

- infringement of Article 87(2)(b) EC and of the guidelines applicable to State aid in the agricultural sector, and breach of the Commission's own working practice — and, in any case, erroneous assessment of the facts and failure to state sufficient reasons — in so far as the Commission found that the financial aid scheme duly notified by the Italian authorities could not be treated as an exception under Article 87(2)(b) EC;
- infringement of Article 87(3)(c) EC — and, in any case, erroneous assessment of the facts and failure to state sufficient reasons — in so far as the Commission found that the financial aid scheme duly notified by the Italian authorities could not be treated as an exception under Article 87(3)(c) EC;
- breach of the principles of sound administration and diligence and of the duty of care, by reason inter alia of the excessive length of the administrative procedure.

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**Action brought on 24 December 2008 — PJ Hungary/
OHIM v Pepekillo (PEPEQUILLO)**

(Case T-580/08)

(2009/C 44/112)

Language in which the application was lodged: Spanish

Parties

Applicant: PJ Hungary Szolgáltató (PJ Hungary kft), (Budapest, Republic of Hungary) (represented by: M. Granado Carpenter and C. Gutiérrez Martínez, lawyers)

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

Other party to the proceedings before the Board of Appeal: Pepekillo SL (Algeciras, Spain)

Form of order sought

- Annul the decision of 30 April 2008 (Case R-722/2007) of the First Board of Appeal of the Office for Harmonisation in the Internal Market (OHIM), which granted the *restitutio in integrum* claimed by PEPEKILLO SL;
- Annul the decision of 24 September 2008 (Case R-722/2007) of the First Board of Appeal of the Office for Harmonisation in the Internal Market (OHIM), which set aside the decision of the Opposition Division of 9 March 2007 and, as a result, granted Community trade mark No 3 546 471 'PEPEQUILLO', and make such other order as is appropriate in accordance with Community law; and

- Order the defendant to pay the costs of the present proceedings, in addition to the costs incurred during the administrative procedure before OHIM.

Pleas in law and main arguments

Applicant for a Community trade mark: Marta Sancho Lora, who subsequently assigned the application to the company PEPEKILLO SL.

Community trade mark concerned: The word mark 'PEPEQUILLO' (Application No 3.546.471) for goods in classes 18 and 25 and services in class 35.

Proprietor of the mark or sign cited in the opposition proceedings: The applicant, to whom the company 'PEPE JEANS N.V.' had assigned its rights.

Mark or sign cited in opposition: Spanish word marks 'PEPE' and 'PEPE JEANS', Spanish figurative marks 'PEPE JEANS LONDON', Spanish word marks 'PEPE 2XL', 'PEPE F4', 'PEPE M99', 'PEPE F4', 'PEPE M3', 'PEPE M5' and 'PEPE F6', Spanish figurative marks 'PEPE JEANS LONDON', 'PEPE JEANS 73', 'PEPE JEANS PORTOBELLO', 'PEPE' and Spanish word marks 'PEPE JEANS M2', 'PEPE BETTY', 'PEPE CLOTHING' and 'PEPECO', for goods in classes 3, 9, 14, 18 and 25; and Community word and figurative marks 'PEPE JEANS' for goods in classes 3, 9, 14 and 18.

Decision of the Opposition Division: Opposition upheld and application refused

Decision of the Board of Appeal: Pleas in law admitted and appeal upheld.

Pleas in law: Incorrect application of Articles 78 and 8(1)(b) and (5) of Regulation No 40/94 on the Community trade mark.

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**Action brought on 31 December 2008 — Fresh Del Monte
Produce v Commission**

(Case T-587/08)

(2009/C 44/113)

Language of the case: English

Parties

Applicant: Fresh Del Monte Produce Inc. (George Town, Cayman Islands) (represented by: B. Meyring, lawyer and E. Verghese, solicitor)

Defendant: Commission of the European Communities

Form of order sought

- annul Articles 1, 2, 3 and 4 of Commission decision C(2008) 5955 final of 15 October 2008 in Case COMP/39.188 — Bananas insofar as it pertains to it;
- alternatively, to substantially reduce the fine imposed on the applicant pursuant to Article 2c of that decision;
- alternatively, to annul Articles 1 and 3 of that decision so far as they pertain to it;
- order the Commission to pay the costs.

Pleas in law and main arguments

By means of this application, the applicant seeks annulment pursuant to Article 230 EC of the Commission Decision C(2008) 5955 final of 15 October 2008 (Case COMP/39.188 — Bananas) relating to a proceeding under Article 81(1) EC which held it jointly and severally liable for the conduct of Internationale Fruchthandels Gesellschaft Weichert & Co. The Commission held that Weichert had infringed Article 81 EC by participating in a concerted practice of coordination of quotation prices for bananas imported to the eight Member States of the Northern European region of the Community. Alternatively, it seeks the amendment of Article 2(c) of the Decision in so far as it imposes a fine on the applicant.

In support of its claims, the applicant puts forward eight pleas, presented in four parts.

In the first part, the applicant puts forward the pleas in support of its claim for annulment of the decision to hold it jointly and severally liable for the conduct of Weichert.

First, it submits that the Commission misapplied Article 81(1) EC and Article 23(2)(a) of Regulation No 1/2003 ⁽¹⁾ in finding the applicant jointly and severally liable for Weichert's conduct on the basis of a distribution agreement and its indirect interest in Weichert as a limited partner (*Kommanditist*), neither of which (alone or in combination) gave the applicant decisive influence over Weichert.

Second, the applicant argues that the Commission infringed Article 253 EC by failing to provide reasons for attributing liability to the applicant, a company that had no direct relationship with Weichert.

Third, it contends that the Commission violated the applicant's right of defence by refusing to disclose relevant evidence.

The secondary and alternative pleas are put forward by the applicant in support of its claim of annulment of the contested decision in so far as it relates to both the applicant and Weichert. In this part of its application, the applicant raises fourth and fifth plea.

The fourth plea relates to a misapplication of Article 81 EC by reason of the fact that the Commission concluded that Weichert

had engaged in a concerted practice with the object of restricting competition.

The fifth plea relates to a breach of the applicant's rights of defence in that it was not granted the right to be heard as a result of a fundamental shift in the Commission's case between the statement of objections and the decision.

In the third part of its application (also in the alternative), the applicant puts forward the precautionary pleas in support of its claim seeking the reduction of the fine imposed jointly and severally on the applicant and Weichert. This part comprises sixth and seventh pleas.

By its sixth plea, the applicant argues that the Commission committed a manifest error of assessment in determining the level of the fine by failing to properly assess gravity.

The seventh plea relates to a violation of Article 23 of Regulation No 1/2003 and of legitimate expectations by the reason of the fact that the Commission failed to take account of Weichert's cooperation in the investigation.

The fourth part of the application seeks the annulment of Articles 1 and 3 of the decision in respect of the applicant on the basis of the eight pleas stating that those Articles involve a misapplication of Article 81 EC, a violation of Article 7 of Regulation No 1/2003 and a violation of Article 253 EC.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, p. 1.

Action brought on 24 December 2008 — Dole Food and Dole Germany v Commission

(Case T-588/08)

(2009/C 44/114)

Language of the case: English

Parties

Applicants: Dole Food Company, Inc. (Wilmington, United States) and Dole Germany OHG (Hamburg, Germany) (represented by: J.-F. Bellis, lawyer)

Defendant: Commission of the European Communities