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

Other party to the proceedings before the Board of Appeal of OHIM: Koki Diskontläden GmbH (Oberhausen, Germany)

Form of order sought

— annul the decision of the Fourth Board of Appeal of OHIM of 6 October 2008 in Case No R 744/2008-4 and

— order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant.

Community trade mark concerned: Figurative mark 'inéa' in the colours blue, pink and white for goods in Classes 3, 5 and 16 (application No 4 462 826).

Proprietor of the mark or sign cited in the opposition proceedings: Kodi Diskontläden GmbH.

Mark or sign cited in opposition: Trade mark 'MINEA' (No 303 61 428,5) for goods in Classes 8, 9 and 16, the opposition being directed against registration for goods in Class 16.

Decision of the Opposition Division: Opposition rejected.

Decision of the Board of Appeal: Decision of the Opposition Division annulled.

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 40/94 ([1]), since there is no likelihood of confusion between the opposing marks.

([1]) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

Action brought on 15 December 2008 — RWE and RWE Dea v Commission

(Case T-543/08)

(2009/C 55/56)

Language of the case: German

Parties

Applicants: RWE AG (Essen, Germany) and RWE Dea AG (Hamburg, Germany) (represented by: C. Stadler and M. Röhrig, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— declare Article 1 of the decision to be void, in so far as it finds that there was an infringement by the applicants of Article 81(1) EC and Article 53 of the EEA Agreement;

— declare Article 2 of the decision to be void, in so far as it imposes a fine of EUR 37 440 000 jointly and severely on the applicants;

— in the alternative, make an appropriate reduction in the fine imposed jointly and severely on the applicants in Article 2 of the decision;

— order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicants are challenging Commission Decision C(2008) 5476 final of 1 October 2008 in Case COMP/39.181 — Candle Waxes, in which the defendant established that certain undertakings, including the applicants, had participated in a continuing agreement and/or concerted practice in the paraffin waxes sector, contrary to Article 81(1) EC and Article 53 of the Agreement on the European Economic Area.

The applicants rely on the following three pleas in law in support of their action.

In their first plea, the applicants claim that the defendant breached Article 81(1) EC and Article 23(2)(a) of Regulation (EC) No 1/2003 ([1]) by erroneously applying the notion of undertaking to the detriment of the applicants. The defendant held the applicants responsible for infringements by the former DEA Mineraloel AG and/or — after re-organisation of the company into an equally owned joint venture with Shell — the Shell & Dea Oil GmbH and, for that reason, imposed a fine on them without having established that they formed a single economic unit.

Alternatively, the applicants claim in their second plea that the defendant did not properly apply the Leniency Notice of 2002 and thereby infringed the principle of equal treatment, because it did not extend the leniency application for the paraffin wax business made by the former DEA Mineraloel AG and/or Shell & Dea Oil GmbH to the applicants. By so doing, the defendant contradicts its own view that the paraffin wax business was specifically part of the same economic unit as the applicants in the period from 3 September 1992 to 30 July 2002. Had the Leniency Notice been correctly applied, the defendant should have granted the applicants full immunity from any fine.

Alternatively, the applicants claim in their third plea that the defendant infringed fundamental principles governing the assessment of fines, in particular the principles of equal treatment and proportionality, and in that way infringed Article 23(2) and (3) of Regulation No 1/2003. The defendant incorrectly applied the 2006 Guidelines on fines by establishing the relevant turnover on the basis of a reference period which was not sufficiently representative, and thus determined a basic amount which was not proportionate to the severity of the

infringement alleged against the applicants, and treated the applicants, by comparison with other involved parties, including Shell, in a discriminatory manner without objective grounds.

(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

Action brought on 15 December 2008 — Hansen & Rosenthal and H & R Wax Company Vertrieb v Commission

(Case T-544/08)

(2009/C 55/57)

Language of the case: German

Parties

Applicants: Hansen & Rosenthal KG (Hamburg, Germany) and H & R Wax Company Vertrieb GmbH (Hamburg, Germany) (represented by: J. Schulte and A. Lober, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul the contested Decision C(2008) 5476 final of 1 October 2008 in Case COMP/39.181 — Candle Waxes of the Commission of the European Communities in so far as it relates to the applicants;

— in the alternative, cancel the fine imposed on the applicants or, in the further alternative, reduce that fine;

— order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicants are challenging Commission Decision C(2008) 5476 final of 1 October 2008 in Case COMP/39.181 — Candle Waxes, in which the defendant found that certain undertakings, including the applicants, had participated in a continuing agreement and/or concerted practice in the paraffin waxes sector, contrary to Article 81(1) EC and Article 53 of the Agreement on the European Economic Area.

The applicants rely on six pleas in law in support of their action.

By the first plea, the applicants assert that the decision is vitiated by a serious lack of reasoning. For that reason, it should be annulled by reason of infringement of Article 81 EC and consequential breach of the applicants' rights of defence.

By the second plea, the applicants claim that the conditions for an infringement of Article 81 EC have not been met. The applicants and the other paraffin producers did not in any way have a common goal. The applicants did not participate in anti-competitive agreements or concerted practices. The dispatch of letters detailing price increases therefore did not serve to give effect to anti-competitive agreements or consultations, but rather took place within the context of relations with suppliers. Furthermore, no restriction of competition resulted otherwise from the exchange of information.

By way of alternative submissions, the applicants take issue, in their third to sixth pleas in law, with the level of the fine imposed on them.

— The Commission, they submit, unlawfully applied Guidelines on fines which were adopted only in 2006, even though the alleged offence was terminated in early 2005. In so doing, the Commission breached the principle that the administration is bound by its own acts, the prohibition of retroactive effect and the principle of legal certainty.

— By their fourth plea in law, the applicants submit that the Commission erred in its calculation of the turnover relevant to the fine. In the relevant years 2002 to 2004, the applicants achieved a turnover with paraffin products of only EUR 18,97 million. The Commission, however, based its calculation of the fine on a turnover of EUR 26 million.

— By their fifth plea, the applicants assert that the Commission also incorrectly assessed the severity of the offence. The fixing, at 17 %, of the proportion of the turnover relevant to the offence and of the entry fee is at variance with the principle of proportionality. Furthermore, insufficient account was taken of the size and importance of the undertakings.

— By their sixth plea, the applicants contend that the Commission erred in its determination of the duration of the infringement alleged against the applicants. The Commission, they argue, has failed to prove that the applicants participated in the alleged restriction of competition for the entire period in respect of which they stand accused.

Action brought on 12 December 2008 — X-Technology Swiss v OHIM (representation of a sock)

(Case T-547/08)

(2009/C 55/58)

Language in which the application was lodged: German

Parties

Applicant: X-Technology Swiss GmbH (represented by A. Herbertz and R. Jung, lawyers)

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