# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
10 April 2003 *

In Case T-195/00,

**Travelex Global and Financial Services Ltd**, formerly Thomas Cook Group Ltd, established in London (United Kingdom),

**Interpayment Services Ltd**, established in London,

represented by C. Delcorde and D. Alexander, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: English.

**Commission of the European Communities,** represented by K. Banks, acting as Agent, and by R.Z. Swift, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for the damage allegedly caused to the applicants by the Commission's adoption, use and promotion of the official euro symbol, which is allegedly substantially identical to a graphic trade mark registered by the applicants,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2002,

gives the following

## Judgment

### Facts

1 Thomas Cook Group Ltd (now Travelex Global and Financial Services Ltd) ('Thomas Cook') and its subsidiary, Interpayment Services Ltd ('ISL'), are two companies incorporated under English law which carry on business in the financial services, international travel and global travel services sectors. ISL operates through financial institutions and travel agencies, which distribute and sell its travellers cheques to end-users with whom it does not deal directly.

2 In the European Union, ISL registered a trade mark in the form of a figurative sign in Italy in 1991, in Germany, Spain and Sweden in 1992 and in the United Kingdom in 1993. The figurative sign comprising ISL's trade mark is a 'C', or crescent shape, horizontally crossed in the middle by two parallel, curved strokes.

*ISL's figurative sign*



3 Those trade marks were registered in respect of products and services falling within Classes 16 and 36, as defined in the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, which meet the following descriptions:

— Class 16: 'Cheques, travellers cheques, cards for use as credit and charge cards, printed publications';

— Class 36: 'Banking and financial services'.

4 According to the applicants, ISL's figurative sign does not appear on travellers cheques marketed by it, but is used in ISL's commercial dealings with its business partners. The applicants have provided various examples of publications intended for those business partners, including, in particular, informative material, a contract and specimen notepaper.

5 The official euro symbol was designed by the Commission in 1996 in preparation for the introduction of the euro. The Commission decided that the new currency should have its own official symbol in order to give the currency symbolic value in political terms and to make it more easily distinguishable from other currencies. The official euro symbol was presented to the Heads of State or Government of the Member States and to the press at the European Council meeting in Dublin on 13 and 14 December 1996.

6 By letter of 8 September 1998, lawyers acting for Thomas Cook wrote to the Commission. That letter stated, in particular:

'A subsidiary of Thomas Cook, Interpayment Services Limited, is the proprietor of the INTERPAYMENT device and trade marks registered in 25 countries, including a number in the EU, for use in connection with banking and financial services. The marks were first registered in 1989. Enclosed is a specimen copy of the device mark juxtaposed against the symbol for the Euro which the Commission has proposed. You will see that the EC Commission's proposed symbol is substantially similar to Thomas Cook's.

The effect of the Commission's promotion of the symbol obviously jeopardises Thomas Cook's trade mark rights and goodwill. We seek a meeting as soon as possible with your services to discuss the position.'

7 By letter of 23 September 1998, the Commission replied to the letter of 8 September 1998 as follows:

'It should be noted that the Commission does not pursue any commercial objectives with the use of the euro symbol.

It appears from the documentation you have submitted, that the euro symbol is significantly different from the symbol used by Thomas Cooke, which does not include two horizontal lines and which resembles more... a "c" than... an "e".

Given that in our view the use of the euro symbol does not jeopardise Thomas [Cook's] trade mark rights, if any, we do not see a need for a meeting to discuss the issue.'

8 Between 24 September 1998 and 13 April 1999, Thomas Cook's lawyers and the Commission exchanged several letters in which they maintained their positions.

9 No meeting took place between the applicants and the Commission.

## Procedure

10 By application lodged at the Registry of the Court of First Instance on 26 July 2000, the applicants brought the present action.

11 The written procedure was closed on 8 June 2001.

12 By letter of 24 July 2001 to the Court Registry, the applicants claimed that the Commission had introduced two new pleas in law in its rejoinder and requested the correction of an erroneous reference to an annex mentioned in their pleadings.

13 By letter of 25 October 2001 to the Court Registry, the Commission disputed the claim and objected to the request made by the applicants in their letter of 24 July 2001.

14 By letters of 8 August and 16 November 2001, the Court Registry informed the parties that those two letters had been placed in the file, that they would have the opportunity to raise those matters again at the hearing, and that the Court would subsequently rule on their requests.

15 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and asked the parties to produce certain documents and information before the hearing. The Commission was, in particular, requested to submit its observations on the correction by the applicants in their letter of 24 July 2001 of an erroneous reference to an annex. The parties complied with those requests within the period prescribed.

16 The parties presented oral argument and answered the questions put by the Court at the hearing on 20 June 2002.

17 At the hearing, the parties agreed that in this judgment the Court need rule only on whether the Commission had incurred any liability and that it would not, in any event, be appropriate for the Court to assess the amount of any damages to be awarded.

## Forms of order sought

18 The applicants claim that the Court should:

— order the Community to pay them the sum of GBP 25.5 million plus interest at an annual rate of 6% from the date of delivery of this judgment;

— order the defendant to pay the costs.

19 The defendant contends that the Court should:

— declare inadmissible the applicants' plea of infringement of trade mark rights and the applicants' complaints of unlawful disregard for their rights and expropriation in so far as those complaints are based on the alleged infringement of trade mark rights;

— for the rest, dismiss the action as unfounded;

— order the applicants to pay the costs.

## Admissibility

20 The Commission, whilst not formally raising an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance, submits that the applicants' plea and complaints relating to infringement of trade mark rights are inadmissible under Article 44(1)(c) of the Rules of Procedure.

21 For their part, the applicants contend that the Commission raised two new pleas in its rejoinder, which are inadmissible. They also state that they made an erroneous reference to an annex in the application. The Commission submits that it did not introduce two new pleas in its rejoinder and disputes the admissibility of the applicants' correction of a reference to an annex in the application.

22 Those arguments must be examined.

*Admissibility of the plea and the complaints alleging infringement of trade mark rights*

23 The Commission observes that an application to the Court of First Instance must contain a summary of the pleas raised and that those pleas must be specified with sufficient particularity as regards, *inter alia*, the rules of law relied on.

