JUDGMENT OF THE COURT OF FIRST INSTANCE (Sixth Chamber)

2 July 2009 *

In Case T-414/07,

Européenne de traitement de l'information (Euro-Information), established in Strasbourg (France), represented by P. Greffe, M. Chaminade and L. Paudrat, lawyers,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto and R. Bianchi, acting as Agents,

defendant,

ACTION brought against the decision of the First Board of Appeal of OHIM of 6 September 2007 (Case R 290/2007-1), rejecting the application for registration as a

* Language of the case: French.

Community trade mark of a sign representing a hand holding a card with three triangles,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas (Rapporteur) and L. Truchot, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 19 November 2007,

having regard to the response lodged at the Court Registry on 4 February 2008,

further to the hearing on 10 October 2008,

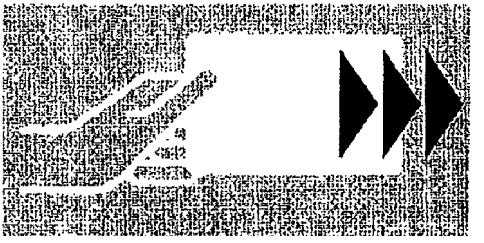
gives the following

Judgment

Background to the dispute

1 On 10 July 2006, the applicant, Européenne de traitement de l'information (Euro-Information), filed an application for a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

2 The mark for which registration was sought is the figurative sign reproduced below:



3 The goods and services in respect of which registration of the mark was sought are in Classes 9, 35 to 38 and 42 within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— Class 9: 'Apparatus for recording, transmission or reproduction of sound or images; electronic diaries; automated dispensers; banknote, ticket statement of account and account summary dispensers; automated payment machines; automated banking machines; film cameras (cinematographic apparatus); video cameras; memory or microprocessor cards; magnetic stripe cards; magnetic stripe or microprocessor identification cards; magnetic stripe or microprocessor payment, credit or debit cards; video cassettes; CD-ROMs; bar code readers; compact discs (audio-video); optical compact discs; counterfeit coin detectors; floppy disks; magnetic data carriers; optical data carriers; video screens; information processing apparatus; intercommunication apparatus; (IT) interfaces; (IT) readers; (registered program) software; software designed for account management; monitors (computer programs); computers; computer peripheral devices; registered computer programs; registered operating system programs (for computers); radiotelephony sets; (audio, video) receivers; telephone apparatus; portable telephones; television apparatus; prepayment devices for television apparatus; time recording apparatus; (telecommunication) transmitters; central processing units (processors); IT programs and equipment to enable full remote banking, finance company and insurance services; secure payment software for online electronic communication networks; electronic payment apparatus and instruments; computer equipment for electronic payment; software for electronic payment transactions; electronic payment cards, electric and electronic devices for the management of financial transactions';

— Class 35: 'Arranging newspaper subscriptions (for others); business management assistance; business management and organisation consultancy; professional business consultancy; efficiency experts; business information; business enquiries; business appraisals; cost-price analysis; dissemination of advertising matter;

transcription; accounting; personnel management consultancy; publicity columns preparation; electronic publicity columns preparation; dissemination of advertising on an online electronic communication network; administrative and business information, consultancy and assistance for carrying out secure payments for online business on the internet; tax return preparation; demonstration of goods; dissemination of advertising material (tracts, prospectus, printed matter, samples); market surveys; organisation of exhibitions for commercial or advertising purposes; compilation of information into computer databases; systemisation of information into computer databases; computerised file-management; book-keeping, account management; market research; economic forecasting; (business management assistance) projects; publication of publicity texts; direct mail advertising; radio advertising; television advertising; drawing up of statements of accounts; telephone answering services (for unavailable subscribers); secretarial services; statistical information services; word processing; auditing; organisation of competitions (advertising or sales promotion); promotional and publicity operations aimed at obtaining customer and personnel loyalty; transfer and reception of orders for goods and services via internet, intranet and extranet; administrative management of automated dispensers, payment and banking machines';

