JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

18 October 2011 *

In Case T-53/10,

Peter Reisenthel, residing in Gilching (Germany), represented by E.A. Busse, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented initially by S. Schäffner, and subsequently by R. Manea and G. Schneider, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

Dynamic Promotion Co. Ltd, established in Bangkok (Thailand),

* * Language of the case: German.

ACTION brought against the decision of the Third Board of Appeal of OHIM of 6 November 2009, as corrected by the decision of 10 December 2009 (Case R 621/2009-3), and against the decision of the Third Board of Appeal of OHIM of 22 March 2010 (Case R 621/2009-3), concerning invalidity proceedings between Peter Reisenthel and Dynamic Promotion Co. Ltd,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: C. Heeren, Administrator,

having regard to the application lodged at the Registry of the Court on 5 February 2010,

having regard to the response lodged at the Court Registry on 31 May 2010,

having regard to the reply lodged at the Court Registry on 16 July 2010,

having regard to the application for measures of enquiry from the applicant of 30 August 2010,

having regard to the change in the composition of the Chambers of the General Court,

having regard to the observations lodged by OHIM at the Court Registry on 30 September 2010,

having regard to the Court's written question to the parties,

further to the hearing on 6 April 2011,

gives the following

Judgment

Background to the dispute

1 The other party to the proceedings before the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Dynamic Promotion Co. Ltd, is the holder of the registered Community design No 217955-0001 ('the contested design').

2 On 22 April 2008, the applicant, Peter Reisenthel — via his representative — submitted an application to OHIM for a declaration of invalidity of the contested design, pursuant to Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

3 By decision of 20 May 2009 ('the Invalidity Division's decision'), the Invalidity Division of OHIM rejected the application for a declaration of invalidity of the contested design. The Invalidity Division's decision is six pages long. On the day of its adoption, it was sent by OHIM to the applicant's representative by fax and post, together with a one-page covering letter. The applicant received the notification by post on 25 May 2009.

4 On 3 June 2009, the applicant filed a notice of appeal against the Invalidity Division's decision. The applicant's representative sent OHIM the written statement setting out the grounds of appeal, initially by post on 21 September 2009 and subsequently by fax on 23 September 2009. OHIM received the faxed copy on 23 September 2009, and then the postal copy on 24 September 2009.

5 On 13 October 2009, the applicant was informed by the Registry of the Boards of Appeal of OHIM that the period for filing the written statement setting out the grounds of appeal, laid down in Article 57 of Regulation No 6/2002, had expired on 21 September 2009. Consequently, according to OHIM, the applicant's appeal could be regarded as inadmissible, since the statement concerned had been received on 23 September 2009 and, therefore, out of time. In that regard, the applicant was given a period ending on 13 November 2009 within which to submit his observations.

6 In his observations of 14 October 2009, the applicant claimed that the Invalidity Division's decision had been notified to him only by post, on 25 May 2009, as evidenced by the entry stamp on the document notified to the applicant's representative's office. Consequently, the written statement setting out the grounds of appeal had been submitted within the prescribed period.

7 By decision of 6 November 2009 ('the decision of 6 November 2009'), the Third Board of Appeal dismissed the appeal as inadmissible. Referring to the Invalidity Division's fax transmission report included in the administrative file, the Board considered that the Invalidity Division's decision had indeed been notified by fax to the applicant's

representative on 20 May 2009. From this, it inferred that the period for filing the written statement setting out the grounds of appeal had ended on 21 September 2009 and that, consequently, the statement received on 23 September 2009 had been submitted out of time. In that context, the Board of Appeal further held that the entry stamp had no evidential value as regards the date of notification of the Invalidity Division's decision.

8 On 12 November 2009, the applicant submitted new observations to OHIM, together with his representative's fax reception report for the period from 18 to 25 May 2009 inclusive. According to the applicant, the report showed that the Invalidity Division's decision had not been notified to his representative by fax on 20 May 2009.