24 It submits that despite the fact that infringements of rights in national trade marks fall within the scope of the national trade mark laws of the States concerned, the applicants have not identified the national trade marks concerned or any relevant provisions of national law. The sole legal basis invoked by the applicants in support of their plea of infringement of trade mark rights is Article 5(1)(b) of First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1, 'the First Trade Mark Directive').

25 Consequently, and since it is not the Commission's responsibility to carry out the research necessary to identify the trade mark rights at issue, the Commission submits that it cannot adopt a definitive position on the application. It therefore contends that the Court should declare inadmissible the applicants' plea alleging infringement of trade mark rights and their plea alleging violation of general legal principles and unlawful expropriation in so far as that plea is based on alleged infringement of trade mark right.

26 The Court observes that under Article 44(1)(c) of the Rules of Procedure of the Court, all applications are to state the subject-matter of the proceedings and to include a summary of the pleas raised. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be stated, at least in summary form, coherently and intelligibly in the application itself (Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

27 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must set out the evidence from which

the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered and the nature and extent of that damage (*Dubois et Fils* v *Council and Commission*, cited above, paragraph 30).

28 In the present case, the application meets those minimum requirements with regard to the plea and the complaints alleging infringement of trade mark rights. It is clear from the applicants' pleadings that they are seeking a declaration that the Community is liable in order that they may obtain compensation for the alleged damage, namely loss of the essential function and the value of ISL's trade mark. The applicants submit that the damage allegedly suffered by them as a result of the adoption and use of the official euro symbol can be attributed to the Commission. The Commission caused the alleged damage, in particular by failing to have regard to ISL's trade mark rights in its figurative sign, as provided for in Article 5(1)(b) of the First Trade Mark Directive.

29 Contrary to the Commission's assertion, the application therefore does set out formally sufficient particulars of the legal basis of the claim concerning infringement of trade mark rights and, accordingly, the plea of inadmissibility is unfounded.

30 The Commission's argument that the applicants should have identified the relevant provisions of national law relates to the conditions which must be met for the Community to incur liability and is therefore not pertinent to the examination of admissibility of the action. That argument is thus considered in the Court's examination of the merits of the case.

*Admissibility of the two allegedly new pleas raised by the Commission in its rejoinder*

31 The applicants contend that only in the rejoinder does the Commission address the pleas alleging infringement of general principles of Community law, expropriation and unequal discharge of public burdens, whereas it should have done so in the defence in order that the applicants might respond to those arguments in their reply.

32 They also allege that the Commission first introduced the argument relating to 'dilution' of ISL's trade mark in its rejoinder.

33 The Court observes that the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

34 The Court has however held that a plea which amplifies a submission put forward previously, whether directly or by implication, and which is closely connected with that submission, will be declared admissible (see, by analogy, Case T-154/98 *Asia Motor France and Others* v *Commission* [2000] ECR II-3453, paragraph 42).

35 As regards, first, the plea alleging unequal discharge of public burdens, the Commission addresses that plea in Section C, entitled 'Liability for an unlawful act', of part III of its defence.

36 As regards, second, the pleas alleging infringement of the general principles of Community law and expropriation, the Commission states in its defence that each of those alleged unlawful acts is based on the applicants' contention that the Commission infringed ISL's trade mark rights and/or was negligent in not carrying out a search for earlier trade marks before adopting the official euro symbol. According to the Commission, that understanding of the applicants' arguments follows automatically from the fact that trade mark law defines the scope of the vested rights and the limits of the intellectual property allegedly expropriated from ISL.

37 The Commission then states that it will go on to demonstrate, in its defence, that there was no infringement of any right relating to a valid trade mark and that the failure to carry out a search for earlier trade marks was not negligent.

38 It is thus apparent, as the Commission has indeed submitted, that it considers the validity of those pleas to be linked to the plea alleging infringement of ISL's rights in its trade mark.

39 Therefore, so far as concerns the Commission's first two arguments, the applicants are not justified in challenging, in the context of an examination of admissibility, the Commission's choice of how to organise its arguments in response to those made by the applicants.

40 As regards, third, the applicants' contention that the Commission raised a new argument in its rejoinder, concerning the 'dilution' of ISL's trade mark, it is evident from the rejoinder that it was in response to the arguments made by the applicants in their reply (paragraph 21) that the Commission considered it necessary to address the issue of 'dilution' of ISL's trade mark.

41 It follows that the applicants likewise cannot, in the context of an examination of admissibility, dispute the Commission's legal assessment of their arguments, which may differ from their own.

42 In any event, there has been no breach of the *audi alteram partem* principle in the present case, because the applicants had an opportunity at the hearing to comment on the allegedly new arguments put forward by the Commission in its rejoinder.

43 In the light of the foregoing, the applicants' assertions that the Commission raised new pleas in its rejoinder must be rejected.

*Admissibility of the corrected reference to an annex cited in the application*

44 In their letter of 24 July 2001, the applicants stated that they had made an error in a reference to one of the annexes to their application. In their pleadings, the applicants had alleged that ISL's trade mark, consisting only of its figurative sign, had been registered in a number of Member States. However, the evidence of those registrations was not contained in Annex 3 to the application, as they had stated, but in Annex 1 to Annex 21 to the application and in Annex 1 to the reply. Annex 3 to the application contained only a list of countries in which ISL had registered its trade mark in the form of its figurative sign in combination with the word 'Interpayment'.

45 The Commission submits essentially that the applicants have made a material amendment to their application, in claiming, by way of a correction of a reference

to an annex, that the trade mark to which their action relates in the form of ISL's figurative sign alone and not, as they had previously claimed, of ISL's figurative sign in combination with the word 'Interpayment'.

46 The Court considers that the applicants make clear in their application that ISL had registered, first, its figurative sign in combination with the word 'Interpayment' and then the figurative sign alone in the countries, and for the classes listed in Annex 3 to that application, and that in the remainder of their application they are referring only to ISL's trade mark in the form of its figurative sign alone.

47 It should also be noted that in their reply the applicants explain that they carried out three types of registration, namely registration of the figurative sign in combination with the word 'Interpayment', registration of the figurative sign alone, and registration of the word 'Interpayment' alone; that the action concerns only the second type of registration, that is to say, registration of ISL's figurative sign; and that Annex 3 refers only to the registration of the figurative sign alone.

48 It follows that despite the lateness of the applicants' correction, the fact remains that, contrary to the Commission's contention, their action concerns ISL's trade mark in the form of the figurative sign alone.