— Class 36: 'Real property affairs; insurance; accident insurance; factoring; banking; financial affairs; monetary affairs; credit bureaux; debt collection agencies; banking analysis; financial analysis; monetary analysis; leasing; real property valuation (estimation); issue of tokens of value; provident funds; mutual funds and capital investment; credit card services; debit card services; guarantees (securities); exchange transactions; cheque verification; issuing of travellers' cheques; insurance consultancy; collection of securities; clearing (exchange); banking consultancy; financial consultancy; insurance brokerage; estate agency; stockbroking; credit; deposit of securities; safe deposit services; savings; financial assessments and evaluations (insurance, banking, real property); fiduciary services; financing services; financial information; tax estimates; fiscal valuation; finds; electronic transfer of funds; financial and banking information; rent collection; health insurance; marine insurance; mortgage loans; financial operations; monetary operations; financial sponsorship; loans (financing); financial transactions; life assurance; asset account management; property management; online financial and banking information services; computerised interactive financial and banking information services; electronic payment services; services for the electronic

transfer of assets, funds, capital, shares, currency and any other financial security; online payment services on an electronic communication network; brokerage and transactions on an online electronic communications network';

— Class 37: 'Installation, maintenance and repair services';

— Class 38: 'Telecommunications, news agencies in particular in the banking sector; communications by computer terminals; radio communications; communications by telephone; communications by television; sending of telegrams, transmission of telegrams; television broadcasting; radio programmes, television programmes, information about telecommunications; rental of message sending apparatus; rental of telephones; electronic mail; transmission of messages; computer aided transmission of messages and images; cellular telephone communication; satellite transmission; telephone services; transmission of information by internet, intranet and extranet; computerised interactive information transmission services; transmission of information from a computer database; international services for transmission of data between networked computer systems; online information transmission; transmission and reception of information, messages, images and sound via fixed telephones, mobile telephones, computers, micro-computers or video systems; telecommunication services by electronic mail and videotext; telecommunication services offering access to full remote banking, finance company and insurance services; supply of online access to a financial database; leasing access time to a database server (IT services); leasing access time to a computer for the manipulation of data';

— Class 42: 'Legal services; analysis for computer system installation; arbitration services; recovery of computer data; litigation services; technical project studies; surveying; rental of computer software; computer rental; computer software

design; updating of computer software; maintenance of computer software; computer programming; legal assistance (wardship); industrial property rights management; filing and management of trade marks and designs; reservation and registration of domain names; management of domain names; online legal information services; computerised interactive legal information services; design and development of electronic payment systems and systems for secure financial transactions on the internet or on any other IT network; computer programming for access to a system of management of automated dispensers, payment and banking machines'.

4 By decision of 18 December 2006, the examiner rejected that application for registration on the basis of Article 7(1)(b) of Regulation No 40/94 (now Article 7(1)(b) of Regulation No 207/2009), solely for the following goods and services ('the goods and services concerned'):

— Class 9: 'Automated dispensers; banknote, ticket, statement of account and account summary dispensers; automated payment machines; automated banking machines; memory or microprocessor cards; magnetic stripe cards; magnetic stripe or microprocessor identification cards; magnetic stripe or microprocessor payment, credit or debit cards; magnetic data carriers; information processing apparatus; intercommunication apparatus; (IT) interfaces; (IT) readers; (registered program) software; software designed for account management; monitors (computer programs); computers; computer peripheral devices; registered computer programs; registered operating system programs (for computers); central processing units (processors); IT programs and equipment to enable full remote banking, finance company and insurance services; secure payment software for online electronic communication networks; electronic payment apparatus and instruments; computer equipment for electronic payment; software for electronic payment transactions; electronic payment cards, electric and electronic devices for the management of financial transactions';

— Class 35: 'Administrative management of automated dispensers, payment and banking machines';

