law which the Commission sets out in a reasoned opinion is incorrect, that cannot constitute a sufficiently serious breach capable of causing the Community to incur non-contractual liability. On the other hand, if assessments set out in a reasoned opinion go beyond determination as to whether a Member State has failed to fulfil its obligations or if other conduct on the part of the Commission in an infringement procedure, for example the wrongful disclosure of trade secrets or of information damaging a person's reputation, exceeds the powers which are conferred upon it, those assessments or that conduct can constitute a breach such as to render the Community liable.

III. Appeals

In 2009, 31 appeals were brought against decisions of the Civil Service Tribunal and 31 cases were brought to a close by the General Court (Appeal Chamber). Two of those cases merit particular attention.

First, in Case T-404/06 P *ETF v Landgren* (judgment of 8 September 2009), the Court upheld the innovatory position of the Civil Service Tribunal that grounds must be stated for every decision terminating a contract of indefinite duration, on the basis of reasoning founded on the requirements of the Staff Regulations and on the inseparable link between the obligation to state reasons and exercise of the power of judicial review.

Second, in Case T-58/08 P *Commission v Roodhuijzen* (judgment of 5 October 2009), the Court held that the conditions for the extension of the Joint Sickness Insurance Scheme to the spouse of an official under Article 72(1) of the Staff Regulations of Officials of the European Communities do not mean that a non-marital partnership between an official and that official's partner must be equivalent to marriage. In order for a qualifying non-marital partnership to exist, it is necessary only that there be a union between two persons and that they produce a document recognised by a Member State acknowledging their status as non-marital partners; there is no need to verify whether the consequences stemming from the partnership entered into by the official concerned are similar to those stemming from a marriage.

IV. Applications for interim measures

In 2009, 24 applications for interim measures were brought before the General Court, an appreciable reduction compared with the number of applications made in the preceding year (58). In 2009, 20 such cases were disposed of, compared with 57 in 2008. Only one application for suspension of operation of a measure was granted, in Case T-95/09 R *United Phosphorus v Commission* (order of the President of the Court of 28 April 2009, not published).

The case giving rise to this order formed part of a series of cases in which the President of the Court had, in 2007 and 2008, dismissed six other applications for the suspension of decisions prohibiting the marketing of certain substances. They were dismissed for lack of urgency, because the damage

alleged was not irreparable and was not sufficiently serious as it represented less than 1% of the worldwide turnover of the group to which the applicant companies belonged. While, in the seventh order, made in *United Phosphorus*, the President of the Court accepted that serious and irreparable harm was imminent, he did so because of the particular circumstances of the case, namely the deep crisis from which the world economy had been suffering for months and which was affecting the value of numerous undertakings and their capacity to secure liquidity. The group to which the applicant belonged had lost much of its value, which showed that the damage alleged was serious. While acknowledging that the mere possibility of bringing an action for damages is sufficient to show that financial harm is in principle reparable, the President of the Court added that he is not obliged to apply the relevant conditions 'mechanically and rigidly', but must determine, in the light of the circumstances of the case, the manner in which urgency is to be verified.

In the case in point, the President of the Court took account in particular of the fact that, in parallel with the administrative procedure that had led to the decision prohibiting the products at issue, the applicant had resubmitted its application for authorisation of those products, under a newly created accelerated procedure that was capable of being concluded only a few months after the date imposed for the withdrawal of the products from the market and in the framework of which it was able to present all of the scientific data alleged to have been improperly neglected in the procedure that had led to the decision prohibiting the products. The President of the Court stated that it would be unreasonable to allow the prohibition of the marketing of a product in respect of which it was not improbable that its marketing would be authorised only a few months later. Also, a number of factors indicated that a return of the applicant to the market in question appeared problematic by reason of the fact that, at the crucial point in time, it would probably not have available to it any source for the supply of the product. That conclusion was supported, at the level of balancing the interests involved, by the finding of a certain slowness in the administrative procedure which showed that the Commission itself did not see any specific reason why the product in question had to be withdrawn from the market as quickly as possible, and by the circumstance that the contested decision itself laid down a period of 13 months for the sale of existing stocks, a fact which indicated that the use of the product was hardly of such a kind as to involve serious risks to public health. The President of the Court accepted that there was a *prima facie* case, on the ground that the action in the main proceedings *prima facie* raised complex, delicate and highly technical issues which called for a detailed examination that could not be carried out in the proceedings for interim measures but had to be the subject of the proceedings in the main action.

So far as concerns the condition relating to urgency, in Case T-159/09 R *Biofrescos v Commission* (order of 25 May 2009, not published), Case T-196/09 R *TerreStar Europe v Commission* (order of 10 July 2009, not published) and Case T-238/09 R *Sniace v Commission* (order of 13 July 2009, not published) the President of the Court dismissed applications for interim measures since the applicants had done no more than put forward mere suppositions in the form of the 'worst-case scenarios' which would arise if their applications were to be dismissed, instead of providing specific and precise particulars, supported by detailed certified documents showing the situation in which they would in all probability be placed if the interim measures sought were not granted.