9 By decision of 10 December 2009 ('the decision of 10 December 2009'), the Third Board of Appeal corrected the decision of 6 November 2009, pursuant to Article 39 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Regulation No 6/2002 (OJ 2002 L 341, p. 28). According to the Board of Appeal, it was necessary to take account of the applicant's observations of 12 November 2009, submitted before the end of the period granted to the applicant by OHIM. However, the Board of Appeal held that the reception report provided by the applicant did not allow the evidence put forward by OHIM to be called into question as regards the notification of the Invalidity Division's decision by fax on 20 May 2009. In particular, that reception report referred to a seven-page fax received by the applicant's representative on 20 May 2009 at 12:35. According to the Board of Appeal, that document corresponded to the Invalidity Division's decision, sent with the covering letter. Consequently, the Board of Appeal decided to maintain the operative part of the decision of 6 November 2009.

10 On 23 December 2009, the applicant requested that the decision of 6 November 2009 be corrected again, in that it should be acknowledged that the written statement setting out the grounds of appeal had been submitted within the prescribed period. In

that regard, the applicant submitted new evidence concerning the working practices and the processing of faxes in his representative's office as well as the systematic recording of the sender's number on faxes from OHIM. In the alternative, the applicant requested *restitutio in integrum*, pursuant to Article 67 of Regulation No 6/2002.

11 By decision of 22 March 2010 ('the decision of 22 March 2010'), the Third Board of Appeal rejected the applicant's requests submitted on 23 December 2009. Regarding the request for correction, it held that the conditions set out in Article 39 of Regulation No 2245/2002 had not been met.

Forms of order sought by the parties

12 In the application, the applicant claims that the Court should:

— primarily, annul the decision of 6 November 2009, as corrected by the decision of 10 December 2009;

— in the alternative, grant him *restitutio in integrum*;

— order OHIM to pay the costs.

13 By letter of 7 April 2010, the applicant amended the form of order sought following the adoption of the decision of 22 March 2010, claiming in addition that the Court should:

— annul the decision of 22 March 2010;

— declare that the written statement setting out the grounds of appeal had been submitted to the Board of Appeal within the prescribed period.

14 In the reply, the applicant withdrew the heads of claim that he be granted *restitutio in integrum* and that it be declared that the written statement setting out the grounds of appeal had been submitted to the Board of Appeal within the prescribed period. Consequently, he ultimately claims that the Court should annul the decision of 6 November 2009, as corrected by the decision of 10 December 2009, annul the decision of 22 March 2010 and order OHIM to pay the costs.

15 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

16 The applicant submits two pleas in law, the first alleging infringement of the right to be heard and the second alleging an error of assessment. He also asks the Court to adopt a measure of inquiry.

17 OHIM contests the merits of the applicant's pleas. Furthermore, it maintains that the claim for annulment of the decision of 22 March 2010 is inadmissible and that certain annexes to the application cannot be taken into consideration by the General Court.

18 The Court considers it necessary, besides analysing the pleas in law and arguments of the parties, to examine of its own motion OHIM's competence to adopt the decisions of 10 December 2009 and 22 March 2010.

Admissibility of the claim for annulment of the decision of 22 March 2010

19 OHIM contends that the claim for annulment of the decision of 22 March 2010 is inadmissible, because it changes the subject-matter of the proceedings before the Board of Appeal. That decision had as its subject-matter two requests from the applicant submitted after the adoption of the decision of 6 November 2009 and the decision of 10 December 2009.

20 The applicant submits that, in requesting the annulment of the decision of 22 March 2010, he has not changed the subject-matter of the proceedings, but has simply extended it. That extension is permissible, according to case-law, for reasons of procedural economy.

21 First, it should be recalled that, under Article 135(4) of the Rules of Procedure of the General Court, the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal.