— Class 36: 'Banking; financial affairs; monetary affairs; credit bureaux; provident funds; credit card services; debit card services; exchange transactions; collection of securities; clearing (exchange); banking consultancy; financial consultancy; credit; deposit of securities; savings; financial information; funds; electronic transfer of funds; financial and banking information; financial operations; monetary operations; loans (financing); financial transactions; asset account management; property management; online financial and banking information services; computerised interactive financial and banking information services; electronic payment services; services for the electronic transfer of assets, funds, capital, shares, currency and any other financial security; online payment services on an electronic communication network; brokerage and transactions on an online electronic communications network';

— Class 38: 'Telecommunications, communications by computer terminals; electronic mail; transmission of messages; computer aided transmission of messages and images; transmission of information by internet, intranet and extranet; computerised interactive information transmission services; transmission of information from a computer database; international services for transmission of data between networked computer systems; online information transmission; transmission and reception of information, messages, images and sound via computers, micro-computers or video systems; telecommunication services by electronic mail and videotext; telecommunication services offering access to full remote banking, finance company and insurance services; supply of online access to a financial database; leasing access time to a database server (IT services); leasing access time to a computer for the manipulation of data';

— Class 42: 'Design and development of electronic payment systems and systems for secure financial transactions on the internet or on any other IT network; computer programming for access to a system of management of automated dispensers, payment and banking machines'.

5 On 15 February 2007, the applicant brought, in accordance with Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009), an appeal before OHIM against the examiner's decision.

6 By decision of 6 September 2007 ('the contested decision'), the First Board of Appeal of OHIM dismissed that appeal under Article 7(1)(b) of Regulation No 40/94, on the ground that the sign applied for was devoid of any distinctive character as regards the goods and services concerned. According to the Board of Appeal, that mark will be perceived by the relevant public as an indication as to use, a step to be taken or a means of proceeding in order to carry out a transaction involving the use of a bank card or other type of card.

Forms of order sought

7 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to proceed to registration of the trade mark applied for.

8 At the hearing, the applicant made the additional claim that OHIM be ordered to pay the costs.

9 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility of the applicant's second head of claim

10 By its second head of claim, the applicant asks the Court to order OHIM to proceed to registration of the trade mark applied for. In that respect, it should be noted that, under

Article 63(6) of Regulation No 40/94 (now Article 65(6) of Regulation No 207/2009), OHIM is required to take the measures necessary to comply with judgments of the Community Courts. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM. It is for the latter to draw the consequences from the operative part of this judgment and the grounds on which it is based (see, to that effect, Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, paragraph 33; and Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12). The applicant's second head of claim is therefore inadmissible.

Substance

11 In support of its action, the applicant raises a single plea in law, alleging infringement of Article 7(1)(b) of Regulation No 40/94.

Arguments of the parties

12 The applicant submits that none of the elements of the mark for which registration was sought, that is to say the stylised representation of a hand, the white rectangular figure held by the hand and the series of three triangles, taken individually or as a group, justifies the conclusion that that mark constitutes an indication of a 'step to be taken' or a 'means of proceeding' in order to carry out 'a transaction involving the use of a bank card', as the Board of Appeal asserted in the contested decision.

13 First, the applicant contests the correctness of the Board of Appeal's assessment, according to which the white rectangular figure held by the hand included in the sign at issue is a bank card.

14 Thus, it is not correct to assert that the trade mark applied for is devoid of any distinctive character with respect to some of the goods and services in Classes 9, 35 and 42, since those goods and services are necessarily connected to the use of electronic payment cards and to conducting transactions by way of those cards, as well as with respect to the services in Classes 36 and 38, because that trade mark conveys the message that consumers could carry out those operations by means of electronic or magnetic stripe cards.

15 Secondly, the applicant claims that the combination consisting of a hand holding a light-coloured rectangular figure is a distinctive element in relation to certain of the goods and services concerned, by virtue of the stylised representation, the placing and the layout of the hand and of the rectangular figure.