49 In those circumstances, since the annex which should have been referred to in place of Annex 3 to the application is in fact Annex 21 to the application, which does not constitute a late offer of further evidence for the purposes of Article 48(1) of the Rules of Procedure, the applicants' correction in their letter of 24 July 2001

of the number of an annex referred to in the application does not constitute a material amendment to their application in the course of the proceedings.

50 Furthermore, the Court gave the Commission an opportunity, in writing before the hearing and then at the hearing itself, to submit its observations on that correction, thereby observing the *audi alteram partem* principle and respecting the rights of the defence.

51 Moreover, at the hearing, the Commission stated that despite its view that the correction was a material amendment to the subject-matter of the application, it was, for the purposes of its oral argument, treating the applicants' action as concerning ISL's trade mark in the form of its figurative sign alone.

52 It follows that the Commission's arguments on this point must be rejected.

**Substance**

53 According to settled case-law, the purpose of an action for damages must be to seek compensation for damage resulting from measures, failure to adopt measures, or unlawful conduct by Community institutions (Case 180/87 *Hamill* v *Commission* [1988] ECR 6141, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, and *Dubois et Fils* v *Council and Commission*).

54 So far as concerns the Community's non-contractual liability, Community law confers a right to compensation where three conditions are met, namely (i) the rule of law infringed must be intended to confer rights on individuals and the infringement must be sufficiently serious, (ii) actual damage must be shown to have occurred, and (iii) there must be a direct causal link between the infringement imputable to the Community and the damage sustained by the injured parties (see to that effect Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

55 In support of their action for damages under Article 288(2) EC, the applicants raise several pleas in law alleging, first, infringement of ISL's trade mark rights, second, infringement of general principles of Community law and, third, expropriation. The applicants also raise a plea alleging unequal discharge of public burdens.

*Liability arising from the alleged unlawfulness of the Commission's conduct*

56 The applicants assert essentially that ISL's figurative sign is used throughout the world to denote and distinguish ISL's activities in the financial services sector and that the official euro symbol adopted, used and promoted by the Commission is unmistakably visually similar to ISL's figurative sign. They consider that the extremely widespread use of the official euro symbol has caused ISL's figurative sign to lose its distinctive character, and, indeed, its validity, and that ISL's trade mark is no longer able to perform its essential function. In that regard, the applicants point out that when promulgating the official euro symbol the Commission did not carry out any searches for earlier trade marks, which would have disclosed the existence of ISL's figurative sign. They also state that the Commission failed to respect their property rights and interests.

57 The Court must therefore examine the lawfulness of the Commission's conduct in adopting, using and inducing third parties to use the official euro symbol.

58 As regards the process by which the official euro symbol was adopted, the documents before the Court show that a number of different graphic representations of that symbol were designed by the Commission and, more specifically, by the Directorate-General for Information, Communication, Culture and Audiovisual Media Communication and that those designs were presented to a panel of European citizens, which chose two of them. The President of the Commission and another member of the Commission then made the final choice of the official symbol for the single currency. The choice of that official symbol was part of a communications plan entitled 'Euro: one currency for Europe'. Commission Communication COM(97) 418 final of 23 July 1997 on the use of the euro symbol constituted one of the technical stages in the introduction of the euro.

First plea: infringement of trade mark rights

— Arguments of the parties

59 Referring to Article 5(1)(b) of the First Trade Mark Directive, the applicants submit that the Commission infringed and continues to infringe ISL's trade mark rights, the official euro symbol being substantially similar to ISL's figurative sign; that the Commission used and induced third parties to use that symbol in the course of trade without the consent of ISL, and that there is a likelihood of confusion and association between the official euro symbol and ISL's figurative sign.

60 They point out that ISL registered three distinct trade marks, namely (i) the word 'Interpayment', (ii) ISL's figurative sign alone, and (iii) ISL's figurative sign in combination with the word 'Interpayment', and that their action concerns the second registered trade mark, that is to say, ISL's figurative sign alone.

61 The applicants submit that the Commission has not disputed that they did consent to the use of the official euro symbol.

62 As regards, first, use of the official euro symbol, the applicants submit that the Commission's argument that its own use of, and its inducement of third parties to use, the official euro symbol was not for economic purposes and thus was not use in course of trade is too narrow, inasmuch as any use in a commercial or economic context constitutes use of a trade mark in the course of trade.

63 Their direct competitors use the official euro symbol on their euro travellers cheques and that symbol is, more generally, used in the financial services and travel sectors. Moreover, the Commission used and induced third parties to use the official euro symbol in a commercial context and not merely as a currency designation. The promotion of the use of the official euro symbol on hats and scarves is a commercial activity, regardless of the aim pursued, namely the launch of the new currency symbol.

64 Article 5(3)(a) of the First Trade Mark Directive expressly prohibits the affixing of the registered sign to goods. The Commission has admitted that it used the euro symbol on a large number of products, albeit only with the aim of promoting the euro.

65 The applicants also observe that, in that context, the Commission used all of the commercial techniques of a promotion campaign for a new brand.

66 They conclude that as a result of the Commission's actions, their trade mark has lost its distinctiveness and no longer performs its essential function and, consequently, ISL's figurative sign has lost its value.

67 As regards, second, the requirement that the signs be similar, the applicants claim that the overall impression gained from a comparison of ISL's figurative sign and the official euro symbol is one of strong similarity. The Commission does not contest the opinions of the three experts in trade mark law appointed by the applicants, who considered the signs in question to be substantially similar.

68 As regards, third, the likelihood of confusion, the applicants state that it has been held that actionable confusion can arise where the consumer no longer regards the trade mark as denoting its proprietor and refer to a judgment of the English High Court (*Provident Financial PLC* v *Halifax Building Society* [1994] FSR 81). In the present case, the problem does not lie in the fact that people may think they are buying the applicants' products when those products bear the official euro symbol, but in the fact that ISL's customers will cease to associate ISL's products with ISL's figurative sign, which will thereby lose all its distinctive character and its essential function.

69 As regards, fourth, the necessary reputation of the mark, the applicants maintain that although business-to-business trade marks differ in certain respects from business-to-consumer marks, they play an important role in denoting origin,

quality and distinctiveness and are thus also entitled to benefit from the provisions of the First Trade Mark Directive. ISL's trade mark is also intended to convey the neutrality of the ISL brand to its customers, which are businesses.

