

Decision of the Board of Appeal: the Opposition Division's decision was annulled and the opposition was rejected

Pleas in law: Infringement of Article 8(1)(b) of Regulation No 207/2009 as there is a likelihood of confusion between the marks at issue. The Board of Appeal focused on the wrong factors in assessing the visual similarity of the signs.

Action brought on 10 June 2011 — HeidelbergCement v Commission

(Case T-302/11)

(2011/C 238/49)

Language of the case: German

Parties

Applicant: HeidelbergCement AG (Heidelberg, Germany) (represented by: U. Denzel and T. Holz Müller, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the General Court should:

- annul Articles 1 and 2 of the Commission's decision of 30 March 2011 in Case COMP/39520 — Cement and related products, in accordance with the fourth paragraph of Article 263 TFEU, in so far as they concern the applicant;
- in accordance with Article 87(2) of the Rules of Procedure of the General Court, order the Commission to pay the applicant's costs.

Pleas in law and main arguments

In support of its action, the applicant relies on five pleas in law.

1. First plea in law: infringement of Article 18(3) of Regulation (EC) No 1/2003 (1)

The contested decision infringes Article 18(3) of Regulation No 1/2003 since it does not give sufficient detail on the purpose of the investigation and requests company information which is not 'necessary', within the meaning of Article 18 of Regulation No 1/2003, to investigate the allegations made.

- The applicant was not informed in the contested decision or at any other stage of the investigation procedure of what exactly is being investigated. The decision thus infringes the duty in Article 18(3) of Regulation No 1/2003 to communicate the purpose of the investigation. According to settled case-law of the Courts of the European Union, sufficient detail of allegations needs to be given so that the addressees and Courts can assess the necessity of the information requested for the investigation.
- The decision largely requests the resubmission of information which has already been provided to the Commission in response to earlier requests for

information. The information which is already at the Commission's disposal is not 'necessary' information within the meaning of Article 18(3) of Regulation No 1/2003.

- There is no apparent link between the requested information and the Commission's 'suspicion'. The Commission misused its powers under Article 18(3) of Regulation No 1/2003 to go on a general 'fishing expedition' in relation to the applicant. For such general investigations of the market the Commission has Article 17 of Regulation No 1/2003 at its disposal.
- The Commission goes beyond its powers in Article 18(3) of Regulation No 1/2003 since, in the contested decision, it requires the applicant to analyse and evaluate the requested information.

2. Second plea in law: infringement of the principle of proportionality

The breadth of the requested information, the choice of means and the short time limit infringe the principle of proportionality.

- The composition and processing of the requested information in the prescribed form was too cumbersome for the applicant and was not proportionate to the general nature of the requested information and the purpose of the investigation.
- the 12-week time limit within which to reply and the Commission's refusal to extend that time limit were disproportionate. It was objectively impossible for the applicant to respect that time limit.

3. Third plea in law: infringement of the duty to give reasons in the second paragraph of Article 296 TFEU

The contested decision infringes the requirements in the second paragraph of Article 296 TFEU that legal acts are to state the reasons on which they are based in a proper manner, since it is not apparent from that decision why the Commission requested such extensive information, why it proceeded on the basis of Article 18(3) of Regulation No 1/2003 and why it imposed such a time constraint.

- The contested decision neither sets out the Commission's concrete allegations, nor why the Commission required such exceptionally detailed and extensive information.
- In contrast to earlier investigations, the Commission does not state the reasons why it considered it appropriate and necessary to proceed on the basis of Article 18(3) of Regulation No 1/2003 in relation to the applicant.
- The Commission does not give sufficient reasons why it set such a short time limit and why it refused to extend that time limit.

4. Fourth plea in law: infringement of the general principle of precision

In the applicant's view, the contested decision and the questionnaire sent with it infringe the requirements of the general principle of precision, since, in many respects, they are unclear, uncertain and contradictory and do not contain any clear guidance for the applicant on how to proceed. The applicant is unable to determine, beyond doubt, what it is required to do in order to avert the risk of being sanctioned. The Commission failed to respond, or at least in a sufficient manner, to the applicant's extensive enquiries and requests for clarification.

5. Fifth plea in law: infringement of the applicant's rights of defence

The contested decision infringes the applicant's rights of defence which are laid down in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 48(2) of the Charter of Fundamental Rights of the European Union in so far as it requires the applicant's active involvement in the evaluation and analysis of company data, which are tasks falling within the Commission's duty to adduce evidence.

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

Action brought on 14 June 2011 — Leopardi Dittajuti v OHIM — Llopert Vilarós (CONTE LEOPARDI DITTAJUTI)

(Case T-303/11)

(2011/C 238/50)

Language in which the application was lodged: English

Parties

Applicant: Piervittorio Francesco Leopardi Dittajuti (Numana, Italy) (represented by: D. De Simone, D. Demarinis, and G. Orsoni, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Pedro Llopert Vilarós (Sant Sadurní D'Anoia, Spain)

Form of order sought

- Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 6 April 2011 in case R 1437/2010-2, and consequently require the Office to take the necessary measures to comply with the given judgment; and
- Order the defendant to pay the costs of all instances of proceedings.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant

Community trade mark concerned: The word mark 'CONTE LEOPARDI DITTAJUTI', for goods and services in classes 33, 35, 40, and 43 — Community trade mark application No 6428338

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited in opposition: Spanish trade mark registration No 2073540 of the figurative mark 'Leopardi', for goods in class 33

Decision of the Opposition Division: Upheld the opposition for part of the contested goods and services

Decision of the Board of Appeal: Rejected the appeal as inadmissible

Pleas in law: Misinterpretation of article 60 of Council Regulation No 207/2009, of Rules 49(1), 20(7)(c) of Commission Regulation (EC) No 2868/95, applicable to the appeal proceedings pursuant to Rule 50(1) of Commission Regulation (EC) No 2868/95, as the Board of Appeal: (i) incorrectly deemed not to grant a suspension of the proceedings and postponing the deadline as jointly requested by the parties; (ii) incorrectly took into account the parties' joint request only after the lapse of the deadline of submission of the statement of grounds, thus factually keeping the concerned party from submitting the same within the due date and causing the time-limit to expire; and (iii) infringement of the procedural requirements by the Board of Appeal, as it did not take into account the grounds of appeal, although the relevant statements had been submitted beyond the time-limit, also in breach of the general principle of procedural economy and of preservation of the validity of case-file records.

Action brought on 10 June 2011 — Schwenk Zement v Commission

(Case T-306/11)

(2011/C 238/51)

Language of the case: German

Parties

Applicant: Schwenk Zement KG (Ulm, Germany) (represented by: M. Raible, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the General Court should:

- annul Commission Decision C(2011) 2367 final of 30 March 2011 (Case COMP/39520 — Cement and related products);
- in accordance with Article 87(2) of the Rules of Procedure of the General Court, order the Commission to pay the applicant's costs.