16 According to the applicant, the Board of Appeal goes beyond the elements which comprise the mark applied for and the list of the goods and services concerned in order to attempt to establish a link between certain elements of the mark applied for and the goods and services concerned. Furthermore, the Board of Appeal ignores the existence of the combination of the three triangles, which constitutes one of the distinctive and dominant elements of the trade mark applied for. However, that element is unusual and arbitrary for the goods and services concerned and makes it possible to identify those of the applicant as opposed to those of its competitors.

17 First, according to the applicant, the elements of the mark applied for, taken individually or together, are completely distinctive in relation to the following goods and services:

— Class 9: 'Magnetic data carriers; information processing apparatus; intercommunication apparatus; (IT) interfaces; (IT) readers; (registered program) software; monitors (computer programs); computers; computer peripheral devices; registered computer programs; registered operating system programs (for computers); central processing units (processors); secure payment software for online electronic communication networks; electronic payment apparatus and instruments; computer equipment for electronic payment; software for electronic payment transactions';

— Class 36: 'Credit bureaux; provident funds; credit; savings; funds; loans (financing); asset account management; property management; electronic payment services; online payment services on an electronic communication network';

— Class 38: 'Telecommunications, communications by computer terminals; electronic mail; transmission of messages; computer aided transmission of messages and images; transmission of information by internet, intranet and extranet; computerised interactive information transmission services; transmission of information from a computer database; international services for transmission of data between networked computer systems; online information transmission; transmission and reception of information, messages, images and sound via computers, micro-computers or video systems; telecommunication services by electronic mail and videotext; leasing access time to a database server (IT services); leasing access time to a computer for the manipulation of data';

— Class 42: 'Design and development of electronic payment systems and systems for secure financial transactions on the internet or on any other IT network'.

18 Taken individually, the elements representing a stylised hand, a light-coloured rectangular figure held by the hand and the series of three triangles, which, together, also constitute a distinctive and arbitrary combination, are distinctive in relation to the aforementioned goods and services, which makes it possible to conclude that there is no need for the combination of those elements to remain free for use in respect of those goods and services.

19 There is nothing, therefore, to support the conclusion that the mark at issue is commonly used in trade in connection with such goods and services.

20 Secondly, the mark for which registration was sought, taken as a whole, is distinctive for the following goods and services:

— Class 9: 'Automated dispensers; banknote, ticket, statement of account and account summary dispensers; automated payment machines; automated banking machines; memory or microprocessor cards; magnetic stripe cards; magnetic stripe or microprocessor identification cards; magnetic stripe or microprocessor payment, credit or debit cards; software designed for account management; IT programs and

equipment to enable full remote banking, finance company and insurance services; electronic payment cards, electric and electronic devices for the management of financial transactions';

— Class 35: 'Administrative management of automated dispensers, payment and banking machines';

— Class 36: 'Banking; financial affairs; monetary affairs; credit card services; debit card services; exchange transactions; collection of securities; clearing (exchange); banking consultancy; financial consultancy; deposit of securities; financial information; electronic transfer of funds; financial and banking information; financial operations; monetary operations; financial transactions; online financial and banking information services; computerised interactive financial and banking information services; services for the electronic transfer of assets, funds, capital, shares, currency and any other financial security; brokerage and transactions on an online electronic communications network';

— Class 38: 'Telecommunication services offering access to full remote banking, finance company and insurance services; supply of online access to a financial database';

— Class 42: 'Computer programming for access to a system of management of automated dispensers, payment and banking machines'.

21 The applicant observes that, even if certain elements making up the mark applied for could potentially bring to mind the field including the aforementioned goods and

services, it must be noted that the representation of a series of three triangles is distinctive and arbitrary with respect to all those goods and services. Thus, there is no need for that element to remain free for use in respect of those goods and services.

22 Furthermore, nothing supports the conclusion that that element is commonly used in trade in relation to such goods and services. Therefore, the series of three triangles combined with the other elements making up the mark at issue is distinctive with respect to those goods and services.

23 Third, the applicant observes that the series of three dark-coloured triangles pointing towards the right, of which two are superimposed on the rectangular figure, constitutes one of the distinctive and dominant elements with respect to all the goods and services concerned.