22 In the present case, the decision of 22 March 2010 was adopted in response to the applicant's letter of 23 December 2009, in which he had requested a second correction of the decision of 6 November 2009 and, in the alternative, *restitutio in integrum*.

23 Those two requests were examined separately in the decision of 22 March 2010 before both being rejected.

24 It is apparent from the decision of 22 March 2010 that the request for correction submitted by the applicant in the letter of 23 December 2009 related to whether the Invalidity Division's decision had been notified to the applicant by fax on 20 May 2009. Thus, it had the exact same subject-matter as the decisions of 6 November and 10 December 2009. Therefore, in so far as the decision of 22 March 2010 concerns the request for correction, it is a continuation of the previous decisions of the Board of Appeal, with the result that it does not change the subject-matter of the proceedings before the Board.

25 On the other hand, the applicant requested *restitutio in integrum* from OHIM for the first time in his letter of 23 December 2009. That question was thus not the subject-matter either of the decision of 6 November 2009 or of the decision of 10 December 2009. Therefore, in so far as the claim for annulment of the decision of 22 March 2010 concerns *restitutio in integrum*, that claim changes the subject-matter of the proceedings before the Board of Appeal within the meaning of Article 135(4) of the Rules of Procedure.

26 Under those circumstances, the claim for annulment of the decision of 22 March 2010 must be declared admissible in so far as that decision concerns the request for correction and inadmissible in so far as that decision concerns the request for *restitutio in integrum*.

OHIM's competence to adopt the decisions of 10 December 2009 and 22 March 2010

27 First, it should be observed that examination of the competence of the authority issuing a measure is a matter of public interest and as such must be raised by the Court of its own motion (see, to that effect, Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, paragraph 31).

28 In the present case, the Court finds it necessary to examine the competence of the Board of Appeal of OHIM to adopt the decisions of 10 December 2009 and 22 March 2010 on the basis of Article 39 of Regulation No 2245/2002.

29 Article 39 of Regulation No 2245/2002 provides:

'In decisions of [OHIM], only linguistic errors, errors of transcription and obvious mistakes may be corrected. They shall be corrected by the department which took the decision, acting of its own motion or at the request of an interested party.'

30 In the present case, neither the amendments made by the decision of 10 December 2009 nor those requested by the applicant on 23 December 2009 relate to linguistic errors or errors of transcription, which moreover is not disputed by the parties.

31 In response to a written question put by the Court by way of measures of organisation of procedure, the applicant submits that those amendments also do not relate to the correction of obvious mistakes. Consequently, he submits that the decisions of 10 December 2009 and 22 March 2010 must be annulled for lack of competence on the part of OHIM.

32 Regarding the decision of 10 December 2009, OHIM considers that the failure to take account of the applicant's observations submitted within the time-limit was an obvious mistake within the meaning of Article 39 of Regulation No 2245/2002. In the alternative, it claims that that decision of the Board of Appeal could have had another legal basis, in particular the general principle of law authorising the withdrawal of an unlawful administrative measure.

33 As regards the decision of 22 March 2010, OHIM claims that the Board of Appeal was competent to rule on the applicant's request for correction of 23 December 2009 under Article 39 of Regulation No 2245/2002.

34 In view of the arguments of the parties, the Court must examine whether the amendments made by the decision of 10 December 2009 and those requested by the applicant on 23 December 2009 related to the correction of obvious mistakes within the meaning of Article 39 of Regulation No 2245/2002.

35 In that regard, according to case-law, in view of the importance of the binding nature of the operative part of a final decision made by a competent authority and following the principle of legal certainty, the rule enabling, in exceptional circumstances, subsequent corrections to be made to that decision is to be interpreted strictly. Therefore, the concept of 'obvious mistakes' is limited to formal mistakes whose incorrectness is clear from the body of the decision itself and which do not affect the scope and substance of that decision as characterised by its operative part and its grounds. On the other hand, the concept of 'obvious mistakes' cannot cover mistakes liable to vitiate the substance of the contested decision (see, to that effect, judgment of 14 December 2006 in Case T-392/04 *Gagliardi* v *OHIM — Norma Lebensmittelfilialbetrieb* (*MANŪ MANU MANU*), not published in the ECR, paragraph 55).

