According to the claimant, the Commission assumed, on grounds that are legally and factually flawed, that the claimant exercised a determining influence on the market conduct of Ballast Nedam Infra B.V. and Ballast Nedam Grond en Wegen B. V.

In support of its action, the claimant invokes, in the first place, a breach of Article 81 EC. Second, the claimant submits that there has been an infringement of the general principles of Community law, in particular the principle of the presumption of innocence. In conclusion, the claimant contends that there has been a breach of Article 27(1) of Regulation No 1/2003 and of the rights of the defence in that it was not until the decision that the claimant's liability was assumed. The claimant was thus not given an opportunity to disprove that view by adducing evidence.

Action brought on 5 December 2006 — Ballast Nedam Infra v Commission

(Case T-362/06)

(2007/C 20/41)

Language of the case: Dutch

Parties

Claimant: Ballast Nedam Infra B.V. (represented by: A.R. Bosman and J.M.M. van de Hel, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— annul Commission Decision C(2006) 4090 final of 13 September 2006, notified to the claimant on 25 September 2006, relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), to the extent to which that decision is addressed to the claimant;

— in the alternative, set aside Article 2 of the decision, to the extent to which it is addressed to the claimant, or at least reduce the fine imposed on it by the said Article 2;

— set aside in part Article 1 of the decision, in so far as it relates to the duration of the infringement up to October 2000, and consequently reduce the fine imposed in Article 2 of the decision, in so far as the claimant is concerned;

— order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

The claimant is challenging the Commission's decision of 13 September 2006 relating to a proceeding under Article 81 EC (Case No COMP/38.456 — Bitumen — NL), by which a fine was imposed on the claimant for breach of Article 81 EC.

In support of its action, the claimant invokes, in the first place, a breach of Article 81 EC and of Article 23(2) of Regulation No 1/2003. According to the claimant, the Commission has failed to adduce any evidence of a single ongoing breach of Article 81 EC. The claimant submits that the Commission has adduced no evidence that the bitumen suppliers and the major road construction companies jointly fixed the gross price for bitumen and that the major road construction companies had an interest in concluding those agreements. The claimant argues that the Commission also erred in classifying as a breach of Article 81 EC the agreement on the standard rebate and the desire on the part of the road construction companies to secure for themselves better conditions than small road construction companies with a less extensive purchase volume.

Second, the claimant invokes a breach of Article 81 EC and of Article 23(2) of Regulation No 1/2003 and the Commission's guidelines on setting fines [1]. The claimant argues that the Commission incorrectly assessed the gravity of the breach.

Third, the claimant alleges a breach of Article 81 EC in that the Commission assumed, on grounds that are incorrect in both factual and legal terms, that the claimant exercised a determining influence on the market conduct of Ballast Nedam Grond en Wegen B.V.

The claimant concludes by invoking a breach of Article 27(1) of Regulation No 1/2003 and of the rights of the defence by reason of the fact that the Commission deprived the claimant of the opportunity to challenge a number of new elements in the decision concerning the claimant's involvement in the alleged infringement during the period from 21 June 1996 to 1 October 2000 inclusive.

[1] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3).

Action brought on 5 December 2006 — Honda Motor Europe v OHIM — SEAT (MAGIC SEAT)

(Case T-363/06)

(2007/C 20/42)

Language in which the application was lodged: English

Parties

Applicant: Honda Motor Europe Ltd (Slough, United Kingdom) (represented by: S. Malynicz, Barrister, N. Cordell, Solicitor)

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

Other party to the proceedings before the Board of Appeal: Seat SA (Barcelona, Spain)

Form of order sought

— the decision of the first Board of Appeal dated 7 September 2006 in Case R 960/2005-1 shall be annulled;

— the Office and other parties to the procedure shall bear their own costs and pay those of the applicant.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: the Community word mark 'MAGIC SEAT' for goods and services in class 12 — vehicle seats and vehicle seat mechanisms, parts and fittings and accessories for these goods — application No 2 503 902

Proprietor of the mark or sign cited in the opposition proceedings: SEAT SA

Mark or sign cited: the national figurative mark 'SEAT' for goods and services in class 12

Decision of the Opposition Division: Opposition upheld

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation No 40/94

In support of its submissions, the applicant claims that the Board of Appeal erred in its approach to the visual analysis, in effect conferring word-only protection on a composite earlier mark that contained a large and striking device element.

According to the applicant, the Board of Appeal's phonetic comparison of the marks was allegedly flawed in two respects. First, it failed to appreciate that the word MAGIC in MAGIC SEAT would not be pronounced as a Spanish word and hence the mark as a whole, MAGIC SEAT, would not be pronounced in a Spanish way either. Secondly, it failed to take into account the fact that MAGIC was the first word of the two-word mark, MAGIC SEAT.

Moreover, the Board of appeal failed to apply the 'rule of counteraction' in the current case and therefore failed to take into account the fact, as part of the conceptual analysis, that the earlier Spanish mark, comprising the word SEAT and the large 'S' badge device element, would be immediately and clearly understood as designating the Spanish carmaker whereas the mark MAGIC SEAT would not be understood so.

In addition, on the question of conceptual dissimilarity, the applicant contends that the Board failed to take into any account the linguistic evidence supplied by the applicant as to how Spanish consumers were likely to see the words MAGIC SEAT.

Furthermore, the applicant claims that the Board failed to appreciate that the category of goods, the features of the relevant market and the attributes of the national consumer for these goods militated against any finding of a likelihood of confusion.

Finally, the applicant considers that the Board failed to take into account whatsoever the applicant's evidence from the trade as to how products of this sort are marketed.

Action brought on 6 December 2006 — Xinhui Alida Polythene v Council

(Case T-364/06)

(2007/C 20/43)

Language of the case: English

Parties

Applicant: Xinhui Alida Polythene Ltd (Xinhui, China) (represented by: C. Munro, Solicitor)

Defendant: Council of the European Union

Form of order sought

— Annulment, pursuant to Article 230 of the Treaty of the European Union, of Council Regulation 1425/2006 of 25 September 2006 imposing a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand, and terminating the proceeding on imports of certain plastic sacks and bags originating in Malaysia; and

— order the Council to pay the costs of the appellant in the present proceedings.

Pleas in law and main arguments

The applicant seeks the annulment of Council Regulation (EC) No 1425/2006 of 25 September 2006 imposing a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand, and terminating the proceeding on imports of certain plastic sacks and bags originating in Malaysia ([1]).