24 The three black triangles, which are graphically unusual and arbitrary in relation to the goods and services concerned, are visually predominant and give the mark, in its entirety, a very particular look, which enables consumers to remember it and to distinguish it from the marks of its competitors.

25 The applicant claims that there is nothing to support the conclusion that the mark at issue is commonly used in trade in relation to the goods and services concerned. It enables the relevant public to distinguish, without the possibility of confusion, the goods and services of the proprietor of the mark from those which have another commercial origin.

26 The applicant asserts that it demonstrated intensive use, prior to the filing of the application for registration, of a logo consisting of three triangles pointing towards the right. It produced a sheet of headed paper, two invoices and an extract from its website. According to the applicant, the public will necessarily make a link between itself and the mark applied for, which fully reproduces that logo.

27 The applicant also claims that the inherent distinctive character of the mark applied for is established, since that mark was intensively used prior to the filing of the application for registration. Banks with which it is connected have made use of the mark on their cash dispensers, as is shown by a photograph taken in 2005 in Thionville (France) and a document entitled 'Euro Automatic Cash — Supports et déploiements sur GABs CEE-SE-IDF-SMB' of June 2006, which it produced during the proceedings before OHIM. The applicant consequently claims that such use gives the mark applied for additional distinctive character and that the knowledge, on the part of the relevant public, of that mark is likely to increase its distinctive character.

28 Finally, the applicant states that OHIM has already accepted registration of marks comparable to the mark applied for.

29 OHIM contends that the arguments put forward by the applicant are unfounded.

Findings of the Court

30 Under Article 7(1)(b) of Regulation No 40/94 'trade marks which are devoid of any distinctive character' are not to be registered.

31 According to settled case-law, the distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration was applied for and, secondly, by reference to the perception of them by the relevant public, which consists of average consumers of the goods or services in question who are reasonably well informed and reasonably observant and circumspect (Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraph 35, and Case C-25/05 P *Storck* v *OHIM* [2006] ECR I-5719, paragraph 25).

32 It must be noted that the trade marks covered by Article 7(1)(b) of Regulation No 40/94 are in particular those which, from the point of view of the relevant public, are commonly used, in trade, for the presentation of the goods or services concerned or in connection with which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner. Moreover, the signs referred to in Article 7(1)(b) are incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (Case T-305/02 *Nestlé Waters France* v *OHIM (Shape of a bottle)* [2003] ECR II-5207, paragraph 28; Case T-216/02 *Fieldturf* v *OHIM (LOOKS LIKE GRASS… FEELS LIKE GRASS… PLAYS LIKE GRASS)* [2004] ECR II-1023, paragraphs 23 and 24; and Case T-393/02 *Henkel* v *OHIM (Shape of a white and transparent bottle)* [2004] ECR II-4115, paragraph 30).

33 The applicant does not contest the Board of Appeal's conclusion concerning the relevant public. The Board of Appeal's assessment of the distinctive character of the mark applied for will, as a result, be reviewed by taking into consideration the average European consumer who is reasonably well informed and reasonably observant and circumspect, who is referred to in paragraph 15 of the contested decision.

34 The applicant does not deny that the mark applied for corresponds to a graphic representation consisting of the stylised representation of a hand, a light-coloured rectangular figure held by the hand and a series of three dark-coloured triangles pointing towards the right, two of which are superimposed on the rectangular figure.

35 With respect to the assessment of the distinctive character of the mark applied for, claimed by the applicant because of a stylised representation of the elements constituting that mark, it must be determined whether, in the light of the overall impression produced by the combination of its shape, its colours and its pictures, the mark applied for can be perceived by the relevant public as an indication of its commercial origin.

36 In that regard, first of all, the applicant's argument that the various elements making up the mark applied for should be treated separately, and that their distinctive character should be assessed individually, must be rejected. The assessment of the distinctive character of the mark applied for must relate to the overall impression that it produces and not to each of its elements, taken separately (see, to that effect, Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraph 29, and Case C-304/06 P *Eurohypo* v *OHIM* [2008] ECR I-3297, paragraph 41).