The decision of 10 December 2009

36 It must be stated that, in adopting the decision of 10 December 2009, the Board of Appeal, in essence, made use of the correction mechanism in order to remedy a breach of the applicant's rights of defence, as enshrined in Article 62 of Regulation No 6/2002, resulting from the fact that the decision of 6 November 2009 had been adopted before the end of the period granted to the applicant for submitting his observations.

37 Such a breach of the rights of the defence is not an obvious mistake within the meaning of Article 39 of Regulation No 2245/2002, as interpreted in paragraph 35 above. That breach is a mistake affecting the procedure that led to the adoption of the decision of 6 November 2009 and, therefore, liable to vitiate the substance of that decision. In the same way, taking into account the observations submitted by the applicant within the prescribed period affected the grounds of the decision of 6 November 2009 and, therefore, its content.

38 Accordingly, Article 39 of Regulation No 2245/2002 was not an appropriate legal basis enabling OHIM to remedy the breach of the applicant's rights of defence in the procedure that led to the adoption of the decision of 6 November 2009. Consequently, the Board of Appeal was not competent to adopt the decision of 10 December 2009 on the basis of that provision.

39 Without prejudice to the conclusion mentioned in the previous paragraph, it should be observed that, as OHIM points out, the decision of 10 December 2009 could, in principle, have been adopted by the Board of Appeal on another legal basis.

40 Indeed, case-law has laid down a general principle of law according to which retrospective withdrawal of an unlawful administrative act which has created individual rights is permissible, provided that the institution which adopted the act complies with the conditions relating to reasonable time-limits and the legitimate expectations of beneficiaries of the act who have been entitled to rely on its lawfulness (Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly* [1957] ECR 39, at 56; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; and Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 97).

41 However, notwithstanding the existence of another legal basis, an error in choosing the legal basis will lead to the annulment of the act concerned when that error may affect the content of that act, inter alia by rendering unlawful the procedure applicable to its adoption (see, to that effect, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 98, and Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 52).

42 In the present case, the case-law cited in paragraph 40 above does not prescribe a particular procedure for the withdrawal of an unlawful act.

43 As regards compliance with the conditions laid down in that case-law, first, the decision of 10 December 2009 was adopted one month and four days after that of 6 November 2009, which is within reasonable time-limits.

44 Second, the decision of 6 November 2009 benefited the other party before the Board of Appeal, since it rejected the applicant's appeal against the Invalidity Division's decision. Since the decision of 10 December 2009 did not amend the operative part of the decision of 6 November 2009, the legitimate expectations of the other party before the Board of Appeal were not affected.

45 Accordingly, there is no evidence to suggest that the content of the decision of 10 December 2009 is likely to have been affected by the incorrect choice of legal basis. Under those circumstances, the annulment of that decision due to that mistake would have no useful effect, since the decision adopted by the Board of Appeal following that annulment would be adopted under the same conditions and based on the same factors as the annulled decision.

46 Therefore, it must be concluded that the Board of Appeal's error as regards the choice of the applicable legal basis does not justify annulling the decision of 10 December 2009.

The decision of 22 March 2010

47 The applicant's request for correction of 23 December 2009 sought acknowledgment that the written statement setting out the grounds of appeal had been submitted within the prescribed period. Such a request does not seek the correction of a formal error affecting the decision concerned, but a re-examination of the substance of that decision and the adoption of a new decision with different content.

48 Accordingly, in view of what has been set out in paragraph 35 above, the mistake referred to by the applicant in the request of 23 December 2009 was not an obvious mistake within the meaning of Article 39 of Regulation No 2245/2002, with the result that the Board of Appeal was not competent to rule on the substance of that request under that provision.

