Pleas in law and main arguments

The applicants object to the findings in the first part of Article 1 of Commission Decision C(2008) 3512 final of 23 July 2008 Measure No C48/2006 (ex N227/2006) Germany DHL and Leipzig Halle Airport that the capital contributions granted by Germany to Leipzig/Halle airport represent State aid to the airport and that that aid amounts to EUR 350 million.

The applicants rely on eight pleas in law in support of their claims:

First, the applicants submit that the rules on State aid are not even applicable because the airport is not an undertaking within the meaning of those rules, so far as the expansion of regional airport infrastructure is concerned.

Second, Flughafen Leipzig/Halle GmbH is a State-owned single purpose vehicle with an organisational structure governed by private law which, accordingly, as is generally acknowledged, cannot be deemed to be a recipient of aid in so far as the State provides it with the resources required in order to perform its functions.

Third, the contested decision is inherently contradictory, in that Flughafen Leipzig/Halle GmbH is simultaneously treated in the decision both as recipient and donor of aid.

Fourth, the application of the guidelines published in 2005 ([1]) to facts which obtained before the guidelines were published is contrary to the prohibition on retroactivity, the requirement of legal certainty, the protection of legitimate expectations and the principle of equality. In the applicant's view, only the Commission's 1994 guidelines ([2]) were applicable.

In addition, the applicants state that the new guidelines are contrary to primary Community law, being factually inapplicable and inherently contradictory where regional airport operators do not have the status of an undertaking. The 2005 guidelines also made the construction of airports subject to the rules on aid, whereas, in the previous guidelines of 1994, this activity was expressly excluded from the application of the State aid rules. In view of the diametrically opposed content of the old and the new guidelines, and the non-revocation of the 1994 provisions, it is unclear how the financing of airport infrastructure is intended to be legally assessed.

Sixth, the applicants submit that the Commission has committed a breach of procedure since it failed to apply the provisions of Regulation No 659/1999 ([3]) on existing aid to the capital contributions which it deemed to be aid.

Seventh, the 2005 guidelines also circumvent the division of powers between the Member States and the Commission, since the Commission is extending its powers beyond the framework laid down in the EC Treaty by adopting an expanded interpretation of the essential criterion of 'undertaking' in Article 87(1) EC and, as a result of this expanded interpretation, making procedures which are within the administrative competence of national authorities subject to review by the Community institutions.

Finally, the contested decision is inherently contradictory and infringes the obligation to state reasons in accordance with Article 253 EC.

([1]) Communication from the Commission — Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ 2005 C 312, p. 1.
([2]) Communication from the Commission — Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ 1994 C 350, p. 7.
([3]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

Action brought on 6 October 2008 — EuroChem MCC v Council

(Case T-459/08)

(2008/C 327/66)

Language of the case: English

Parties

Applicants: EuroChem Mineral and Chemical Company OAO (EuroChem MCC) (Moscow, Russia), (represented by: P. Vander Schueren and B. Evtimov, lawyers)

Defendant: Council of the European Union

Form of order sought

— Annul Council Regulation (EC) No 661/2008 of 8 July 2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 ([1]) insofar as it imposes an anti-dumping duty on the applicants, its manufacturing subsidiaries and related companies, indicated in recital 23(a) and (c) and Articles 1.2(a) and 2.2(a) of the contested regulation;

— Order the Council to pay the costs of and occasioned by these proceedings.

Pleas in law and main arguments

In support of their application the applicants put forward two grounds for annulment. The second ground is divided into three pleas.

First, the applicants submit that the Council and the Commission breached Article 11(3) of the basic regulation [2] and/or made a breach of an essential procedural requirement by refusing to initiate upon their own initiative an interim review of injury and the injury margin findings in parallel with the expiry review, and consequently made a manifest error of assessment in the finding of a likelihood of recurrence of injury in the context of the expiry review.

Secondly, the applicants claim that the Council and the Commission wrongly established the normal value for the applicants in the partial interim review, leading to its artificial increase, and made a wrong comparison with export price, and hence made an erroneous finding of dumping, thereby breaching Articles 1 and 2 of the basic regulation, committing series of manifest errors of assessment and violating fundamental principles of Community law.

More particularly, the applicants argue that the Council and the Commission erred in law and violated Article 2(3) and (5) of the basic regulation as well as their legal context provided by Articles 1 ad 2 of the basic regulation, by disregarding a major part of the applicants' costs of production as being unreliable and/or de facto applying a non-market economy methodology for establishing the major part of the applicants' normal value.

Once having decided to proceed with the gas adjustment, the Commission violated Article 2(5), second sentence, and/or made a manifest error of appreciation and showed a lack of reasoning by implementing the gas adjustment on the basis of the intra-Community price of gas at Waidhaus, Germany and failing to make further deductions.

Finally, the applicants submit that the Council and the Commission violated Article 2(10) of the basic regulation and made a manifest error of assessment of the facts by deducting from the applicants' export price the first independent customer selling, general and administrative expenses and commissions in respect of related companies, which are integral parts of the applicants' single economic entity and integrated sales department.

(1) OJ L 185, p. 1.
(2) Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

Action brought on 13 October 2008 — Winzer Pharma v OHIM — Alcon (OFTAL CUSI)

(Case T-462/08)

(2008/C 327/67)

Language in which the application was lodged: German

Parties

Applicant: Dr. Robert Winzer Pharma GmbH (Berlin, Germany) (represented by: S. Schneller, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Alcon, Inc. (Hünenberg, Switzerland)

Form of order sought

— Annul the decision of the Board of Appeal of OHIM of 17 July 2008 (R 1471/2007-1) and the decision of the Opposition Division of OHIM of 16 July 2007 (B 809 899);

— Reject the Community trade mark application No 003679181 'Oftal Cusi';

— Order OHIM to pay all the costs of the proceedings.

Pleas in law and main arguments

Applicant for a Community trade mark: Alcon Cusì, S.A (subsequently, Alcon, Inc.)

Community trade mark applied for: the word mark 'OFTAL CUSI' for goods in Class 5.

Proprietor of the mark or sign cited in the opposition proceedings: Winzer Pharma

Mark or sign cited in opposition: 'Ophtal' (No 489 948) for goods in Class 5.

Decision of the Opposition Division: Rejection of the opposition.

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

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 40/1994 [1] in that on account of their similarity there is a likelihood of confusion between the marks at issue.

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