In support of its claims, the applicants submit that, in the first instance, it has not been established that Repsol YPF Lubricantes y especialidades S.A. (Rylesa) was involved in certain identified conduct which has been dealt with on an individual basis for the purposes of imposing a penalty. In particular, the Decision did not produce sufficient evidence to show that Rylesa took part in an agreement to share customers and markets.

Nor does the Decision take account of the fact that the purpose of the technical meetings was not to share customers and markets. Such practices, had they existed, would have occurred, as some of the companies to which the Decision was addressed have recognised, within the bilateral and multilateral contacts at the fringes of the technical meetings. However, in the contested Decision it is considered unnecessary to investigate such bilateral and multilateral contacts, as a result of which the applicants may not be deemed party to the infringement identified by the Decision. In any event, the Decision does not explain why Rylesa is deemed liable for such conduct while at the same time it clears other companies that were present at the technical meetings put forward as evidence of such conduct.

The applicants also contest the criteria used by the Commission to determine the turnover of the relevant products and therefore set the penalty applicable. First, the Decision does not precisely define the products concerned by the infringement. Second, in accordance with the 2006 Guidelines on the method of setting fines, applicable to the present case, fines are to be set according to the value of the sales made by a company during the last full business year of its participation in an infringement. However, in the present case, the Commission has departed from that general rule, and has calculated the value of the fine by reference to Rylesa's average sales volume between 2001 and 2003. At no point did the Commission provide any reasons to justify why, in the case of Rylesa, it disregarded the rules it set itself in the Guidelines in order to apply a criterion (the average sales value between the years 2001 and 2003), which, moreover, substantially prejudices Rylesa. The value of sales to be taken into account is ultimately that generated in 2003, as the Decision itself states, since that is the last full year in which the Commission itself alleges that Rylesa participated in the infringement.

In the Decision, the Commission considers that any infringement by Rylesa was terminated by 4 August 2004. However, there is not the slightest evidence that any infringement by Rylesa persisted until that date. In particular, Rylesa is not a party to the agreements or practices adopted in the technical meetings which took place in the first half of 2004. Any infringement must be therefore be deemed to have terminated by January 2004 or May 2004 at the latest.

Lastly, the contested Decision disregards the considerable evidence put forward in the administrative procedure, in which it was proved that Rylesa is a completely autonomous entity from its parent company, Repsol Petróleo S.A. In any event, case-law does not allow the Commission to extend liability for an infringement committed by a company to the whole of the group of which it forms part, which is why the liability of Repsol YPF S.A. is not established.

Action brought on 16 December 2008 — CM Capital Markets v OHIM — Carbon Capital Markets (CM Capital Markets)

(Case T-563/08)

(2009/C 44/107)

Language in which the application was lodged: Spanish

Parties

Applicant: CM Capital Markets Holding, SA (Madrid, Spain), (represented by: T. Villate Consonni and J. Calderón Chavero, lawyers)

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

Other party to the proceedings before the Board of Appeal: Carbon Capital Markets Ltd (London, United Kingdom)

Form of order sought

— Annul the decision of the First Board of Appeal of OHIM of 26 September 2008 in Case R-015/2008-1, which would lead to the refusal of the contested mark in its entirety;

— Uphold the applicant's claims, and

— Order OHIM to pay the costs of the present proceedings should they be contested and reject its claims.

Pleas in law and main arguments

Applicant for a Community trade mark: CARBON CAPITAL MARKETS LIMITED.

Community trade mark concerned: The word mark 'CARBON CAPITAL MARKETS' (Application No 4 480 208) for services in class 36.

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

Mark or sign cited in opposition: The national and Community figurative marks 'CAPITAL MARKETS' for services in class 36.

Decision of the Opposition Division: Opposition rejected.

Decision of the Board of Appeal: Appeal dismissed.

Pleas in law: Incorrect application of Article 8(1)(b) of Regulation (EC) No 40/94 on the Community trade mark.