

**Action brought on 23 February 2007 — BYK-Chemie v OHIM — (Substance for Success)**

(Case T-58/07)

(2007/C 95/96)

*Language of the case: German*

**Parties**

*Applicant:* BYK-Chemie (Wesel, Germany) (represented by: J. Kroher and A. Hettenkofer, lawyers)

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

**Form of order sought**

- Annul the decision of the Fourth Board of Appeal of the defendant of 9 January 2007 in Case R0816/2006-04;
- order the defendant to pay the costs.

**Pleas in law and main arguments**

*Community trade mark concerned:* The word mark 'Substance for success' for goods and services in Classes 1, 40-42 (Application No 3 660 552).

*Decision of the Examiner:* Rejection of the application.

*Decision of the Board of Appeal:* Dismissal of the appeal.

*Pleas in law:* Breach of Article 7(1)(b) and (c) of Council Regulation No 40/94 <sup>(1)</sup> as the registered trade mark is neither devoid of the necessary distinctive character nor is to be reserved for use in trade.

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

**Action brought on 20 February 2007 — Polimeri Europa v Commission**

(Case T-59/07)

(2007/C 95/97)

*Language of the case: Italian*

**Parties**

*Applicant:* Polimeri Europa SpA (Brindisi, Italy) (represented by: M. Siragusa and F.M. Moretti, avvocati)

*Defendant:* Commission of the European Communities

**Form of order sought**

The applicant claims that the Court should

- annul the decision, in whole or in part, with all the consequences entailed for the amount of the penalty;
- in the alternative, annul or reduce the penalty;
- in any case, order the Commission to pay the costs, fees and expenses.

**Pleas in law and main arguments**

By decision of 29 November 2006 (C(2006) final in Case COMP/F/38.638 — Butadiene Rubber (BR) and Emulsion Styrene Butadiene Rubber (ESBR); 'the Decision'), the Commission declared that Polimeri Europa, together with other undertakings, has infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area by agreeing price targets for BR/ESBR products, sharing customers through non-aggression pacts and exchanging sensitive commercial information.

In support of its action challenging that measure, Polimeri Europa alleges serious breaches of procedure and infringement of its rights of defence. In particular, the applicant notes the following conduct on the part of the Commission: (i) its use of incorrect rules in applying the Leniency Notice; (ii) its unjustified and inexplicable adoption of a second statement of objections, thereby distorting the role of such a statement; (iii) its attribution to Polimeri Europa — first stated in the Decision — of sole liability for facts relating to a period during which Syndial SpA, not Polimeri Europa, had been managing the business; (iv) its introduction in the Decision of an assessment of the market that was new and different as compared with the assessment previously used.

The applicant also alleges that the Decision is flawed by the following substantive defects: (i) lack of a proper preliminary investigation, coupled with an insufficient and contradictory statement of reasons, as regards the definition of the relevant market, in that the Commission carried out a joint evaluation of the BR/ESBR sectors — without, however, taking natural rubber into account — and assessed the market unfairly; (ii) erroneous attribution to Polimeri Europa of liability for facts relating to a period during which another company (not Polimeri Europa) was managing the products in question; (iii) lack of a proper preliminary investigation, coupled with an insufficient and contradictory statement of reasons, as regards the assessment of the facts; (iv) lack of a proper preliminary investigation, coupled with an insufficient and contradictory statement of reasons, as regards the evidence for a hypothetical unlawful act on the BR market.

Lastly, the applicant alleges that the penalty imposed on it is unlawful for the following reasons: (i) breach of the obligation to evaluate the true impact of the infringement; (ii) failure properly to state reasons and breach of the principles of equal treatment and proportionality as regards the application of the multiplier for the purposes of deterrence; (iii) erroneous calculation of the duration of the infringement in the light of the evidence available; (iv) faulty reasoning and breach of the principles of legal certainty and proportionality as regards application of the repeat offender mechanism; (v) failure to apply the mitigating factor consisting in non-implementation of the alleged agreements and concerted practices.