70 The Commission submits, first of all, that the provisions applicable to the present case are the national laws to transpose Article 5(1)(b) of the First Trade Mark Directive that were adopted by the Member States in which ISL's trade mark is registered. However, for the sake of simplicity, it states that it will present its defence by reference to Article 5(1)(b), rather than by reference to national provisions transposing the directive.

71 The Commission observes that, contrary to the applicants' assertions, the trade mark registered by ISL in the Member States referred to above does not consist of ISL's figurative sign alone but of a combination of that sign with the word 'Interpayment'.

72 Since ISL's figurative sign is always used in combination with the word 'Interpayment', which constitutes the dominant component of that mark, businesses and traders exposed to that mark are not likely to confuse it with the official euro symbol.

73 The Commission submits that the applicants have not proven that in the present case the conditions are met for protection of the rights of the proprietor of a registered trade mark under Article 5(1)(b) of the First Trade Mark Directive.

74 As regards, first, the requirement of use in the course of trade, the Commission submits that, contrary to the applicants' assertion, it has never used the official

euro symbol in the course of trade, given that as the executive body of a supranational organisation, it does not engage in any commercial activity. It notes that the sole use which it made of the official euro symbol in relation to goods and services was intended only to promote the idea of the new currency by distributing, without charge, to Heads of State or of Government and to the press articles (hats and scarves) bearing the official euro symbol. In any event, those articles are not similar to the products or services in Classes 16 and 36 in respect of which ISL's figurative sign was registered.

75 Moreover, it is clear from the Communication of 23 July 1997 that the Commission uses, and induces third parties to use, the official euro symbol as a designation for the single currency. Such use is therefore not intended to indicate the trade origin of the goods or services in question but only to promote universal awareness of the official euro symbol.

76 In that regard, the Commission states that in paragraph 31 of their application the applicants acknowledge that use of the official euro symbol as a currency designator does not amount to use in the course of trade. In any event, even assuming that it were in fact use in the course of trade, it would be covered by the exemption provided for in Article 6(1)(b) of the First Trade Mark Directive.

77 As regards, second, the reputation of ISL's figurative sign, the Commission states that it is clear from the case-law of the Court of Justice that the degree of distinctiveness and the reputation of a registered trade mark are relevant in assessing similarity and the likelihood of confusion (see Case C-251/95 *SABEL* [1997] ECR I-6191 and Case C-39/97 *Canon* [1998] ECR I-5507). In the present case, it is clear from the 'Corporate Identity Interpayment Guidelines' that the applicants' trade marks are not used in relation to the general public; moreover, the general public would not be able to recognise them because ISL's figurative sign does not appear on Interpayment travellers' cheques. That low level of

recognition implies that ISL's figurative sign is only entitled to a low degree of protection. The Commission submits that the applicants have failed to provide any evidence that their customers consider ISL's figurative sign to be a significant feature of their business.

78 Finally, the Commission states that the applicants' use of ISL's trade mark was restricted to a limited group of businesses and traders who are easily able to distinguish the official euro symbol from ISL's figurative sign.

79 As regards the similarity of the signs for the purposes of Article 5(1)(b) of the First Trade Mark Directive, the Commission considers that there is at most only a slight degree of similarity between ISL's figurative sign and the official euro symbol.

80 As to the degree of similarity of the goods and services, the Commission notes that ISL's trade mark is only registered in respect of products in Classes 16 and 36 and that the applicants base their claim of infringement of trade mark rights only on the use of the official euro symbol on travellers' cheques and in the context of certain other financial services. The Commission points out that the other goods and services mentioned by the applicants are in no way similar to the goods and services covered by those specifications. Any use of the official euro symbol on goods dissimilar to those covered by ISL's trade mark is irrelevant to Article 5(1)(b) of the First Trade Mark Directive and cannot, therefore, constitute an infringement of trade mark rights.

81 Finally, in respect of the likelihood of confusion, the Commission submits that as ISL's trade mark does not have any reputation at all among the general public, there can be no likelihood of confusion by that class of persons. In addition, the Commission submits that the businesses and traders exposed to ISL's trade mark

are aware that the official euro symbol denotes a currency and will not think that goods or services bearing that symbol are supplied by the applicants or by the Commission.

82 Moreover, the applicants have conceded that there is no possibility of confusion as to the trade origin of the goods but submit that there is a real risk that ISL's customers will cease to think that ISL's figurative sign denotes ISL's products. However, that type of confusion, which is characteristic of 'dilution' of a mark, is not relevant to infringement under Article 5(1)(b) of the First Trade Mark Directive. That situation is at best characterised as a likelihood of association, which the Court of Justice has held is not of itself sufficient to establish a likelihood of confusion within the meaning of Article 5 of the First Trade Mark Directive (*SABEL*, cited above, *Canon*, cited above, and Case C-425/98 *Marca Mode* [2000] ECR I-4861).

83 The Commission considers that the applicants' reference to the judgment of the High Court in *Provident Financial PLC* v *Halifax Building Society*, cited above, is not relevant and that, in any event, that case was decided under a law predating the First Trade Mark Directive.

— Findings of the Court

84 In the first plea, the applicants submit that the Commission's interference with ISL's trade mark rights is unlawful because ISL is entitled to the exclusive use of its registered figurative sign. They refer to Article 5(1)(b) of the First Trade Mark Directive, which sets out the circumstances in which the proprietor of a registered trade mark is entitled to prevent third parties from using signs similar or identical to its trade mark.

85 First of all, it should be noted that Community institutions are obliged to comply with the entire body of Community law, which includes secondary law, and, in that connection, all measures for the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market (see, by analogy, Case C-383/00 *Commission* v *Germany* [2002] ECR I-4219, end of paragraph 18).

86 Accordingly, the Commission cannot disregard the provisions of the First Trade Mark Directive, which was adopted unanimously by the Council on a proposal from the Commission under Article 94 EC. The aim of that directive is to ensure that registered trade marks receive the same protection in all the Member States.

87 It must also be recalled that according to settled case-law the action for damages under Article 235 EC and the second paragraph of Article 288 EC was established as an autonomous form of action with a particular purpose to fulfil within the system of actions, and that its exercise is subject to conditions imposed in view of its specific objective. Although an action for damages must be appraised with regard to the entire system for the judicial protection of the individual and although its admissibility may thus, in some cases, be subject to the prior exhaustion of national remedies, it is none the less a necessary precondition that those national remedies give effective protection to the individuals concerned who are aggrieved by measures of Community institutions and that they are capable of leading to compensation for the damage alleged (Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 9).

