

**Action brought on 9 April 2010 — Air France v OHIM
(Representation of a parallelogram)**

(Case T-159/10)

(2010/C 161/71)

*Language in which the application was lodged: French***Parties***Applicant:* Air France (Roissy Charles de Gaulle, France) (represented by A. Grolée, lawyer)*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)**Forms of order sought**

- Annulment of the decision of 27 January 2010 of the Second Board of Appeal in Case 1018/2009-2 in so far as it dismissed the application for trade mark No 007576218 for the goods and services which are the subject of this action;
- Grant registration of the application for Community figurative mark No 007576218 for all goods and services covered by it;
- Order OHIM to pay the applicant's costs incurred in the proceedings before OHIM and in the present action, pursuant to Article 87 of the Rules of Procedure.

Pleas in law and main arguments*Community trade mark concerned:* Figurative mark, representing the shape of a parallelogram, for goods and services in Classes 9, 14, 16, 18, 21, 24, 25, 28, 35 to 39 and 41 to 45 (Application No 7 576 218)*Decision of the Examiner:* Rejection of the application for registration*Decision of the Board of Appeal:* Appeal dismissed*Pleas in law:* Infringement of Article 7(1)(b) of Council Regulation (EC) No 207/2009 on the Community trade mark, as the mark applied for has the requisite minimum level of distinctiveness.**Action brought on 13 April 2010 — Niki Luftfahrt GmbH
v Commission**

(Case T-162/10)

(2010/C 161/72)

*Language of the case: German***Parties***Applicant:* Niki Luftfahrt GmbH (Vienna, Austria) (represented by: H. Asenbauer, lawyer)*Defendant:* European Commission**Form of order sought**

- Annul the contested Commission Decision C(2009) 6690 of 28 August 2009, Case COMP/M.5440 — Lufthansa/Austrian Airlines in accordance with the first paragraph of Article 264 TFEU (formerly the first paragraph of Article 231 EC); and
- Order the European Commission to pay the applicant's costs in accordance with Article 87(2) of the Rules of Procedure.

Pleas in law and main arguments

The applicant challenges Commission Decision C(2009) 6690 final of 28 August 2009 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.5440 — Lufthansa/Austrian Airlines). In that decision the Commission takes the view that, the acquisitions by Deutsche Lufthansa AG of sole control over the Austrian Airlines company — subject to the implementation of the commitments submitted by Deutschen Lufthansa AG — is compatible with the common market and the EEA Agreement.

In support of its action for annulment the applicant, which operates a privately financed airline, submits, first, that the Commission has infringed the EC Treaty (or the TFEU) and the rules of law relating to its application. It is claimed in this connection that the Commission based its decision on a market definition which hampers an assessment of all negative effects of the concentration on competition. Further, the applicant submits that the Commission incorrectly assessed the impact of the concentration in particular with regard to flight routes to Eastern Europe, so that in this respect there was a gross and manifest misappraisal. Furthermore, the Commission did not follow the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings⁽¹⁾. According to the applicant, the Commission in particular failed to take into account that the concentration at issue has negative effects on competition in the common market, because as a result the competitiveness of the remaining competitors in the market would be significantly impeded, that there are no alternative players on the relevant market and that entry into the relevant market is not sufficiently easy. Further, the applicant