49 Furthermore, since, in rejecting the request of 23 December 2009, the Board of Appeal found, by implication, that its previous decision on the appeal was not unlawful, it was also not competent to withdraw that decision.

50 Consequently, the Board of Appeal had no competence to adopt the decision of 22 March 2010 as regards rejecting on the substance the request for correction of 23 December 2009.

51 Under those circumstances, the decision of 22 March 2010 must be annulled in so far as it concerns the applicant's request for correction of 23 December 2009.

The annexes to the application

52 According to OHIM, since Annexes K 8 and K 13 to the application were submitted to it only after the adoption of the decisions of 6 November and 10 December 2009, they may not be taken into consideration.

53 The applicant has not replied specifically to OHIM's argument.

54 It must be observed that the documents concerned, namely affidavits from the applicant's representative and from one of the representative's employees, were submitted to OHIM as annexes to the applicant's letter of 23 December 2009, that is, after the end of the period granted to the applicant by OHIM for submitting his observations on the admissibility of the written statement setting out the grounds of appeal. Consequently, they did not form part of the factual context of the case as it existed when the decision of 10 December 2009 was adopted.

55 Moreover, the documents concerned were examined by the Board of Appeal in the decision of 22 March 2010. First, it is apparent from paragraphs 47 to 51 above that they should not have been thus examined in connection with the applicant's request for correction, since the Board of Appeal did not have any competence to rule on the substance of that request. Second, in so far as the decision of 22 March 2010 concerns the request for *restitutio in integrum*, it does not form part of the subject-matter of the proceedings before the General Court, as is apparent from paragraphs 19 to 26 above. Consequently, the content of Annexes K 8 and K 13 is not, in any event, relevant to that subject-matter.

56 Accordingly, it is not necessary for the Court to take account of Annexes K 8 and K 13 to the application, since they did not form part of the factual context on the day when the decision of 10 December 2009 was adopted and they are not covered by the subject-matter of the proceedings before the General Court as specified in paragraphs 19 to 26 above.

Substance

57 The applicant submits two pleas in law, the first alleging infringement of the right to be heard and the second alleging an error of assessment. However, it should be observed that both pleas have essentially the same purpose and therefore merge since they both address the error allegedly made by the Board of Appeal in finding that the written statement setting out the grounds of appeal had been submitted out of time and was, thus, inadmissible. Consequently, both pleas should be examined together.

58 The applicant submits, in essence, that the Invalidity Division's decision had been notified to him by post on 25 May 2009, with the result that the written statement setting out the grounds of appeal, received by OHIM on 23 September 2009, was submitted within the four-month period laid down in Article 57 of Regulation No 6/2002.

59 The applicant denies, in that context, that the Invalidity Division's decision was notified to his representative by fax on 20 May 2009 and points out that the burden of proof in that regard lies with OHIM.

60 OHIM contests the merits of the applicant's arguments.

61 It should be borne in mind as a preliminary point that it is apparent from Article 47 of Regulation No 2245/2002 that OHIM may notify its decisions by fax (see, by analogy, Joined Cases T-380/02 and T-128/03 *Success-Marketing* v *OHIM - Chipita* (*PAN & CO*) [2005] ECR II-1233, paragraphs 54 to 61).

62 Article 51 of Regulation No 2245/2002 states that the details of transmission by fax are to be determined by the President of OHIM.

63 In that regard, Article 2 of Decision EX-03-04 of the President of OHIM of 20 January 2003 states:

'Any decision, communication or notice which is transmitted by [OHIM] in proceedings concerning registered Community designs by telecopier or electronic means of communication shall state the responsible department in the letterhead, and shall indicate the full name of the responsible official or officials at the end of the decision, communication or notice. These indications shall substitute any seal or signature.'