88 However, in the present case, a finding, by a national court in a Member State in which ISL's figurative sign has been registered, of an infringement of that sign by the Commission could not give rise to an order to compensate damage allegedly caused to the applicants.

89 The combined provisions of Articles 235 and 288 EC give the Community Courts exclusive jurisdiction to hear actions seeking compensation for damage attributable to the Community, which is bound, under the second paragraph of Article 288 EC, to make good, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or by its servants in the performance of their duties (Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 14).

90 Consequently, the Court must examine whether, as the applicants maintain, the Commission has acted unlawfully in such a way as to incur liability, by adopting, using and inducing third parties to use the official euro symbol in disregard of the circumstances, set out in Article 5(1)(b) of the First Trade Mark Directive, in which protection is accorded to a registered trade mark.

91 Article 5(1)(b) of the First Trade Mark Directive, which concerns 'rights conferred by a trade mark' states as follows:

'The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

...

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade

mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.'

92 In view of the conditions for protection of a trade mark under that provision, the Court must first of all determine whether the Commission used the official euro symbol in the course of trade.

93 In that regard, it has been held that the use of a sign identical to a trade mark is indeed use in the course of trade where it takes place in the context of commercial activity with a view to economic advantage (Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, I-10299, paragraph 40, and the Opinion of Advocate General Ruiz-Jarabo Colomer in that case, ECR I-10275, point 59).

94 The 10th recital in the preamble to the First Trade Mark Directive states that the purpose of the protection afforded by the trade mark is, in particular, to guarantee its function as an indication of origin. According to settled case-law, the essential function of the trade mark is to guarantee the identity of the origin of the marked product or service to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another trade origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality (Case C-10/89 *HAG GF (HAG II)* [1990] ECR I-3711, paragraphs 13 and 14, and *Canon*, paragraph 28).

95 Here, the official euro symbol is not a sign affixed to products or services to distinguish them from other products and services thereby enabling the general public to identify their origin, but is instead intended to denote a currency unit

and is generally preceded or followed by a number. Moreover, the Commission Communication of 23 July 1997 states that the 'Commission invites all currency users to use the [official euro] symbol... whenever a distinctive symbol is needed for the description of monetary amounts in euro, e.g. in price lists and invoices on cheques and in other legal instruments'. That communication also states that '[t]he early definition of... [an official] symbol for the euro also reflects the vocation of the euro to become one of the world's major currencies'.

96 Use of the official euro symbol to designate the single currency does not therefore amount to use of a sign corresponding to a trade mark in the course of trade within the meaning of Article 5(1)(b) of the First Trade Mark Directive.

97 Furthermore, while it is indisputable that the Commission induced third parties to use the official euro symbol, also in the course of financial transactions, its actions served only to encourage its use as a means of designating the single currency and not as a sign intended to distinguish specific goods or services.

98 The fact, pleaded by the applicants, that at the meeting of the European Council in Dublin in 1996, the Commission distributed hats and scarves bearing the official euro symbol to Heads of State or Government and to the press does not constitute use in the course of trade. Although that use may, in certain respects, be equated to advertising, the Commission, acting in its capacity as a supranational body, did not intend to promote the sale of products bearing the official euro symbol and to identify those products as originating from a particular undertaking or to display a symbol designed to identify such an undertaking, but intended to mark the introduction, and to promote awareness, of that graphic symbol as the official symbol of the single currency.

99 That use therefore cannot be regarded as use in the course of a commercial activity whereby goods and services are manufactured and supplied in a particular market.

100 As to the fact that the official euro symbol was affixed to various products, such as those mentioned in the Commission publication submitted by the applicants, entitled 'The Euro on everything, everywhere', and to a Belgian lottery ticket also submitted by the applicants, the applicants have not established that it was the Commission which caused those products to be marketed or distributed or, indeed, that those products were marketed in the Member States in which ISL's figurative sign is registered.

101 The Community can be held liable only for damage that is a sufficiently direct consequence of the misconduct of the institution concerned (Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68). Therefore, even assuming that damage has been caused to the applicants as a result of the marketing of the abovementioned products bearing the official euro symbol, the applicants have not established that the damage is a sufficiently direct consequence of the allegedly unlawful conduct of the Commission.

102 In addition, as regards the alleged examples of use of the official euro symbol in the course of trade to which the applicants refer, it has already been pointed out that, contrary to the requirements of Article 5(1)(b) of the First Trade Mark Directive, the products to which the Commission affixed the official euro symbol are not identical, or even similar, to those in respect of which ISL's trade mark was registered.

103 Finally, as regards the Commission's action encouraging retailers to display the word 'euro', the first letter of which is represented by the official euro symbol, together with the phrase 'Payment in euros accepted', it should be noted that the

depiction of that word bears no similarity to ISL's figurative sign. In any event, its publication was not intended to promote goods or services commercially but merely to encourage end consumers to use the single currency, to familiarise them with it and to create a climate of confidence for the changeover.

104 It follows from the foregoing that, contrary to the applicants' assertions, the Commission did not use or induce third parties to use the official euro symbol in the course of trade, that is to say, in the context of commercial activity with a view to economic advantage within the meaning of the case-law referred to above. In those circumstances, it cannot be held that by adopting and promoting the official euro symbol, the Commission infringed ISL's rights in its trade mark.

105 However, given the specific features of the present action, the Court also observes, as a secondary point, that even assuming that the Commission's use of the official euro symbol were comparable to use in the course of trade, the applicants have not established that there is a likelihood of confusion between ISL's figurative sign and that symbol.

106 It is settled case-law that the likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case. A global assessment means that there is some interdependence between the relevant factors. For example, a likelihood of confusion may be found, despite a lesser degree of similarity between the goods or services concerned, where the marks are very similar and the earlier mark, in particular its reputation, is highly distinctive (*Marca Mode*, cited above, paragraph 40).

107 Therefore, there is a likelihood of confusion within the meaning of Article 5(1)(b) of the First Trade Mark Directive where the public can be mistaken as to the

trade origin of the goods or services in question. By contrast, there can be no such likelihood where it does not appear that the public could believe that the goods or services come from the same undertaking or, as the case may be, from economically-linked undertakings (*Canon*, paragraph 30).

