Communities on 27 September 2002 by Koninklijke BAM NBM N.V., whose registered office is in the Hague (Netherlands), represented by E.H. Pijnacker Hordijk and G.W.H. Corstens.

The applicant claims that the Court should:

1. Annul the Commission Decision of 3 September 2002 pursuant to Article 9(3) of Regulation (EEC) No 4064/89 in Case COMP/M.2881-BAM NMB/HBG;

2. Order the Commission to pay the costs.

*Plea in law and main arguments*

The applicant notified the Commission of its planned acquisition of the Hollandsche Beton Group N.V. Both undertakings are active in the construction sector and in related markets.

By the contested decision, the Commission, at the request of the Netherlands Minister for economic affairs, referred the case to the Netherlands competition authority as regards the construction sector and the regional asphalt markets. As regards the other activities of the applicant and of Hollandsche Beton Group, the planned concentration was approved by a Commission decision of the same date pursuant to Article 6(1)(b) of Regulation No 4064/89 [1].

In support of its application the applicant submits, first, that in its referral decision the Commission made a manifestly incorrect appraisal of the facts. According to the applicant, the Commission errs in finding that the applicant and Hollandsche Beton Group N.V. have a joint market share of more than 25 % on the relevant market for major works.

The applicant also submits that the contested decision infringes Article 9(3) of Regulation No 4064/89. The Commission misappraises the effects of the concentration on the civil and utility construction sectors, on the one hand, and the earth-moving, hydraulic engineering and road construction sectors on the other hand. In particular the market shares of the applicant and of Hollandsche Beton Group for major projects in those sectors are much smaller than the Commission concludes. Projects of that kind are implemented by various undertakings which work together on one project. According to the applicant, the Commission erred in completely attributing to the applicant and Hollandsche Beton Group the market shares of those groups of undertakings in which they took part, without taking into account the other undertakings cooperating with them.

The applicant also claims infringement of Article 9(3) of Regulation No 4064/89 concerning the market for the production of asphalt. The Commission omitted to indicate the specific regional markets on which there would be negative consequences for competition.

Furthermore, the applicant claims infringement of the principle of the right to a fair hearing and the obligation to state reasons. The Commission bases its finding concerning the consequences of the concentration for the civil and utility construction sectors, on the one hand, and the earth-moving, hydraulic engineering and road construction sectors, on the other, on the results of a survey. The applicant states that it was never able to inspect that information and was unable to comment on it.

Finally, the applicant claims infringement of the obligation to state reasons with regard to the markets for the production of asphalt.

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[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) (corrected version published in OJ 1990 L 257, p. 13).

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## Action brought on 27 September 2002 by Lidl Stiftung & Co. KG against the Office for Harmonisation in the Internal Market (Trade Marks and Designs)

**(Case T-296/02)**

(2002/C 289/66)

*(Language of the case: to be determined pursuant to Article 131(2) of the Rules of Procedure — Language in which the application has been drafted: German)*

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) was brought before the Court of First Instance of the European Communities on 27 September 2002 by Lidl Stiftung & Co. KG, of Neckarsulm (Germany), represented by Peter Gross, Rechtsanwalt.

A further party to the proceedings before the Board of Appeal was REWE-Zentral AG, of Cologne (Germany).

The applicant claims that the Court should:

— declare void and annul the decision adopted on 17 July 2002 by the Third Board of Appeal of the Office for Harmonisation in the Internal Market, concerning appeal No R 0036/2002-3 relating to registration of the Community trade mark 'Lindenhof' (application No 629741);

— order the defendant to pay the applicant's costs.

*Pleas in law and main arguments*

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|---|---|
| Applicant for the Community trade mark: | REWE-Zentral AG |
| The Community trade mark applied for: | the word mark 'Lindenhof', *inter alia* for goods in Class 32 (mineral waters and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices) — application No 629741 |
| Proprietor of the trade-mark right opposed in the opposition proceedings: | the applicant in these proceedings |
| Trade-mark right opposed: | the German pictorial mark 'LINDERHOF' for goods in Class 33 (champagne-like wines) |
| Decision of the Opposition Division: | partial rejection of the opposition |
| Decision of the Board of Appeal: | rejection of the applicant's appeal |
| Grounds of claim: | — likelihood of confusion within the meaning of Article 8(1)(b) of Regulation (EC) No 40/94 [1];<br>— the competing marks are extremely similar;<br>— the goods of the trade-mark applicant are not sufficiently dissimilar to those of the applicant in these proceedings. |

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

## Action brought on 30 September 2002 by ACEA S.p.A. against the Commission of the European Communities

**(Case T-297/02)**

(2002/C 289/67)

*(Language of the case: Italian)*

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 30 September 2002 by ACEA S.p.A., represented by Andrea Giardina, Luca G. Radicati di Brozolo and Vincenzo Puca, avvocati.

The applicant claims that the Court should:

— annul the Commission's decision of 5 June 2002 (State Aid No C.27/99) in so far as it declares unlawful and incompatible with the common market the three-year exemption from tax on profits granted by Italy to local public service undertakings the majority of the shares in which are publicly owned within the meaning of Article 3(70) of Law No 549/1995, and loans granted on preferential terms pursuant to Article 9a of Decree-Law No 488/1986, and in so far as it requires Italy to recover the aid in question from the recipients thereof, including the applicant (Articles 2 and 3 of the decision);

— order the Commission to pay the costs.

*Pleas in law and main arguments*

The pleas in law and main arguments are similar to those advanced in Case T-292/02 Confederazione Nazionale dei Servizi v Commission.

In particular, the applicant pleads that the measures at issue cannot constitute State aid, inasmuch as the companies benefitting from the system in question do not operate within a framework of competition. Furthermore, even if the measures at issue were to be regarded as State aid and were not classified as existing aid, they should be regarded as compatible aid within the meaning of Article 87(3)(c) EC.