64 In the present case, OHIM's transmission report relating to the notification by fax of the Invalidity Division's decision contains the following elements:

— a copy of the first page of the fax, that is, a covering letter, addressed to the applicant's representative, identifying the responsible department (HAUPTABTEILUNG GESCHMACKSMUSTER — NICHTIGKEITSABTEILUNG) and the responsible official, and indicating that a six-page decision of the Invalidity Division of 20 May 2009 was attached;

— 20 May 2009 at 12:22 as the date and time of the communication;

— '+34965139818' as OHIM's fax number;

— '00498982006111' as the addressee's fax number;

— '7' as the number of pages transmitted;

— 'OK' as the result of the transmission;

— 20 May 2009 at 12:27 as the date and time of the report's creation.

65 Thus, in light of the transmission report, it must be stated first that OHIM complied with the requirements laid down in Article 2 of Decision EX-03-04 regarding the formalities of notification by fax.

66 Next, it is also apparent from the transmission report that, on 20 May 2009 at 12:22, OHIM sent the applicant's representative a seven-page fax which included a one-page covering letter indicating that the Invalidity Division's six-page decision was attached.

67 Lastly, according to the transmission report, the fax sent by OHIM at 12:22 was correctly received by the applicant's representative's fax machine.

68 The four arguments relied on by the applicant to dispute that finding must be examined.

69 Thus, first, the applicant claims that it is apparent from his representative's fax reception report for the period from 18 to 25 May, submitted by him, that a seven-page fax was received from an unidentified sender on 20 May 2009 at 12:35.

70 In itself, that fact tends to strengthen the evidential value of the transmission report examined above, since it shows that a fax including the same number of pages as the fax sent by OHIM was received, shortly afterwards, by the applicant's representative.

71 Second, the applicant claims, however, that an excessive interval separates the transmission of the fax by OHIM and the receipt of a fax by the applicant's representative.

72 In that regard, it must be acknowledged that, although it is apparent from OHIM's fax transmission report that the transmission of the fax began at 12:22 and finished, at the latest, at 12:27, the applicant's representative's fax reception report indicates 12:35 as the time of receipt.

73 Nevertheless, as OHIM pointed out at the hearing, that eight-minute interval may be explained by the fact that, due to manually operated settings, the two fax machines may not be set at exactly the same time, and thus show data which differ to a certain extent.

74 Therefore, the recorded interval between transmission and receipt does not mean that the fax received by the applicant's representative is not the same as that sent by OHIM.

75 Third, the applicant states that the fax received by his representative at 12:35 does not show the sender's number.

76 However, even if, as the applicant claims, the sender's number is generally shown on faxes from OHIM, it is still possible for such identification not to be displayed by a given fax machine, inter alia for technical reasons. In that regard, OHIM actually stated at the hearing that the fax machine used to send the fax concerned was not part of its automated system, with the result that it was not automatically set to display the sender's number.

77 Furthermore, it is not apparent from Decision EX-03-04 that OHIM is required to indicate the sender's number on the faxes which it sends, and the applicant does not claim that that obligation exists on another basis.

78 Under those circumstances, the lack of any indication of the sender's number on the fax received by the applicant's representative also does not permit the inference that that fax was not the one sent by OHIM.

79 Fourth, the applicant claims that he cannot be required to prove a negative, namely the non-receipt of the fax sent by OHIM, in order to be able to call in question the evidential value of the transmission report relating to the notification of the Invalidity Division's decision by fax.

80 However, it must be stated that the evidential value of that transmission report could have been called in question by producing positive evidence. In particular, the applicant could have produced the fax which he actually received on 20 May 2009 at 12:35, in order to establish that it was not the fax sent by OHIM on that same day at 12:22.

81 The applicant submits, however, that he cannot be required to produce that evidence. First, due to the lack of identification of the sender's fax number, it is not possible to identify how that fax was dealt with. Second, a considerable period of time has elapsed since its receipt.

