

- Annul paragraph 72 of Commission Decision C(2010) 3204 in state aid case N 461/2009 (OJ 2010 C 162, p. 1); and
- Order the defendant to pay the applicant's costs incurred in this action.

### Pleas in law and main arguments

By means of the present application, the applicant seeks, pursuant to Article 263 TFEU, the annulment of Commission Decision C(2010) 3204 in state aid case N 461/2009 (OJ 2010 C 162, p. 1), whereby it has been decided that the aid measure 'Cornwall & Isles of Scilly Next Generation Broadband', providing aid from the European Regional Development Fund to support the deployment of next generation broadband networks in the Cornwall & Isles of Scilly region, is compatible with Article 107(3)(c) TFEU.

In support of their action, the applicant submits the following pleas in law:

Firstly, the applicant alleges that the Commission committed manifest errors in the appreciation of the facts, in particular that the Commission found that:

- (a) There was an open, non-discriminatory and competitive tender process when it should have found that competition had been eliminated in relation to the tender;
- (b) Existing infrastructure was available to all bidders on request when the incumbent operator has openly admitted that it did not use infrastructure which was packaged into products and available to all bidders on request;
- (c) The overall effect on competition was positive when competition was eliminated by the actions of the incumbent operator.

In addition, the applicant contends that the Commission fails to apply and/or breaches Article 102 TFEU so that the assessment in the Commission Decision C(2010)3204 of the impact of the measure on competition is invalid and that therefore the said decision is unlawful and not within Article 107(3)(c) TFEU, the relevant abuses for Article 102 TFEU being:

- (a) Unlawful bundling with respect to existing infrastructure of dark fibre with active electronics;
- (b) Refusal of access for competing bidders to fibre and/or ducts;

- (c) Margin squeeze abuse through bundling fibre with active electronics to construct products which do not permit the Applicant or other competitors to compete in the Tender Process.

Finally, the applicant argues that the Commission breaches its rights of defence, including in particular failing to open a full investigation under the procedure in Article 108(2) TFEU on the following grounds:

- (a) In the light of the first and second pleas, it was unlawful to terminate the enquiry under Article 108(3) TFEU and/or not to open a full investigation under Article 108(2) TFEU;
- (b) Termination of the investigation prior to a formal investigation deprives the Applicant of its procedural rights;
- (c) Breach of rights of defence through not giving the applicant an opportunity to refute arguments and/or evidence presented by the UK authorities.

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### Action brought on 27 August 2010 — Abbott Laboratories v OHIM (RESTORE)

(Case T-363/10)

(2010/C 288/107)

*Language in which the application was lodged: German*

### Parties

*Applicant:* Abbott Laboratories (Abbott Park, Illinois, United States of America) (represented by M. Kinkeldey, S. Schäffler and J. Springer, lawyers)

*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 9 June 2010 in Case R 1560/2009-1;

— Order the defendant to pay the costs.

### Pleas in law and main arguments

*Community trade mark concerned:* the word mark 'RESTORE' for goods in Class 10

*Decision of the Examiner:* rejection of the application

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

*Pleas in law:*

Infringement of the right to be heard as the Board of Appeal referred in its decision to evidence which was not adduced by the applicant;

Infringement of Article 7(1)(c) of Regulation (EC) No 207/2009 <sup>(1)</sup> as the mark applied for is not a term which directly describes the goods covered by the application;

Infringement of Article 7(1)(b) of Regulation (EC) No 207/2009 as the mark applied for has the required distinctive character.

<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

### Action brought on 2 September 2010 — Duravit and Others v Commission

(Case T-364/10)

(2010/C 288/108)

*Language of the case:* German

### Parties

*Applicants:* Duravit AG (Hornberg, Germany); Duravit SA (Bischwiller, France); and Duravit BeLux BVBA (Overijse, Belgium) (represented by: R. Bechtold, U. Soltész and C. von Köckritz, lawyers)

*Defendant:* European Commission

### Form of order sought

— Pursuant to Article 263(4) TFEU, declare Articles 1(1), 2 and 3 of the decision of the European Commission of 23 June 2010, C(2010) 4185 final, in Case COMP/39092 — Bathroom fittings and fixtures, to be invalid in so far as they concern the applicants;

— In the alternative, reduce the amount of the fine imposed on the applicant under Article 2(9) of the decision;

— Pursuant to Article 87(2) of the Rules of Procedure of the General Court, order the Commission to pay the applicants' costs.

### Pleas in law and main arguments

The applicants have brought this action against Commission decision C(2010) 4185 final of 23 June 2010 in Case COMP/39092 — Bathroom fittings and fixtures. By the contested decision, fines were imposed on the applicants and other undertakings for infringement of Article 101 TFEU and Article 53 EEA. According to the Commission, the applicants participated in a continuous agreement or concerted practice in the bathroom fittings and fixtures sector in Belgium, Germany, France, Italy, the Netherlands and Austria.

In support of their action, the applicants submit nine pleas in law.

In their first plea, the applicants allege that the Commission has not produced sufficient evidence to prove that the applicants participated in price-fixing or other anti-competitive conduct. The Commission misunderstood the burden and standard of proof required to establish an infringement of Article 101 TFEU in Commission proceedings, and imposed excessive requirements on the applicants in the Commission proceeding in relation to the provision of positive proof and the burden of proof.

In their second plea, the applicants claim that the Commission held the applicants responsible for the whole of the infringement in relation to the relevant goods on account of their participation in alleged 'cartel meetings' of a German umbrella Association for the relevant goods, without establishing that the applicants had taken part in discussions about the relevant goods. In that regard, the applicants argue that the Commission incorrectly, immediately, and without taking account of the actual business and legal background, categorised the discussions in the German umbrella association as deliberate restrictions on competition.