Other parties to the proceedings before the Board of Appeal of OHIM: Pablo Barranco Schnitzler (Sant Just Desvern, Spain) and Mariano Barranco Rodriguez (Sant Just Desvern)

Form of order sought

— annul the decision of the Second Board of Appeal of OHIM of 30 May 2008 (Case R 1034/2007-2);

— order OHIM to pay the costs, including those of the proceedings before the Board of Appeal.

Pleas in law and main arguments

Applicant for a Community trade mark: the applicant

Community trade mark concerned: figurative mark 'MATRATZEN CONCORD' for goods in Classes 10, 20 and 24 (Application No 3 355 369)

Proprietors of the mark or sign cited in the opposition proceedings: Pablo Barranco Schnitzler and Mariano Barranco Rodriguez

Mark or sign cited in opposition: national word mark 'MATRATZEN' for goods in Class 20

Decision of the Opposition Division: Refusal of the application for a Community trade mark

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation No 40/94, in that there is no likelihood of confusion between the conflicting marks, and infringement of Article 43(2) of that regulation, in that no proof has been provided of genuine use of the mark cited in opposition.

Action brought on 25 August 2008 — Pannon Hőerőmű v Commission of the European Communities

(Case T-352/08)

(2008/C 285/85)

Language of the case: Hungarian

Parties

Applicant(s): Pannon Hőerőmű Energiatermelő (Pécs, Hungary) (represented by: M. Kohlrusz, P. Simon and G. Ormai)

Defendant(s): Commission of the European Communities

Form of order sought

— As a main claim, annulment of the decision of the Commission of 4 June 2008 on aid granted by Hungary under long term power purchase agreements (C 41/2005 (ex NN 49/2005), 'the contested decision').

— In the alternative, that the applicant be exempted from the obligation to repay the aid imposed by the contested decision.

— That the Commission be ordered to pay the costs.

Pleas in law and main arguments

The applicant is a private limited company principally involved in the production of electricity. Before the accession of Hungary to the European Union, certain electricity producers, as sellers, concluded long term power purchase agreements ('PPAs') with MVM Trade Villamosenergia-kereskedelmi Zrt. ('MVM'), as purchaser. Under those agreements, MVM is obliged to purchase a specific quantity of electricity from the producers operating under the PPAs. According to the contested decision, that obligation to purchase constitutes state aid incompatible with the common market, which must be repaid by its recipients.

In support of its main claim, seeking the annulment of the contested decision, the applicant essentially alleges that there has been a breach of essential procedural requirements, that the legal rules have been misapplied and that it has an obligation to supply in the general economic interest.

As regards the breaches of essential procedural requirements, the applicant complains, first, that the Commission did not examine each of the PPAs but reached a general conclusion concerning all the PPAs. Second, the applicant alleges that the Commission did not take into account the applicability of the PPAs in the long term but only from 1 May 2004, that is to say, it considered the period between the accession of Hungary to the European Union and the adoption of the contested decision. Third, the applicant states that the Commission only examined how an economic operator in the position of MVM proceeded and did not analyse the conduct of economic operators in the position of the electricity producers. Fourth, it alleges that the Commission erroneously classed the price fixing mechanism adopted under the PPAs as a 'guarantee'. Fifth, and finally, it submits that, as regards distortion of competition, the Commission merely made general statements and did not examine the actual circumstances.

In the event that the plea in law alleging breach of essential procedural requirements is held to be unfounded, the applicant puts forward a plea based on the misapplication of the law. According to the applicant, the conditions are not met for the classification of the PPAs it concluded as State aid. First, the Commission is wrong to apply the criterion of private investor, since the situation of MVM cannot be compared to that of a typical private investor. Second, the measure cannot be said to be of a selective nature either, since the conclusion of the PPAs was an express legal obligation. Third, the advantage was not granted by the State as MVM is a commercial company operating under market conditions. Fourth, there was no distortion of competition since there is no evidence that the PPAs have had any effect on competition.

However, in the event that the Court of First Instance should consider that the conditions for State aid are met, the applicant states that the service it supplied is in the nature of a service of general economic interest so that the PPAs which it concluded do not constitute State aid incompatible with the common market.

In support of its claim that it should be exempted from the obligation to repay, submitted in the alternative in its application, the applicant relies on the principles of proportionality, of the protection of legitimate expectations and legal certainty and the right to legal redress.

Action brought on 21 August 2008 — Spira v Commission

(Case T-354/08)

(2008/C 285/86)

Language of the case: English

Parties

Applicant: Diamanthandel A. Spira BVBA (Antwerp, Belgium) (represented by: J. Bourgeois, Y. Van Gerven, F. Louis, A. Vallery, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— Annul the Commission decision of 5 June 2008, pursuant to Article 7(2) of Council Regulation No 773/2004, in case COMP/38.826/B-2-Spira/De Beers/DTC Supplier of Choice;

— Order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

In the present case, the applicant contests Commission Decision (2008) D/203546 of 5 June 2008 by which the Commission declared that the change in facts due to the annulment by the Court of First Instance of the commitment decision ([1]) was not a decisive element which would require the Commission to revisit its Decision (2007) D/200338 of 26 January 2007, by which it rejected, for lack of Community interest, the applicant's complaint regarding violation of Articles 81 and 82 EC in connection with the Supplier of Choice (SoC) system applied by De Beers Group for the distribution of rough diamonds ('rejection decision' ([2])) (Case COMP/38.826/B-2-Spira/De Beers/DTC Supplier of Choice).

The applicant puts forward three pleas in law in support of its claims.

Firstly, the applicant alleges that the Commission failed to examine with care and impartiality the anticompetitive practices denounced by the applicant in its complaint.

Secondly, the applicant claims that when re-examining the issue of input foreclosure the Commission could not claim that there was a lack of Community interest to act on the complaint in light of the significant damage resulting from the input foreclosure caused by the SoC system. The applicant submits that the input foreclosure should have been considered of Community interest as it affects the availability of rough diamonds EU-wide and even worldwide. It considers that the SoC distribution system is an anti-competitive selective distribution system that restricts intra-brand competition.

Thirdly, in the alternative, the applicant submits that the Commission erred in law and provided inadequate statement of reasons in the application of the foreclosure effects test by:

— not having first defined the analyzed market structure, market power of the company concerned and the market position of its competitors;

— failing to engage the examination of all potential restrictions or monopolization activities of the supplier whose selective distribution system was under scrutiny.