108 Indeed, Article 2 of the First Trade Mark Directive provides that a trade mark must be capable of distinguishing the goods or services of one undertaking from those of other undertakings, while the 10th recital of the directive states that the purpose of the protection afforded by the mark is primarily to ensure its essential function as an indication of origin, as that notion is defined in paragraph 94 above (*Canon*, paragraph 27).

109 Having regard to those considerations alone, in order to determine whether use of the official euro symbol could result in a likelihood of confusion between it and ISL's trade mark, it is necessary first to compare the products and services in question in the present case, then the signs at issue and, finally, to identify the relevant public.

110 As regards the comparison of the goods and services in question, which, under Article 5(1)(b) of the First Trade Mark Directive, must be identical or similar, it should be noted that, when making that comparison all the relevant factors relating to those goods or services should be taken into account. Those factors include, *inter alia*, their nature, their end users, their method of use and whether they are in competition with each other or are complementary (*Canon*, paragraph 23).

111 As the Court has already observed, it is not the Commission itself which actually affixes the official euro symbol to products or services. Moreover, the sole purpose of affixing the official euro symbol to products or services is, in principle, to identify the currency unit, and that would be so even if that symbol were affixed to products or services in Classes 16 and 36 in respect of which the

applicants have obtained registration of ISL's figurative sign. As to the products mentioned by the applicants, to which the official euro symbol was affixed by the Commission, it has already been observed that they are not covered by Classes 16 and 36.

112 As to the comparison of the signs at issue, it has been held that the global assessment of the likelihood of confusion must, as regards the visual, aural or conceptual similarity of signs, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components (*SABEL*, paragraph 23, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 25).

113 There are undeniable visual similarities between ISL's figurative sign and the official euro symbol, although they are not identical. As the applicants have correctly pointed out, one of the differences is that the two strokes crossing the letter 'C' are curved in ISL's figurative sign and rectilinear in the official euro symbol.

114 Finally, so far as concerns the identification of the relevant public, according to the case-law the perception of marks by the average consumer of the category of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (*Lloyd Schuhfabrik Meyer*, cited above, paragraph 26).

115 However, according to the applicants, ISL's figurative sign does not appear on travellers cheques intended for the general public, it being used only in ISL's dealings with the traders through whom its business is actually conducted. According to the applicants, the traders are financial institutions and travel agencies with which ISL does business for the purposes of marketing its products and services.

116 Therefore, given that ISL's trade mark is registered in the United Kingdom, Germany, Italy, Spain and Sweden, the relevant public consists solely of the traders in those Member States through whom ISL conducts its business.

117 It cannot be concluded that there is a likelihood of confusion between the official euro symbol and ISL's figurative sign on the part of that well-informed group of traders.

118 The applicants have not provided convincing evidence to support the conclusion that despite only a low degree of similarity between the products and services concerned, ISL's figurative sign is highly distinctive, either in itself or as a result of its high market recognition, and has, in particular, a strong reputation with the relevant public.

119 In that regard, it should also be noted that the applicants have not proven their assertion that ISL makes routine and extensive use of its trade mark in the form of its figurative sign alone. On the contrary, the applicants' examples of use of the ISL trade mark relate, with a single exception, only to the trade mark in the form of ISL's figurative sign in combination with the word 'Interpayment' and not to ISL's trade mark at issue in these proceedings, which consists of its figurative sign alone. That factual situation is evident from Annex 4 to the application, entitled 'Corporate Identity Interpayment Guidelines', which concerns, *inter alia*, the conditions of use of ISL's trade mark, in which that trade mark is represented by ISL's figurative sign in combination with the word 'Interpayment'.

120 Furthermore, it cannot be supposed that when a member of that well-informed public sees the official euro symbol on notes or even on the products cited by the applicants, he will think that those notes or products have been produced and marketed by ISL.

121 Moreover, according to the applicants, the likelihood of confusion stems from the fact that ISL's customers will cease to associate ISL's figurative sign with ISL's products and not from the fact that those customers will think that products bearing the official euro symbol are products marketed by ISL. They assert that no one who previously associated ISL's figurative sign with its products will continue to do so.

122 It must therefore be found that in support of this plea the applicants have not argued that there is a likelihood of confusion between the official euro symbol and ISL's trade mark but that there is a likelihood of association.

123 However, Article 5(1)(b) of the First Trade Mark Directive applies only where, because of the identity, or similarity both of the sign and the trade mark and of the designated goods or services, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.

124 In that regard, the Court of Justice has held that it follows from the wording of that article that the concept of likelihood of association is not an alternative to that of likelihood of confusion, but serves to define its scope. The very wording of that provision therefore precludes its application in cases where there is no likelihood of confusion on the part of the public. Accordingly, a condition for protection of a registered trade mark under Article 5(1)(b) of the First Trade Mark Directive is that there be likelihood of confusion. That interpretation is also consistent with the 10th recital in the First Trade Mark Directive which states that 'the likelihood of confusion... constitutes the specific condition for such protection' (*SABEL*, paragraphs 18, 19 and 26, *Canon*, paragraph 30, *Lloyd Schuhfabrik Meyer*, paragraph 17, and, most recently, *Marca Mode*, paragraphs 34 and 35).

125 It follows that a likelihood of association alone, as relied on by the applicants, does not suffice to show that the required likelihood of confusion exists and that, as previously observed, the constituent elements of a likelihood of confusion are, in any event, not present in this case.

126 In those circumstances, since the Commission has not used the official euro symbol in the course of trade and because, in any event, there is no likelihood of confusion between ISL's figurative sign and the official euro symbol on the part of the relevant public, it cannot be concluded that, by adopting, using and promoting that symbol, the Commission has acted unlawfully in such a way as to incur liability, since it has not infringed ISL's trade mark rights. The first plea raised by the applicants must therefore be rejected.

Second plea: violation of the principles of respect for vested rights, protection of legitimate expectations, non-discrimination and proportionality

— Arguments of the parties

127 The applicants observe that '*tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui-ci par la faute duquel il est arrivé à le réparer*' (any act of man which causes damage to another, obliges the person whose fault has caused it to make good the damage). Leaving aside the infringement of trade mark rights alleged in the first plea, the Commission acted wrongfully, negligently and, hence, unlawfully and, in particular, committed clear breaches of 'superior' rules of law.

