Form of order sought

— annul the decision of the Fourth Board of Appeal of OHIM of 6 October 2008 in Case R 846/2008-4;

— order OHIM to bear its own costs and pay those of the applicant.

Pleas in law and main arguments

Community trade mark concerned: Figurative trade mark as 'other mark — positional mark' of the colour 'orange (Pantone 16-1359 TPX)' for goods in Class 25 (application No 5 658 117).

Decision of the Examiner: Registration refused.

Decision of the Board of Appeal: Appeal dismissed.

Pleas in law: Infringement of Article 7(1)(b) of Regulation (EC) No 40/94, [1] since the trade mark applied for fulfils the minimum requirement as to distinctive character.

[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 — Tudapetrol Mineralölerzeugnisse Nils Hansen v Commission

(Case T-550/08)

(2009/C 55/59)

Language of the case: German

Parties

Applicant: Tudapetrol Mineralölerzeugnisse Nils Hansen KG (Hamburg, Germany) (represented by: U. Itzen and J. Ziebarth, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul the contested decision in so far as it relates to the applicant;

— in the alternative, reduce as appropriate the level of the fine imposed on the applicant in the contested decision;

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

Pleas in law and main arguments

The applicant is 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 applicant, 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 applicant relies on two pleas in law in support of its action.

By its first plea in law, the applicant claims that there has been an infringement of the duty to state reasons under Article 253 EC and an infringement of the rights of the defence inasmuch as the appraisal of evidence carried out by the Commission in the contested decision does not in fact specifically indicate which acts contributing to the offence are to be attributed to the applicant. The broad-brush appraisal of the evidence carried out by the Commission relates to, besides the applicant, also other companies, the actions of which cannot be attributed to the applicant. In light of the unclear appraisal of the evidence, there is an infringement of the rights of the defence, as the Commission is under an obligation to indicate, in a clear and unequivocal manner, which contributory acts it attributes to which undertakings and the consequences thereof.

The applicant further claims that it was not involved in any activity contrary to Article 81 EC. Not only did the Commission fail, in formal terms, to carry out a proper appraisal of the evidence, but even a subsidiary substantive examination of the evidence indicates that no allegation made against the applicant was substantiated. The conclusion that the applicant infringed the law on cartels cannot be drawn from the meetings detailed and the evidence thereof provided in the framework of the appraisal of the evidence. This is especially true also in light of the fact that only a limited allegation was made from the outset in relation to the applicant. That fact, however, was not taken into consideration when the evidence was being appraised; instead, and to the further detriment of the applicant, account was taken of evidence which might prove potential offences on the part of third parties but in which the applicant was not involved.

By its second plea in law, the applicant claims that the limitation period had expired. It claims that it had already, at the beginning of 2000, transferred the distribution business in question to another company, with the result that the first measures in early 2005 that stopped the limitation period running could no longer have led to action being taken against the applicant in respect of an old offence.

Action brought on 15 December 2008 — H & R ChemPharm v Commission

(Case T-551/08)

(2009/C 55/60)

Language of the case: German

Parties

Applicant: H & R ChemPharm GmbH (Salzbergen, Germany) (represented by: M. Klusmann and S. Thomas, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul the contested decision in so far as it relates to the applicant;

— in the alternative, reduce as appropriate the amount of the fine imposed on the applicant in the contested decision;

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

Pleas in law and main arguments

The applicant is 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 applicant, 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 applicant relies on four pleas in law in support of its action.

In its first plea, the applicant alleges infringement of its rights of defence inasmuch as the contested decision does not differentiate between it and other companies which were fined separately, but instead refers uniformly to 'H & R/Tudapetrol'. The applicant asserts that it does not understand which specific acts contributing to the offence are to be attributed to it. Its rights of defence are thereby infringed in so far as the grounds of complaint and the decision must indicate unambiguously which specific acts lead to the allegation of a breach of law and the resulting imposition of a fine.

In the alternative, the applicant argues in its second plea in law that there is no evidence that it acted unlawfully. The Commission, on the basis of its broad-brush appraisal of the evidence in relation to all of the undertakings to which the decision was addressed, failed to have regard for the fact that there was no evidence of an infringement on the part of the applicant. The applicant submits that the Commission did not carry out a sufficiently discriminating and individual appraisal of the evidence which could, and would necessarily, have shown that the evidence adduced was insufficient to establish that the applicant had committed an offence.

In the further alternative, the applicant claims in its third plea in law that, in the calculation of the fine, the initial amount was erroneously set too high.

In the further alternative, the applicant claims in its fourth plea in law that the principle of proportionality and the prohibition of discrimination were breached by reason of the erroneous calculation of the fine. Specifically, the applicant asserts that an error of assessment was made when fixing at 17 % the percentage of turnover for the severity of the offence and the entry fee and that the level of the fine was disproportionate as a result of the disproportionate account taken of the size of the undertaking. Finally, the applicant points out that the 2006 Guidelines on fines were unlawfully applied retroactively in the present case, which predates those Guidelines.

Action brought on 17 December 2008 — Commission v Domótica

(Case T-552/08)

(2009/C 55/61)

Language of the case: Portuguese

Parties

Applicant: Commission (represented by A.M. Rochaud-Jöet and S. Petrova, Agents, assisted by G. Anastácio and A.R. Andrade, lawyers)

Defendant: Domótica, Estudo e Projecto de Edifícios Inteligentes, Lda (Lisbon, Portugal)

Form of order sought

— An order that the defendant should pay the applicant the sum of EUR 124 319,22, being the repayment of an advance paid by the applicant in performance of contract No BU/466/94 PO/ES, concluded in connection with the Thermie programme and terminated on grounds of the failure of the defendant and other cocontractors to perform their contractual obligations, with an increase of EUR 48 000 by way of default interest accrued until 30 September 2008 and interest still to fall due until full and final payment;

— An order that the defendant should pay the costs.

Pleas in law and main arguments

On 17 January 1995 the Commission of the European Communities concluded Thermie contract No BU/466/94 PO/ES with the defendant, with the teaching hospitals of Coimbra and with the company Técnicas Reunidas S.S., pursuant to Regulation (EEC) No 2008/90 ([1]).

The defendant was appointed to be project co-ordinator and took on responsibility for submitting to the Commission the necessary documents, and to act as link between the contractors and the Commission. The liability of the cocontractors was joint and several.

On 10 February 1995, in accordance with what had been agreed, the Commission paid the advance of 30 %, that is to say, EUR 176 693.

On 24 May 2000 the Commission rescinded the contract for just cause (having put the defendant on notice), putting forward the following failures to perform contractual obligations:

— delays in performance not communicated timeously to the Commission;

— Domótica's inability to begin to perform the contract (admitted by the defendant);

— failure to send to the Commission financial and technical reports in good time and due form;

— failure to conclude work implementing the project within the original period, or within the extension subsequently granted (31 August 2000).