

Trade mark at issue: EU figurative mark containing the word element 'WHISTLER' — Application for registration No 12 870 648

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the First Board of Appeal of EUIPO of 18 October 2017 in Case R 311/2017-1

Form of order sought

The applicant claims that the Court should:

- reject the opposition in its entirety;
- order EUIPO to bear the costs.

Plea in law

- Infringement of article 8 (1) (b) of Regulation No 207/2009.

Action brought on 8 January 2018 — Deutsche Lufthansa v Commission

(Case T-1/18)

(2018/C 063/31)

Language of the case: English

Parties

Applicant: Deutsche Lufthansa AG (Köln, Germany) (represented by: S. Völcker and J. Ruiz Calzado, lawyers)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

- annul the Commission's decision of 27 October 2017 in Case No. M.8633 — *Lufthansa/Certain Air Berlin Assets, Commission decision pursuant to Article 7(3) of Council Regulation (EC) No 139/2004 and Article 57 of the Agreement on the European Economic Area*;
- in the alternative annul paragraph 44(c) of the contested decision, and
- order the Commission to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on five pleas in law.

1. First plea in law, alleging that the Commission lacked the power to impose that Lufthansa could acquire aircraft from third-party lessors that these lessors had leased to NIKI or its parent company Air Berlin on the condition that Lufthansa make those aircraft available on market terms to NIKI or an alternative acquirer of NIKI if the NIKI Transaction were to fail for whatever reason ('the Condition') under Article 7(3) ECMR ⁽¹⁾, because aircraft purchases do not constitute partial implementation.

The applicant puts forward that the Commission lacked any power under Article 7(3) of the ECMR to impose the Condition, as Lufthansa's purchase of aircraft from third parties was unrelated to the NIKI Transaction ⁽²⁾ and did not constitute a partial 'implementation' of the planned acquisition of NIKI that would have required a derogation from the stand-still provision in Article 7(1) of the ECMR.

2. Second plea in law, alleging that by requiring Lufthansa to facilitate the sale of NIKI to another buyer, the Condition exceeds the permissible scope of Article 7(3) ECMR and thereby infringes the principle of proportionality.

According to the applicant, conditions under Article 7(3) ECMR are appropriate only to the extent they are needed in a given case to ensure that undue impact on the target's market conduct and the implementing steps for a notified transaction can be reversed in order to restore the status quo ante.

3. Third plea in law, alleging that the vague standard of 'market terms' and the lack of any procedural safeguard or limiting principles by design operates against Lufthansa and thus breaches the principles of proportionality, legal certainty, and Lufthansa's right to property and freedom to conduct business.
4. Fourth plea in law, alleging that the contested decision lacks adequate reasoning with respect to the number of aircraft covered.

Lufthansa submits that the Commission has failed to state adequate reasons because its interpretation of its own decision creates fundamental uncertainty over the scope of the Condition, which is highly prejudicial to Lufthansa's ability to seek judicial protection, and the Court's ability to perform its duty of judicial review.

5. Fifth plea in law, alleging that the applicant's right to be heard was breached.

Lufthansa submits that the Commission did not respect Lufthansa's right to be heard and ignored the provisional procedure provided for in Article 18 ECMR and Article 12 of Commission Regulation (EC) No. 802/2004 ⁽³⁾ by adopting the contested decision as 'final' without having afforded Lufthansa an opportunity to make known its views on the Condition and any alleged competitive harm the Condition was supposed to remedy, neither before (Article 18(1) ECMR) nor after (Article 18(2) ECMR) the adoption of the Decision.

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- ⁽¹⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004, L 24, p. 1.
- ⁽²⁾ in the context of Lufthansa's proposed acquisition of the shares of NIKI Luftfahrt GmbH ('NIKI') and Luftfahrtgesellschaft Walter mbH ('LGW') from Air Berlin PLC & Co. Luftverkehrs KG ('Air Berlin') (the 'Transaction') (in relation to NIKI alone, the 'NIKI Transaction').
- ⁽³⁾ Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004, L 133, p. 1).

Action brought on 8 January 2018 — Wirecard v EUIPO — AXA Banque (boon.)

(Case T-2/18)

(2018/C 063/32)

Language in which the application was lodged: English

Parties

Applicant: Wirecard AG (Aschheim, Germany) (represented by: A. Bayer, lawyer)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: AXA Banque SA (Fontenay sous Bois, France)

Details of the proceedings before EUIPO

Applicant of the trade mark at issue: Applicant

Trade mark at issue: EU figurative mark containing the word element 'boon.' — Application for registration No 14 672 562

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the Second Board of Appeal of EUIPO of 25 September 2017 in Case R 706/2017-2