128 As regards, first, respect for vested rights, the applicants claim that the right to property, and fundamental rights more generally, are guaranteed by, and form part of, the Community legal order (Case 44/79 *Hauer* [1979] ECR 3727, paragraph 17, and *Dubois et Fils* v *Council and Commission*, paragraph 73). In that regard, trade mark rights constitute essential rights, respect for which must be ensured within the Community (see, to that effect, the spirit of the First Trade Mark Directive, and *HAG GF*, cited above).

129 The Commission failed to carry out a search for earlier trade marks to assess the risk that someone else may have already obtained exclusive rights to a similar mark, and thereby exhibited extreme negligence. Moreover, if the Commission had in fact carried out a normal trade mark search, it would have become aware of ISL's figurative sign, as demonstrated by the results of searches for earlier trade marks carried out in the United Kingdom using the Marquesa system.

130 The applicants also refer to the legal opinions drawn up at their request by Mr Braun, a lawyer, and by Professors Gielen and Tilmann, experts in trade mark law, which confirm both the necessity of a search for earlier trade marks and the Commission's carelessness in not carrying out such a search.

131 As regards, second, the principle of the protection of legitimate expectations, the applicants state that the Council's adoption of the First Trade Mark Directive and numerous Commission decisions acknowledging the importance of trade mark rights led them to entertain 'reasonable expectations', within the meaning of the case-law, that their trade mark rights would be respected and preserved. Accordingly, since the existence and maintenance of trade mark rights throughout the Community is not subject to any discretionary power of the Commission, by failing to take the applicants' rights into account at the time of launching the

euro the Commission failed to observe the fundamental principle of the protection of legitimate expectations (Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26, Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 32, and *Dubois et Fils* v *Council and Commission*, paragraph 68).

132 As regards, third, the principle of non-discrimination, the applicants argue that by adopting, promulgating and promoting the official euro symbol, the Commission discriminated against them since no other trade mark holder's rights were disregarded.

133 As regards, fourth, the principle of proportionality, the applicants consider that the Commission acted in pursuit of apparently legitimate objectives but that the means employed to achieve those objectives went beyond what was necessary to attain them. Respect for the principle of proportionality requires that those objectives be achieved without abrogation of the applicants' rights.

134 The Commission counters the applicants' argument that it was negligent in not carrying out a search for earlier trade marks by stating that the extracts of the three opinions relied on by the applicants do not support their argument that the Commission owed a legal duty to all trade mark owners to carry out a search for earlier trade marks. It is clear from those three legal opinions that a commercial undertaking intending to adopt a new trade mark would normally carry out such a search. Although that general proposition is not contentious, the Commission argues that since the official euro symbol was very similar to its earlier emblem, reserved under the Paris Convention for the Protection of Industrial Property of 20 March 1883, which it used widely, it was not necessary to carry out any new searches. In any event, the conclusion common to the three opinions is irrelevant inasmuch as the Commission did not intend to adopt a trade mark or a brand.

135 In addition, the Commission contends that a legal duty to carry out a search for earlier trade marks would be incompatible with the general scheme of protection for signs, trade marks and brands since there is already a remedy for unlawful use of a mark (the action for infringement of trade mark rights). The failure to carry out a search for earlier trade marks is not in itself a sufficient ground for an action.

136 As regards the complaint alleging disregard for vested rights, the Commission contends that the rights referred to by the applicants are only the trade mark rights in ISL's figurative sign. The Commission has already shown that it has not infringed the rights in that trade mark.

137 The Commission submits that the argument based on violation of the principle of non-discrimination is fallacious and the argument relating to violation of the principle of proportionality is too vague.

— Findings of the Court

138 It should be recalled that the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (see *Hauer*, cited above, paragraph 17).

139 However, in the present case, the property right relied on by the applicants is ISL's right to the property in its trade mark by virtue of the registration of its figurative sign in a number of Member States. That is an intangible property right

consisting of an exclusive right to use that trade mark which is enforceable against all third parties but only within limits. The limitations inherent in the relative nature of that property right result from, first, the principle of speciality, by virtue of which the right conferred by the trade mark covers only the designated products or services, and, second, the fact that registration is carried out nationally, the protection conferred by it being limited to the territory of the State in which the trade mark has been registered.

140 It follows that this argument cannot be distinguished from the argument alleging infringement of ISL's trade mark rights.

141 It has already been observed that the Commission has not used the official euro symbol in the course of trade and that, in any event, the applicants have not established that ISL's trade mark has lost its essential function. Therefore, it cannot be found that the Commission infringed ISL's exclusive property rights in its figurative sign or, *a fortiori*, that the Commission violated the principles of non-discrimination and proportionality.

142 Furthermore, as regards the applicants' assertion that the Commission failed to carry out a search for earlier trade marks in order to determine whether an undertaking already held an exclusive right in a similar sign, it should once again be pointed out that the Commission has not used the official euro symbol as a trade mark.

143 Moreover, according to settled case-law, omissions by the Community institutions can give rise to liability on the part of the Community only when the institutions have infringed a legal obligation to act under a provision of Community law (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 58, and Joined Cases T-12/98 and T-13/98 *Argon and Others*

v *Council and Commission* [2000] ECR II-2473, paragraph 18). However, in their pleadings the applicants have not referred to any provision of Community law under which the Commission was required to carry out a search for earlier trade mark registrations of the official euro symbol or a similar sign.

144 Nor do the legal opinions of the three experts in trade mark law supplied by the applicants identify the provisions of Community law imposing such an obligation on the Commission.

145 More generally, it should be noted that those opinions do not cast doubt on the Court's earlier observations regarding the alleged infringement of ISL's trade mark rights, since they are based on the incorrect premiss that the Commission used the official euro symbol as a trade mark for commercial ends.

146 As regards the principle of legitimate expectations, the right to rely on its protection extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of this principle unless the administration has given him precise assurances (*Dubois et Fils* v *Council and Commission*, paragraph 68).

147 The applicants submit that the adoption by the Council of the First Trade Mark Directive, and the adoption by the Commission of various decisions recognising the importance of trade mark rights, led them to entertain reasonable expectations.

148 However, besides the fact that the Commission's adoption of the official euro symbol did not infringe ISL's trade mark rights, it must, in any event, be observed that there is an important difference between a statement made by the Commission in very general terms, which cannot give rise to any reasonable expectations, and an assurance in precise terms on which expectations may legitimately be based (see Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 74).

