

- annul Article 1 and 2 of the decision of the European Commission of 8 February 2017 (C(2017) 900 final) relating to a proceeding under Article 101 TFUE ('the contested decision'), to the extent that it holds that the Applicants have infringed Article 101 TFUE;
- in subsidiary order, annul Article 2 of the contested decision to the extent it imposes a fine on the Applicants of EUR 8 158 000,00 and to reduce the fine in line with the arguments of the application;
- order the Commission to pay the Applicants' costs.

Pleas in law and main arguments

In support of the action, the applicants rely on four pleas in law.

1. First plea in law, alleging a number of procedural heads of complaint including the duty to give reasons relating to the determination of the amount of the fine and in particular the need for the adjustment applied under point 37 of the Fining Guidelines ⁽¹⁾ and regarding the percentage of the applied increase. The Applicants also submit that the Commission breached their rights of defense, their right to be heard and the principle of good administration by not stating the intention to apply an increase under point 37 of the Fining Guidelines in the Statement of Objections or in any Supplementary Statement of Objections. They also plead infringement of the duty to give reasons, the principles of legal certainty, equal treatment and proportionality because the Commission increased the amount of the Applicants' fine by 10 % based on point 37 of the Fining Guidelines and applied this uniform increase to all the undertakings that had participated in the alleged infringement, without taking into account that the Applicants' individual participation differed greatly from that of the other undertakings involved.
2. Second plea in law, alleging that the contested decision is erroneous as it has not established to the requisite legal standard that the Applicants committed an infringement of Article 101 TFEU. The Applicants invoke both the contested decision's incorrect assessment of the evidence as well as the evidence's inability to support the contested decision's finding that the Applicants were a party to the infringement found in Article 1 of the contested decision.
3. Third plea in law, alleging, in subsidiary order, if the Court were to conclude that the Applicants have been engaged in any agreement or practice infringing Article 101(1) TFEU, an infringement of Article 23(3) of Regulation No 1/2003 ⁽²⁾ and the Fining Guidelines due to an incorrect assessment of the gravity and duration of the infringement as well as the mitigating circumstances and a breach of the principle of non-discrimination in the calculation of the basic amount of the fine.
4. Fourth plea in law, alleging, in subsidiary order, to the extent the Court would not annul the contested decision because of the procedural heads of complaint in the first plea in law, that these procedural breaches should at least give rise to an annulment of the increase of the fine imposed under point 37 of the Fining Guidelines.

⁽¹⁾ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006, C 210, p. 2).

⁽²⁾ 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 2003, L 1, p. 1).

Action brought on 5 May 2017 — ExpressVPN v EUIPO (EXPRESSVPN)

(Case T-265/17)

(2017/C 202/42)

Language of the case: English

Parties

Applicant: ExpressVPN Ltd (Glen Vine, United Kingdom) (represented by: A. Muir Wood, Barrister)

Defendant: European Union Intellectual Property Office (EUIPO)

Details of the proceedings before EUIPO

Trade mark at issue: International registration designating the European Union in respect of the figurative mark containing the word element 'EXPRESSVPN' — Application for registration No 1 265 562

Contested decision: Decision of the Fifth Board of Appeal of EUIPO of 16 February 2017 in Case R 1352/2016-5

Form of order sought

The applicant claims that the Court should:

- alter the contested decision to permit the mark proceed to registration on the basis that the mark is neither descriptive nor devoid of distinctive character and the basis of the evidence of acquired distinctiveness submitted to the examiner and to the Fifth Board of Appeal;
- issue an order for payment of the costs incurred by the applicant in connection with this appeal.

Plea in law

- Infringement of Articles 7(1)(b)(c), 7(2) and 7(3) of Regulation No 207/2009.

Action brought on 9 May 2017 — Kwizda Holding v EUIPO — Dermapharm (UROAKUT)

(Case T-266/17)

(2017/C 202/43)

Language in which the application was lodged: German

Parties

Applicant: Kwizda Holding GmbH (Vienna, Austria) (represented by: L. Wiltschek, D. Plasser and K. Majchrzak, lawyers)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: Dermapharm GmbH (Vienna, Austria)

Details of the procedure before EUIPO

Party applying for the mark at issue: Applicant

Mark at issue: EU word mark 'UROAKUT' — application No 13 854 146

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the Fourth Board of Appeal of EUIPO of 7 March 2017 in Case R 1221/2016-4

Form of order sought

The applicant claims that the Court should:

- uphold the action and amend the contested decision in such a way that the opposition to the EU trade mark application No 13 854 146 UROAKUT is rejected; in the alternative, annul the contested decision and refer the case back to the Board of Appeal of the European Union Intellectual Property Office (EUIPO);
- order EUIPO to pay the costs of the proceedings before the General Court and before the Board of Appeal;
- order the intervener to pay the costs incurred in the proceedings before the Opposition Division.