

Under the third plea for annulment, the applicant submits that the contested decision does not comply with the rules regarding the stating of reasons, but simply repeats in summary form some of the applicant's arguments during the administrative procedure without, however, answering them. Similarly, the ground in the decision relating to the geographical extent of the lignite market does not enable the addressee of the decision to understand the defendant's final conclusions on that point. Lastly, in the applicant's submission, the decision does not state reasons as to why 40 % is considered to be the necessary proportion of known exploitable lignite reserves that must be made available to competitors of DEI.

Finally, under the fourth plea for annulment, the applicant maintains that the contested decision infringes the principles of freedom of contract and of proportionality. In so far as the decision prohibits persons who will in the future acquire by tender procedures exploitation rights in respect of the deposits in the areas of Drama, Ellassona, Vegora and Vevi from selling quantities of extracted lignite to DEI, it automatically restricts excessively the contractual freedom both of the applicant and of the third parties. Furthermore, in view of significant developments that demonstrate the gradual opening of the Greek electricity market, the exclusion of DEI from tender procedures for the grant of all new lignite rights and the unjustified restriction of its business activity constitute unnecessary measures and are disproportionate to the alleged infringement.

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**Action brought on 21 October 2009 — Bayerische Asphalt-Mischwerke v OHIM — Koninklijke BAM Groep (bam)**

**(Case T-426/09)**

(2010/C 11/56)

*Language in which the application was lodged: English*

#### **Parties**

*Applicant:* Bayerische Asphaltmischwerke GmbH & Co. KG für Straßenbaustoffe (Hofolding, Germany) (represented by: R. Kunze, lawyer and Solicitor, and G. Würtenberger, lawyer)

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

*Other party to the proceedings before the Board of Appeal:* Koninklijke BAM Groep NV (Bunnik, The Netherlands)

#### **Form of order sought**

- Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 11 August 2009 in case R 1005/2008-2, in so far as the opposition was rejected with respect to “non-metallic rigid piping for building; transportable structures; monuments, not of metal; building construction; repairs; repair and maintenance”;
- Grant the opposition against the Community trade mark concerned also for “non-metallic rigid piping for building; transportable structures; monuments, not of metal; building construction; repairs; repair and maintenance”;
- Order the defendant 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 “bam”, for goods and services in classes 6, 19, 37 and 42

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

*Mark or sign cited:* German trade mark registration of the figurative mark “bam”, for goods in classes 7 and 19

*Decision of the Opposition Division:* Allowed the opposition partially

*Decision of the Board of Appeal:* Annulled partially the decision of the Opposition Division

*Pleas in law:* Infringement of Articles 8(1)(b) Council Regulation No 207/2009 as the Board of Appeal failed to conclude that there was similarity between the goods and services covered by the Community trade mark concerned, on one hand, and the goods covered by the trade mark cited in the opposition proceedings, on the other hand; misuse of power as the Board of Appeal acted *ultra vires*; infringement of Article 75 of Council Regulation No 207/2009 as the Board of Appeal failed to deal, in a comprehensive manner, with the applicant's arguments set forth in the appeal substantiation; infringement of Article 63(1) of Council Regulation No 207/2009 as the Board of Appeal erred in limiting the scope of protection of the Community trade mark concerned and, thus, wrongly failed to take into account all relevant factors.