

**Form of order sought**

— Annulment of the decision delivered by the Fourth Board of Appeal of OHIM of 17 December 2008 in Case No R 518/2008-4.

**Pleas in law and main arguments**

*Applicant for a Community trade mark:* Tubos del Mediterráneo, SA

*Community trade mark concerned:* Figurative mark 'T TUMESA TUBOS DEL MEDITERRANEO S.A.' for goods and services in Classes 6, 35 and 42 — application No 4 085 098

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

*Mark or sign cited in opposition:* National and international word and figurative marks 'TUBESCA' for goods in Classes 6, 19 and 20

*Decision of the Opposition Division:* Opposition partially upheld; partial refusal to register the mark applied for

*Decision of the Board of Appeal:* Annulment of the decision of the Opposition Division and rejection of the opposition

*Pleas in law:* There is a likelihood of confusion between the opposing marks for consumers displaying average attention or end users, especially since the marks 'TUBESCA' are well known and highly distinctive.

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**Action brought on 4 March 2009 — Italy v Commission**

(Case T-99/09)

(2009/C 102/50)

*Language of the case: Italian***Parties**

*Applicant:* Italian Republic (represented by: P. Gentili, avvocato dello Stato)

*Defendant:* Commission of the European Communities

**Form of order sought**

— Annul letter No 000841 of 2 February 2009 (document No 1) of the European Commission — Directorate General for Regional Policy — concerning 'Payments made by the Commission which differ from the amount requested' which contained the following decision: 'Therefore, the date from which the European Commission will regard as non-eligible the expenditure incurred in relation to measure 1.7 of Regional Operational Programme 2000-2006 is 29 June 2007 and not 17 May 2006, as stated in the memorandum of 22 December 2008 referred to above';

— Annul letter No 001059 of 6 February 2009 (document No 2) of the European Commission — Directorate General for Regional Policy — concerning 'Suspension of the request for payment and for information concerning financial corrections under Article 39 of Regulation No 1260/99 for the Campania Regional Operation' which contained the following decision: 'Therefore, the date from which the European Commission will regard as non-eligible the expenditure incurred in relation to measure 1.7 of Regional Operational Programme 2000-2006 is 29 June 2007 and not 17 May 2006, as previously indicated';

— Annul letter No 012480 of 22 December 2008 (document No 3) of the European Commission — Directorate General for Regional Policy — concerning ROP Campania 2000-2006 (CCI No 1999 IT 16 1 PO 007) — Outcome of infringement procedure 2007/2195 on waste management in Campania, by which 'the Commission requests that, with effect from the next request for payment, all expenditure relating to measure 1.7 incurred after 29 June 2007 be deducted'.

**Pleas in law and main arguments**

In support of its claims, the applicant alleges infringement of Article 32(3)(f) and 32(2) and Article 39(2) and (3) of Regulation No 1260/99. (1) It submits in particular that:

- (a) If a request for payment of assistance from a Structural Fund is to be regarded as not permissible on the basis that an infringement procedure is pending, the specific subject-matter of the infringement procedure must be identical to that of the request for payment.

- (b) In the infringement procedure, the Commission criticises the situation concerning final waste disposal on the ground that the necessary structures are lacking (waste to energy plants, landfills) to carry out this stage of the waste 'cycle' in a manner that complies with the directive. However, other stages of the 'cycle' and other means of waste management besides final disposal have no connection with the specific subject-matter of the infringement procedure. In particular, these include the different methods of waste recovery, which vary on the basis that waste is collected separately. Moreover, measure 1.7 of ROP Campania 2000 and the operations (projects) forming part of that programme refer specifically to the waste recovery stage and the separate collection of waste to which the recovery is subject.
- (c) By memorandum of 20 October 2008 referred to in the memoranda challenged, the Commission expressed doubts as to the waste management plan of 28 December 2007. However, none of those points of criticism concerning the management plan of 28 December 2007 was ever the subject of infringement procedure 2007/2195, if only because that procedure was based on the situation as it

existed when the reasoned opinion expired, that is to say, on the situation obtaining on 1 March 2008.

- (d) The Commission's decision to treat as impermissible the requests for payment under measure 1.7 on the ground that 'adequate guarantees do not exist that the operations jointly financed by the European Regional Development Fund within the scope of measure 1.7 were properly carried out' could never have been adopted pursuant to the second possibility in Article 32(3)(f) (infringement procedure pending). That decision could at most have been adopted pursuant to the first possibility indicated in that provision (suspension of payments under Article 39(2) of Regulation No 1260/99). That, however, would have necessitated the institution of *inter partes* proceedings, something which the Commission intended to avoid.

Finally, the applicant also claims that there has been a breach of essential formal requirements inasmuch as there was inadequate reasoning.

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(<sup>1</sup>) Council Regulation (EC) No 1260/99 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).