37 As the Board of Appeal correctly pointed out, in view of the goods and services concerned, the representation of a hand holding a rectangular figure resembling a card, together with three triangles pointing in the same direction, will be perceived by the relevant public as an indication as to use, intended to indicate the steps to be taken in using a card in order to carry out a transaction, and not as an indication of the commercial origin of the goods and services concerned. The average consumer encounters on a daily basis that type of indication as to use in various places, such as banks, supermarkets, railway stations, airports, car parks and telephone boxes.

38 It must be held that the applicant has not put forward any arguments allowing the correctness of that assessment to be called into question. Although the applicant contests the fact that the light-coloured rectangular figure may be perceived as a magnetic stripe card or a chip card, it must be observed that the context in which that figure is placed, namely the stylised hand which holds it and the three directional triangles, as well as the goods and services concerned, leaves no room for doubt with regard to the perception of that sign by the relevant public.

39 Likewise, it must be observed that the group of three black triangles, by reason of its inclusion in the sign at issue, does not possess the distinctive character claimed by the applicant, because it is perceived by the relevant public as being composed of directional arrows having a utilitarian function, namely to indicate where the magnetic stripe card must be inserted into the dispenser. Thus, those triangles are not distinctive with respect to any of the classes of the goods and services concerned. Therefore, it is not necessary to examine separately the other elements of the mark applied for.

40 Furthermore, it should be noted that the Board of Appeal correctly held that its conclusion relating to the absence of distinctive character on the part of the mark applied for applied, as it demonstrated in detail in paragraphs 19 to 22 of the contested decision, to all the goods and services concerned, which are connected to the use of electronic payment cards and to carrying out transactions involving the use of those cards, such as electronic payments by way of a magnetic stripe card (class 9), to the administrative management of automated dispensers (class 35), to electronic payment systems on IT networks (class 42), to the marketing of magnetic stripe payment cards and to transactions carried out using those cards (class 36), and also to methods of telecommunications and transmission of electronic information serving as a sort of message according to which those services can be obtained using a magnetic stripe card (class 38).

41 In that regard, it should, in particular, be noted that the applicant has failed to demonstrate that the Board of Appeal erred in stating, in paragraphs 19 to 22 of the contested decision, that, account being taken of the goods and services concerned, the mark applied for would be perceived by the relevant public as directly and necessarily linked to the carrying out of electronic payment transactions by means of a magnetic stripe card.

42 In the light of the foregoing, it must be considered that the Board of Appeal was correct to hold that, in view of the overall impression produced by the combination of the various elements making up the sign applied for, that sign would not enable the relevant public to identify the commercial origin of the goods and services concerned, where it is required to make a choice at the time of a purchase.

43 The applicant claims also that the distinctive character of the mark applied for is increased as a result, first, of the use which has been made of the element representing a series of three triangles pointing towards the right as the applicant's logo included on its headed paper, invoices and website and, secondly, of the use which was made of the mark applied for, prior to the filing of the application for registration of the mark, by a banking group, to which the applicant belongs, in particular on the automated cash dispensers initially of the CIC bank, and then of the whole group.

44 In this respect, it should be noted, first of all, that the applicant does not plead infringement of Article 7(3) of Regulation No 40/94 (now Article 7(3) of Regulation No 207/2009), according to which the absolute grounds for refusal to register referred to in Article 7(1)(b), (c) and (d) of that regulation (now Article 7(1)(b), (c) and (d) of Regulation No 207/2009) do not preclude registration of a trade mark if it has become distinctive, in relation to the goods or services for which registration was requested, in consequence of the use which has been made of it. However, it is important to emphasise that, in order to avoid the absolute ground for refusal referred to in Article 7(1)(b) of Regulation No 40/94, the applicant cannot claim that the mark applied for has gained 'additional' distinctive character or that that character has been

increased in consequence of the use which has been made of the mark. Since the mark applied for does not have inherent distinctive character, for the purposes of Article 7(1)(b) of Regulation No 40/94, that sign can be registered only if the conditions under Article 7(3) of Regulation No 40/94 are fulfilled.

