

Secondly, the applicant claims that its right to a prior hearing was infringed and thirdly, that Article 81 EC and Article 53 EEA were wrongly applied by reason of the fact that the applicant was condemned for a non-existent infringement. In particular, it submits that with the signature of territorial clauses there was no infringement of competition but that those clauses are necessary to ensure to those entitled proper management of their rights in the country in which each contracting society operates. In addition, the applicant maintains that the Court of Justice of the European Communities has accepted that clauses of territorial exclusivity in reciprocal representation agreements do not infringe competition.

Fourthly, the applicant claims that the contested decision does not take account of the fact that in Community law intellectual property and intellectual and artistic works are not the same as other goods and services and wrongly subjects the facts to the legal rule applicable to the latter.

Fifthly, the applicant maintains that the Commission has infringed Article 151 EC, introducing the principle of the cultural exception, according to which the Commission must, in any action, take cultural aspects into account in order to respect and to promote the diversity of the cultures of the Community.

Sixthly, the applicant submits that the fact that the question of fault did not enter into the examination of the alleged infringement of Article 81 EC constitutes a misapplication of the legal rule and a clear failure to give reasons for the contested decision.

Seventhly, the applicant considers that the contested decision infringes the principle of proportionality, since European intellectual property societies are not of the same size, as well as the principle of impartiality, because it was adopted following a preliminary procedure that was not fair. Furthermore, the applicant maintains that the existence of serious contradictions renders the decision defective and irrational. Moreover, the contested decision, in the misleading guise, according to the applicant, of facilitating the obtaining of licences to use music via cable, satellite or on the internet, in reality is aimed at the mutual annihilation of intellectual property societies, by distorting healthy competition, laying down unequal market terms and creating inevitable clashes between those societies. Lastly, the contested decision, directly misconstrues, in the applicant's view, Directive 93/83/EEC<sup>(1)</sup> and infringes the international Berne Convention for the protection of literary and artistic works, to which the European Union has acceded.

<sup>(1)</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

**Action brought on 18 September 2008 — Clearwire Corporation v OHIM (CLEARWIFI)**

**(Case T-399/08)**

(2008/C 301/86)

*Language of the case: English*

**Parties**

*Applicant:* Clearwire Corporation (Kirkland, United States) (represented by G. Konrad, lawyer)

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

**Form of order sought**

- Annul the Decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 June 2008 in case R 706/2008-1; and
- Order OHIM to pay the costs.

**Pleas in law and main arguments**

*Community trade mark concerned:* The word mark CLEARWIFI for services in class 38 — international registration No W00 934 594

*Decision of the examiner:* Rejection of the application

*Decision of the Board of Appeal:* Dismissal of the appeal

*Pleas in law:* Infringement of Article 7(1)(b) and (c) of Council Regulation No 40/94 as the grounds for refusal put forward by the Board of Appeal do not preclude registration.

**Action brought on 22 September 2008 — Enercon v OHIM — BP (ENERCON)**

**(Case T-400/08)**

(2008/C 301/87)

*Language in which the application was lodged: English*

**Parties**

*Applicant:* Enercon GmbH (Aurich, Germany) (represented by: R. Böhm, lawyer)

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

*Other party to the proceedings before the Board of Appeal:* BP plc (London, United Kingdom)

### Form of order sought

- Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 14 July 2008 in case R 957/2006-4, insofar as it dismisses the appeal lodged by the applicant against the decision of the Opposition Division of 26 May 2006 ruling on opposition number B 760 605; and
- Order the defendant to pay the costs.

### Pleas in law and main arguments

*Applicant for the Community trade mark:* The applicant

*Community trade mark concerned:* The word mark 'ENERCON' for goods in classes 1, 2 and 4

*Proprietor of the mark or sign cited in the opposition proceedings:* The other party to the proceedings before the Board of Appeal

*Mark or sign cited:* Community trade mark registration No 137 828 of the word mark 'ENERGOL' for goods in classes 1 and 4

*Decision of the Opposition Division:* Upheld the opposition except for the goods that were found dissimilar

*Decision of the Board of Appeal:* Rejected the appeal for the goods that were found dissimilar and dismissed the appeal for the remainder

*Pleas in law:* Infringement of Article 8(1)(b) of Council Regulation No 40/94 as the Board of Appeal erred in its finding that there is a likelihood of confusion between the conflicting trade marks.

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### Action brought on 20 September 2008 — Fluorsid and Minmet v Commission

(Case T-404/08)

(2008/C 301/88)

*Language of the case:* Italian

### Parties

*Applicants:* Fluorsid SpA (Assemini, Italy) and Minmet Co. (Lausanne, Switzerland) (represented by: L. Vasques and F. Perego, lawyers)

*Defendant:* Commission of the European Communities

### Form of order sought

- annulment of the decision of the Commission of the European Communities adopted on 25 June 2008 C(2008) 3043 concerning proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the EAA Agreement, Case COMP/39.180 — Aluminium fluoride, notified to Fluorsid and Minmet on 11 July 2008 and 9 July 2008 respectively, or, in the alternative, for reduction of the fine imposed on Minmet and Fluorsid under the decision as provided for in Article 4482) of the Rules of Procedure of the Court.

### Pleas in law and main arguments

By its present action, the companies Fluorsid and Minmet wish to challenge the decision by which the European Commission found an infringement of Article 81(1) of the Treaty and Article 53(1) of the EAA Agreement and therefore jointly and severally fined Fluorsid and Minmet for an alleged serious infringement of Article 81 of the Treaty for the sum of EUR 1 600 000 (one million six hundred thousand).

In support of their claims, the applicants plead:

- Absence of proof of the potential harm in the EAA and infringement of the provisions of Article 81 of the Treaty. In that respect it is stated that it is impossible to argue that four small undertakings, of which one has not even had sales in 2000 in the EAA, can, even in the abstract, impose prices on large aluminium producers (also called 'smelters') in a market in which it is supply and not demand which determines prices.
- Infringement of the duty to state reasons regarding the proof of the unlawful conduct in breach of Article 253 of the Treaty and Article 2 of Regulation (EC) No 1/2003, for changing in a surreptitious manner the contested infringement in order to lessen the Commission's burden of proof. It claims on that point that the Commission was able to acquire evidence of an exchange of information between competitors, but not of an agreement with an object to restrict competition. That change of the description of the unlawful conduct favoured the Commission, which was then able to refer, in the applicants' view incorrectly, the per se rule laid down for hard core restrictions, therefore lightening its burden of proof and enabling it to disregard the fact that the alleged unlawful conduct had no effect on the market.
- Infringement of Article 27 of Regulation No 1/2003 and of the rights of the defence, as well as of Articles 253 and 173 of the Treaty in so far as the Commission does not cite leniency in respect of Fluorsid under the Statement of Objections (SO), carried out investigations and acquired documentation for the case-file after the SO, and in the final decision challenged unlawful conduct which was different from that challenged in the SO (uninterrupted infringement and infringement lasting 6 months).