

Form of order sought

- Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 4 July 2008 in case R 1031/2007-1; and
- Order the defendant and, as the case may be, the other party to the proceedings before the Board of Appeal, to pay the costs of the proceedings, including those incurred before the Board of Appeal.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: The figurative mark 'ISDIN' for goods in classes 3 and 5 — application No 3 288 339

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited: Irish trade mark registration No 64 939 of the word mark 'ISTIN' for goods in class 5; United Kingdom trade mark registration No 824978 of the word mark 'ISTIN' for goods in class 5

Decision of the Opposition Division: Partially upheld the opposition

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 as the Board of Appeal erred in its findings that the trade marks concerned are similar, that the goods in question were hardly similar and that there is a likelihood of confusion between the trade marks concerned.

Action brought on 21 October 2008 — AES-Tisza v Commission

(Case T-468/08)

(2009/C 6/74)

Language of the case: English

Parties

Applicant: AES-Tisza Erőmű kft (AES-Tisza kft) (Tiszaújváros, Hungary) (represented by: T. Ottervanger and E. Henny, lawyers)

Defendant: Commission of the European communities

Form of order sought

- Annul the decision of the Commission of 4 June 2008, C 41/2005;
- Order the Commission to pay the costs.

Pleas in law and main arguments

The applicant seeks the annulment of Commission Decision C(2008) 2223 final, of 4 June 2008, declaring incompatible with the common market the aid granted by the Hungarian authorities to certain electricity generating producers in the form of long-term power purchase agreements ('PPA') of electricity concluded between the transmission operator Magyar Villamos Művek Rt. ('MVM'), owned by the Hungarian State, and these producers at a date prior to the accession of the Republic of Hungary to the European Union [State aid C 41/05 (ex NN 49/05) — Hungarian 'Stranded Costs']. The applicant is identified in the contested decision as a beneficiary of the alleged State aid and the decision orders Hungary to recover the aid, including interest, from the applicant.

The applicant claims that the Commission erred in law and committed manifest errors of assessment, and has further infringed fundamental principles of European law, by finding that the purchase obligations contained in the PPA between MVM and the applicant constitute illegal State aid. In support of its claims, the applicant raises seven pleas in law.

In its first plea, the applicant submits that the Commission infringed Article 87(1) EC in as much as it committed errors of law and manifest errors of assessment by failing to establish to the requisite standard that the alleged aid measure conferred a selective advantage to the applicant through State resources.

Second, the applicant claims that, by qualifying the applicant's PPA as aid and requiring its recovery, the decision violates the fundamental principles of Community law. The applicant argues that the Commission infringed its procedural rights by failing to respect the right to a fair hearing. In the applicant's view, the Commission infringed as well the fundamental principles of legal certainty and of legitimate expectations in as much as it applied an *ex post* assessment to the alleged aid measures, departing from the established rule of *ex ante* assessment, without any valid justification. The applicant further submits that the Commission infringed the principles of neutrality and equal treatment.

Third, the applicant contends that the Commission committed manifest errors of assessment in relation to the application of the cumulative criteria of Article 87(1) EC to the applicant's PPA in the period after the accession.

Fourth, the applicant states that the Commission infringed its obligation to state reasons, as required by Article 253 EC, in particular in relation to the conclusions regarding the classification of the PPAs as aid as of 1 May 2004 and in the application of the 'counterfactual' market.

Fifth, the applicant submits that the Commission infringed Article 87(3)(a) and (c) EC by failing to recognize any role for the applicant's PPA in securing the necessary investment in a modern, upgraded plant.

Sixth, in the applicant's opinion, the Commission infringed its duty to ensure legal specificity in respect of recovery, failed to qualify the scope and value of the 'purchase obligations' and based its recovery order on hypothetical elements.

Finally, the applicant claims that the Commission infringed the fundamental principles of Community law in ordering recovery of the alleged aid.

Action brought on 22 October 2008 — Companhia Muller de Bebidas v OHIM — Missiato Industria e Comercio (61 A NOSSA ALEGRIA)

(Case T-472/08)

(2009/C 6/75)

Language in which the application was lodged: English

Parties

Applicant: Companhia Muller de Bebidas (Pirassununga, Brazil) (represented by: G. Da Cunha Ferreira and I. Bairrão, lawyers)

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

Other party to the proceedings before the Board of Appeal: Missiato Industria e Comercio Lda (Santa Rita do Passa Quatro, Brazil)

Form of order sought

- Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 4 July 2008 in case R 1687/2007-1, inasmuch as it upheld the decision allowing the registration of the Community trade mark concerned;
- Declare the registration of the Community trade mark concerned invalid for all goods protected, on the basis that there is a likelihood of confusion with the trade marks cited in the opposition proceedings; and
- Order the defendant and the other party to the proceeding before the Board of Appeal to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The other party to the proceedings before the Board of Appeal

Community trade mark concerned: The figurative mark '61 A NOSSA ALEGRIA' for goods in class 33

Proprietor of the mark or sign cited in the opposition proceedings: The applicant

Mark or sign cited: Portuguese trade mark registration No 273 105 of the figurative mark 'CACHAÇA 51' for goods in class 33; Portuguese trade mark registration No 331 952 of the figurative mark 'CACHAÇA 51' for goods in class 33; Benelux trade mark registration No 576 901 of the figurative mark 'CACHAÇA 51' for goods in classes 32 and 33; Danish trade mark registration No VR 1998 03649 of the figurative mark 'CACHAÇA 51' for goods in class 33; United Kingdom trade mark registration No 2 248 316 of the series of figurative marks 'CACHAÇA 51' for goods in class 33; Spanish trade mark registration No 2 354 943 of the figurative mark 'CACHAÇA 51' for goods in class 33; German trade mark registration No 30 071 545 of the figurative mark 'CACHAÇA 51'; Austrian trade mark registration No 161 564 of the figurative mark 'CACHAÇA 51' for goods in class 33; Portuguese well-known figurative trade mark 'CACHAÇA 51' for goods in class 33; Portuguese well-known word trade mark 'CACHAÇA 51' for goods in class 33.

Decision of the Opposition Division: Rejected the opposition in its entirety

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation No 40/94 as the Board of Appeal erred in its finding that there is no likelihood of confusion between the conflicting trade marks; Infringement of Article 52(1)(a) of Council Regulation No 40/94 as the Board of Appeal erred in its finding that the evidence submitted by the applicant was not sufficient to prove the well known character of the earlier trade marks in Portugal, or, at least its enhanced distinctiveness as a whole.

Action brought on 28 October 2008 — Apollo Group v OHIM (THINKING AHEAD)

(Case T-473/08)

(2009/C 6/76)

Language of the case: English

Parties

Applicant(s): Apollo Group, Inc. (Phoenix, United States) (represented by A. Jaeger-Lenz and A. Link, lawyers)

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