In Case T-52/09 R *Nycomed Danmark v EMEA* (order of the President of the Court of 24 April 2009, not published), an undertaking — which was intending to apply to the Commission for marketing authorisation in respect of a medicinal product — was required under the applicable legislation first to seek validation of its application for authorisation from the European Medicines Agency (EMA). After being refused validation by the EMA, the undertaking applied for interim measures in order to prevent another pharmaceutical company from gaining an edge and obtaining marketing authorisation for a competing product. The President of the Court dismissed the application, observing that the damage caused by a delay in placing the medicinal product in question on the

market was purely hypothetical in nature in that it presupposed the occurrence of future, uncertain events. There was no certainty whatsoever that that product would be placed on the market, as that depended on the Commission's granting a marketing authorisation, for which the applicant intended to apply only after successfully completing the validation procedure pending before the EMEA; the applicant had also not specified the probability of the actual risk that it would be overtaken in the race to get its product onto the market by competing undertakings, failing to identify undertakings which had already initiated the procedure for obtaining marketing authorisation for a substitute product. The situation was similar in Case T-457/08 R *Intel v Commission* (order of the President of the Court of 27 January 2009, not published), relating to certain measures taken in the context of a proceeding under Article 82 EC. The applicant sought, prior to closure of the administrative procedure before the Commission, to avoid the consequences of a final decision which would be taken on the conclusion of that procedure in breach of its rights of defence. According to the President of the Court, the occurrence of the damage alleged depended on a future and hypothetical event, namely the adoption by the Commission of a final decision unfavourable to the applicant. Not only was the adoption of such a decision not certain, but any harmful consequences would not have been irreparable, since the applicant would have been able to apply for that decision to be annulled or suspended.

In Case T-352/08 R *Pannon Hőerőmű v Commission* (order of 23 January 2009, not published), which concerned a Commission decision ordering national authorities to recover State aid classified as unlawful, the President of the Court ruled on the relevant date for determining fulfilment of the condition for the grant of interim measures that relates to the presence of urgency and stated that the circumstances capable of justifying urgency must in principle be established by reference to the legal and factual position obtaining when the application for interim measures is lodged, as set out in that application. In the case in point, the Commission decision provided that the national authorities' calculation of the amount to be recovered had to comply with a specific methodology to be determined by the legislature. On the date when the recipient of the aid in question applied for the operation of that decision to be suspended, the legislative process had still only reached the stage of a draft law, which could be amended in the course of parliamentary debate, so that there was not yet a definitive legal framework governing the recovery procedure. The application for interim measures was therefore held premature.

The President of the Court was faced on a number of occasions with allegedly serious and irreparable damage of a financial nature. In *United Phosphorus v Commission*, he classified the damage caused to the applicant, namely the loss of market share and customers, as purely financial, stating that the risk of an irremediable change in the applicant's market share could be placed on an equal footing with the risk of disappearing from the market entirely and justify adoption of the interim measure sought only if the market share liable to be irremediably lost was sufficiently large in the light, in particular, of the characteristics of the group to which the undertaking concerned belonged. With regard to the concept of a group, in Case T-199/08 R *Ziegler v Commission* (order of 15 January 2009, not published, under appeal) the President of the Court took account of the economic link between the companies in a network comprising around 100 closely connected companies with common interests.

In the field of tendering and selection procedures, the President of the Court was provided with the opportunity in Case T-511/08 R *Unity OSG FZE v Council and EUPOL Afghanistan* (order of 23 January 2009, not published) and in *TerreStar Europe v Commission* to confirm a recent development in the case-law⁽³⁶⁾, establishing that the harm suffered as a result of losing the opportunity of being

⁽³⁶⁾ Order of the President of 25 April 2008 in Case T-41/08 R *Vakakis v Commission*, not published.

selected' can be assigned an economic value capable of satisfying the requirement that full compensation be made for the harm actually suffered. He therefore rejected the argument that the harm was irreparable because it would be impossible to quantify.

Finally, *Sniace v Commission* concerned an application for suspension of operation of a decision by which the Commission had instructed the national authorities to recover State aid found to be unlawful from the undertaking which had received it. The President of the Court confirmed the case-law requiring the applicant to show, in the application for interim measures, that the remedies available to him under the applicable national law to oppose immediate recovery of the State aid at issue do not enable him, by invoking in particular his financial position, to avoid serious and irreparable damage. This case-law was applied in Case T-149/09 R *Dover v Parliament* (order of 8 June 2009, not published) and in *Biofrescos v Commission*, because of the clear correspondence between the respective situations. In the latter two cases, the applications for interim measures concerned (i) the recovery by the European Parliament of parliamentary allowances wrongly paid to a member, in a situation in which the Parliament was required to institute proceedings for recovery before the national courts, and (ii) a Commission decision instructing national authorities to recover import duties payable by an undertaking. The President of the Court thus concluded that there was no urgency, as there was nothing to indicate that the domestic remedies available to the applicants would not enable the feared damage to be avoided.