

In support of their claims, the applicants submit:

- infringement of the rights of defence, by basing the decision on various matters of fact which were not communicated during the administrative procedure and on which the applicants were not given the opportunity to comment;
- that the Commission committed a number of manifest errors of assessment relating to:
  - the definition of three separate wholesale markets and not a single market for access to wholesale ADSL including both the local loop and national and regional access, or in the alternative, at least the latter two;
  - the presumption that the applicants were dominant both on the relevant wholesale broadband product markets and on the retail market;
  - the application of Article 82 EC in relation to its alleged abusive conduct. First, the Commission applies that article to the *de facto* refusal to contract when the wholesale products in question do not constitute 'essential infrastructure', thereby contradicting the case-law in *Oscar Bronner*. Secondly, even if Article 82 could be applied to the applicants' conduct, *quod non*, the decision disregards the requirements laid down in the case of *Industrie des Poudres Sphériques* according to which, in order to make a finding of illegal margin squeeze, it is necessary to show past evidence of both excessive pricing of the upstream product and predatory pricing of the final product;
  - the alleged abusive conduct and its impact on the market; first, because it incorrectly selects the wholesale inputs for comparison, and secondly, because it commits, *inter alia*, major errors of calculation and omissions both in the application of the 'period-by-period' test and the 'discounted cash flow' test. These errors, both individually and collectively, invalidate the methodology and calculations set out in the decision. The decision also fails to probe sufficiently the alleged negative impact of the conduct on competition;
  - the *ultra vires* acts of the Commission, which, in any event, infringe the principles of subsidiarity, proportionality, legal certainty, loyal cooperation and sound administration by intervening where the national telecommunications regulator had already acted, which was set up under European legislation and which acted in accordance with the powers and competences conferred on it by that legislation and under a set of rules based on the Community competition rules;

As regards the annulment or reduction of the fine, the applicants submit that the Commission infringed Articles 15(2) of Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty (now Articles 81 and 82) and 23(2) of Council Regulation (EC) No 1/2003 on the implementation of

the competition rules laid down in Articles 81 and 82 of the Treaty, by considering that the infringement was committed in a deliberate or seriously negligent manner and by classifying the infringement as 'characteristic abuse'.

### Action brought on 6 September 2007 — Brilliant Hotelsoftware v OHIM (BRILLIANT)

(Case T-337/07)

(2007/C 269/101)

*Language of the case: German*

#### Parties

*Applicant:* Brilliant Hotelsoftware Limited (London, United Kingdom) (represented by J. Croll and C. Pappas, lawyers)

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

#### Form of order sought

- Annul the Decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (OHIM) of 14 June 2007 and register the trade mark 'BRILLIANT' in the Register of trade marks;
- Order OHIM to pay the costs.

#### Pleas in law and main arguments

*Community trade mark concerned:* The word mark 'BRILLIANT' for goods and services in Classes 9 and 42 (application No 4 345 849).

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

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

*Pleas in law:* Infringement of Article 7(1)(b) and (c) of Regulation (EC) No 40/94 <sup>(1)</sup>, since the trade mark applied for is not descriptive and does not lack the necessary distinctive character.

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