149 Therefore that argument, and indeed this plea in its entirety, must be rejected.

Third plea: Expropriation

150 The applicants submit that the corollary of the fundamental right to property is the right that it not be appropriated, a right enshrined in Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the institutions of the Community are obliged to respect (see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, the Opinions of Advocate General Capotorti in *Hauer* [1979] ECR 3727, and Advocate General Jacobs in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22). The measures adopted by the Commission in this case amount to an unlawful expropriation of the applicants' property because they result in the loss of distinctiveness and value of ISL's figurative sign. The Commission could easily have avoided causing damage to the applicants and if the applicants have no remedies for infringement of their trade mark rights, as contended by the Commission, they will receive no compensation for the loss of their intellectual property and their business goodwill. Moreover, the Commission had no justification to act as it did and, even assuming that its actions were justified or lawful, it is still obliged to make good the damage caused to the applicants (see the Opinion of Advocate General Sir Gordon Slynn in Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057).

151 The Commission maintains that there is no basis in the applicable legislation for arguing that the 'dilution' of a trade mark may be treated as equivalent to an expropriation.

152 In that regard, the Court simply finds that the plea alleging unlawful expropriation cannot be distinguished from the plea alleging infringement of trade mark rights or from that alleging disregard for vested rights, since those complaints concern, in exactly the same way, ISL's intangible exclusive right in the figurative sign at issue.

153 It follows that the previous assessments, following which it was concluded that the Commission had not infringed ISL's rights in its trade mark, are also relevant to this plea, and it must, therefore, also be rejected.

154 It follows from all the foregoing that the applicants have not established that the Commission has acted unlawfully in such a way as to give rise to liability on its part.

*No-fault liability*

Arguments of the parties

155 The applicants allege that liability may be incurred under Article 288 EC even where the conduct of the Community institution in question is not unlawful,

provided that the burden of that conduct falls disproportionately and unfairly on certain individuals and constitutes unequal discharge of public burdens.

156 Accordingly, in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, the Council accepted that there could be Community liability for lawful acts and the Court held that such liability could only be incurred if the damage suffered constitutes a still subsisting injury, affects a particular circle of economic agents in a disproportionate manner by comparison with others (special damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage), and the legislative measure that gave rise to the alleged damage is not justified by a general economic interest (see paragraph 80 of the judgment in that case).

157 Although those conditions were not all met in *Biovilac* v *EEC*, *Dubois et Fils* v *Council and Commission* and *Dorsch Consult* v *Council and Commission* the applicants consider that they are all met in the case at issue. As regards special damage, the applicants claim that they were uniquely and disproportionately affected by the adoption and launch of the euro symbol. As regards unusual damage, the applicants claim that the risk of a public body disregarding a person's trade mark rights by adopting a sign for matters connected with commerce is not inherent in all trade marks, nor was it foreseeable even though the ensuing damage could easily have been avoided. Finally, although the Commission's objective may have been justified by the general economic interest, it was not the objective pursued but the careless means, unjustifiable by the general interest, employed by the Commission in pursuit of that objective which caused the damage suffered by the applicants.

158 The applicants accordingly conclude that, even if the Commission's conduct does not constitute an unlawful act capable of giving rise to liability on its part, the Commission is still obliged to compensate them for their damage.

159 The Commission contends that, as the applicants admit, the Community courts have not yet applied the principle that the Community may be held liable for a lawful act. Moreover, it follows from the relevant case-law that such liability presupposes, in any event, proof that the alleged damage is real and that there is special and unusual damage (*Dorsch Consult* v *Council and Commission*, paragraph 59). In the present case, the applicants have not provided evidence that those conditions are met.

160 Moreover, the Commission claims that it is clear from the judgment in *Dorsch Consult* v *Council and Commission*, cited above, that there is no liability if the measure that gave rise to the alleged damage is justified by a general economic interest, as is the case here. Although the applicants seek to distinguish between the Commission's objective in adopting the official euro symbol, which in their view is justified by a general economic interest, and the means employed by it to attain its objective, namely the failure to carry out a search for earlier trade marks, the Commission observes that it had no duty to carry out such searches and the mere fact that it did not do so is not such as to establish its liability.

Findings of the Court

161 It should be noted that, if the principle of no-fault liability were recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the special and unusual nature of that damage (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19, and Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 171).

162 As regards the existence of actual and certain damage, it is incumbent upon the applicant to produce to the Community Courts the evidence to establish the fact of the loss which it claims to have suffered. The existence of actual and certain damage cannot be considered in the abstract by the Community Courts but must be assessed in relation to the specific facts characterising each particular case (Case C-237/98 P *Dorsch Consult* v *Council and Commission*, cited above, paragraphs 23 and 25).

163 As regards the existence of a causal link, it is settled case-law that there is a causal link for the purposes of the second paragraph of Article 288 EC where there is a direct link of cause and effect between the relevant action of the institution concerned and the injury pleaded, the burden of proof being on the applicant. The Community can be held liable only for damage which is a sufficiently direct consequence of the conduct of the institution concerned (see, by analogy, *TEAM* v *Commission*, cited above, paragraph 68, and the case-law cited).

164 It has already been observed that the applicants have not, in this case, provided evidence to show that the Commission de facto prevented ISL from using its trade mark. They have not proven that the official euro symbol, whose function is to denote the single currency, has been used as a trade mark in the course of trade and, in any event, has given rise to a likelihood of confusion on the part of the relevant public thereby causing the ISL trade mark to lose its essential function.

165 Moreover, as to the submission that third parties have affixed the official euro symbol to various products, it should be noted that even assuming that that symbol has been affixed to products in Classes 16 and 36 in order to enable the public to identify their trade origin, the fact remains that that use is not

sufficiently directly attributable to the Commission. It has already been observed that although the Commission induced third parties to use the official euro symbol, the aim of its actions was to promote awareness of the official euro symbol as a means of denoting the single currency and not as a sign intended to distinguish specific goods or services (see paragraph 104 above).

166 It follows that the applicants' claim based on the Community's no-fault liability must be rejected since they have not proven the existence of actual and certain damage attributable to the Commission.

167 In the light of all the foregoing, the action must be dismissed in its entirety.

## Costs

168 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicants to pay the costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 10 April 2003.

H. Jung
Registrar

R. García-Valdecasas
President