45 Consequently, in so far as the applicant claims at most that the mark applied for has sufficient inherent distinctive character, for the purposes of Article 7(1)(b) of Regulation No 40/94, in consequence of the use, first, of the logo of three triangles, which is included in the mark, and, secondly, of the mark applied for itself, this complaint must be rejected.

46 In so far as the applicant nevertheless wanted to assert that the mark applied for must be registered under Article 7(3) of Regulation No 40/94, it must be noted that it follows from the case-law relating to the interpretation of Article 3(3) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), whose legislative content is essentially the same as that of Article 7(3) of Regulation No 40/94, that the acquisition of distinctive character through use of a mark requires that at least a significant proportion of the relevant public identifies the goods or services concerned as originating from a particular undertaking because of the mark (see, to that effect, Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 52, and Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 61; see, also, concerning Regulation No 40/94, Case T-399/02 *Eurocermex* v *OHIM (Shape of a beer bottle)* [2004] ECR II-1391, paragraph 42, and Case T-207/06 *Europig* v *OHIM (EUROPIG)* [2007] ECR II-1961, paragraph 55).

47 For the purposes of assessing whether a mark has become distinctive in consequence of the use made of it, the following may, inter alia, be taken into account: the market share held by the mark; how intensive, geographically widespread and long-standing the use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identifies the goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations. If, on the basis of those factors, it can be considered that the relevant class of persons, or at least a significant proportion thereof, identifies the goods as originating from a particular undertaking because of the trade mark, it must be concluded that the requirement under Article 7(3) of Regulation No 40/94 is satisfied (see, by analogy, *Windsurfing Chiemsee*, paragraphs 51 and 52; *Philips*, paragraphs 60 and 61; Case T-237/01 *Alcon* v *OHIM — Dr Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 50).

48 In the present case, first, it must be stated that the logo referred to by the applicant is not the same as the mark applied for, but constitutes one of the elements of which it is composed. As the Board of Appeal correctly held in paragraph 27 of the contested decision, even assuming that that logo has become distinctive in consequence of its use, that distinctive character cannot benefit the sign applied for, which is composed of other elements which are decisive in the overall impression which it produces.

49 Secondly, it must be noted that the evidence of use of the mark applied for, produced by the applicant during the proceedings before OHIM, is clearly insufficient to demonstrate distinctive character in consequence of use, given the requirements of Article 7(3) of Regulation No 40/94, considered in paragraphs 47 and 48 of this judgment. Suffice it to note, in this regard, that, in the absence of relevant information concerning market shares, and the intensity and geographical extent of the use of the mark applied for, the mere fact that a banking group has made use of that mark on its cash dispensers does not in any way support the conclusion that a significant proportion of the relevant public will associate the goods and services concerned, for which the mark applied for would be used, with the applicant or with the group to which it belongs.

50 Consequently, the applicant's argument can neither establish an increase in the distinctive character of the mark applied for nor demonstrate the acquisition of distinctive character in consequence of use for the purposes of Article 7(3) of Regulation No 40/94.

51 As regards the arguments based on the earlier registrations made by OHIM, which seek to found an infringement of the principle of equal treatment, it should be noted that, according to settled case-law, the legality of the decisions of Boards of Appeal must be assessed solely on the basis of Regulation No 40/94 (now Regulation No 207/2009), as interpreted by the Community Courts, and not on the basis of a previous decision-making practice of those boards (*BioID* v *OHIM*, paragraph 47, and Case T-106/00 *Streamserve* v *OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 66).

52 It follows that the single plea in law, alleging infringement of Article 7(1)(b) of Regulation No 40/94, is unfounded and that, therefore, the action must be dismissed.

Costs

53 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE COURT OF FIRST INSTANCE (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Européenne de traitement de l'information (Euro-Information) to pay the costs.**

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 2 July 2009.

[Signatures]