82 Those arguments cannot be accepted. The procedure for dealing with faxes received by the applicant's representative is the exclusive responsibility of that representative. Consequently, since it is apparent from examination of the transmission and reception reports that OHIM sent a fax to the applicant's representative and that, shortly afterwards, the representative received a fax with the same number of pages from an unidentified sender, the consequences of non-submission of the fax actually received by that representative must be borne by the applicant.

83 This is particularly the case because, under Article 28(1)(c)(i) of Regulation No 2245/2002, read in conjunction with Article 1(1)(b) thereof, the applicant for a declaration of invalidity or his representative is free to indicate — or not to indicate — a fax number and, consequently, to determine whether that method of communication will be used in the transmission of communications between himself and OHIM. Under those circumstances, it is for the applicant for a declaration of invalidity or his representative to take appropriate precautions in order to be able to establish, where appropriate, the contents of documents actually received via that means of communication.

84 In light of the foregoing, it must be concluded that the transmission report establishes to the requisite legal standard that the Invalidity Division's decision was notified by fax to the applicant's representative on 20 May 2009. Therefore, the Board of Appeal did not err in finding that the written statement setting out the grounds of appeal, received on 23 September 2009, was received after the period laid down in Article 57 of Regulation No 6/2002 and therefore could not be taken into consideration.

85 Under those circumstances, contrary to what the applicant claims, the Board of Appeal was not required to consider the possibility of a technical problem with the receipt of that fax or of that fax being sent to a wrong number. Moreover, the applicant does not give any details as regards the nature of any technical problem and he does not deny that the addressee's number displayed in the transmission report is the fax number of his representative.

86 Nor may the applicant legitimately claim that the Board of Appeal infringed his right to be heard by not allowing him to submit observations. First, in failing to submit a written statement setting out the grounds of appeal within the period provided for that purpose, the applicant himself failed to make use of that right in relation to the grounds of his appeal. Second, as regards the admissibility of the written statement setting out the grounds of appeal, the applicant submitted observations to OHIM on 14 October and 12 November 2009 which were examined by the Board of Appeal in the decisions of 6 November and 10 December 2009.

87 Lastly, the applicant claims that the interests involved were not adequately weighed by the Board of Appeal, in particular as regards a possible request for *restitutio in integrum* seeking to resolve the problem of the transmission of the fax at issue.

88 However, the applicant does not specify which interests should have been weighed against the fact that the written statement setting out the grounds of appeal had been submitted out of time.

89 Moreover, the Board of Appeal's decision on the admissibility of the appeal did not deny the applicant the possibility of requesting *restitutio in integrum*, as indeed he did on 23 December 2009. However, it is apparent from paragraphs 25 and 26 above that the way that request was dealt with by the Board of Appeal in the decision of 22 March 2010 does not form part of the subject-matter of the proceedings before the Court.

90 Since all the applicant's arguments have been rejected, the two pleas relied on by him must be dismissed.

Application for measures of inquiry

91 The applicant asks the Court to hear two witnesses in order, first, to establish that faxes from OHIM show the sender's fax number and, second, to explain the working practice in his representative's office, in particular as regards processing incoming faxes. The applicant asserts that that measure will prove that the Invalidity Division's decision was not notified to his representative by fax on 20 May 2009.

92 In light of what has been set out in paragraphs 75 to 78 and 81 to 83 above, neither the question as to whether faxes from OHIM show the sender's fax number, nor the details of how work is organised within the applicant's representative's office, are relevant to resolving the dispute before the Court. Consequently, the application for measures of inquiry must be dismissed as ineffective.

93 In light of all the foregoing, the decision of 22 March 2010 must be annulled in so far as it concerns the applicant's request for correction of 23 December 2009, and the remainder of the action must be dismissed.

Costs

94 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the General Court may order that the costs be shared or that each party bear its own costs. In the circumstances of this case, each party should bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 22 March 2010 (Case R 621/2009-3) in so far as it concerns Peter Reisenthel's request for correction of 23 December 2009;**

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 18 October 2011.

[Signatures]