JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

5 April 2006 *

In Case T-202/04,

Madaus AG, established in Cologne (Germany), represented by I. Valdelomar Serrano, lawyer,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by J. Novais Gonçalves, acting as Agent,

defendant,

the other party before the Board of Appeal of OHIM being

Optima Healthcare Ltd, established in Cardiff (United Kingdom),

* Language of the case: English.

ACTION brought against the decision of the Second Board of Appeal of OHIM of 30 March 2004 (Case R 714/2002-2), relating to opposition proceedings between Madaus AG and Optima Healthcare Ltd,

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

composed of J.D. Cooke, President, I. Labucka and V. Trstenjak, Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 27 May 2004,

having regard to the response lodged at the Court Registry on 6 October 2004,

gives the following

Judgment

Background to the dispute

1 On 19 May 2000 Optima Healthcare Ltd filed an application for a Community trade mark with 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.

2 The mark in respect of which registration was sought is the word sign ECHINAID.

3 The goods in respect of which registration of the mark was sought fall within Class 5 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 to the following description: 'vitamins, food supplements, herbal preparations, pharmaceutical and medical preparations'.

4 On 18 December 2000 the application was published in *Community Trade Marks Bulletin* No 101/2000.

5 On 16 March 2001 Madaus AG, the holder of the international trade mark ECHINACIN (effective in Spain, France, Italy, Austria, Portugal and the Benelux Countries), for goods in Class 5 described as 'chemical pharmaceuticals', filed a notice of opposition against the registration of the mark applied for in respect of all of the goods listed in the application. It submitted that there was a likelihood of confusion between the two marks within the meaning of Article 8(1)(b) of Regulation No 40/94.

6 By decision of 15 July 2002 OHIM's Opposition Division rejected the opposition on the ground, essentially, that there was no likelihood of confusion since the prefix 'echina-', referring to the name of the plant 'Echinacea', had to be regarded as having descriptive character. Consequently, the fact that the two marks have the same prefix was not enough, in the view of the Opposition Division, for it to conclude that there was a likelihood of confusion.

7 On 20 August 2002 the applicant filed a notice of appeal with OHIM, under Articles 57 to 62 of Regulation No 40/94, against the decision of the Opposition Division.

8 By decision of 30 March 2004 ('the contested decision'), notified to the applicant the following day, the Second Board of Appeal dismissed the appeal. It considered that there was no likelihood of confusion between the two marks on the ground, essentially, that the average consumer, who was reasonably well informed, reasonably observant and used to products containing the prefix 'echina-', was likely to pay more attention to the endings of the marks rather than to the descriptive prefix 'echina-', which is insufficiently distinctive.

9 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and set the date of the hearing for 20 September 2005. The parties did not attend. The report for the hearing, which was sent to the parties, did not give rise to any observations from them.

Forms of order sought

10 The applicant claims that the Court of First Instance should:

— recognise that OHIM erred in law in the contested decision;

— annul that decision;

— order OHIM to issue another decision refusing to register the trade mark applied for, on account of the likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

11 OHIM claims that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility of the applicant's heads of claim

12 In its third head of claim the applicant is effectively requesting the Court to issue a direction to OHIM to refuse registration of the mark applied for.

13 The admissibility of an action and the forms of order sought therein is an issue of public policy which may be raised by the Court of its own motion; its review is not confined to the objections of inadmissibility raised by the parties (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 19; Case T-130/89 *B.* v *Commission*

[1990] ECR II-761, summary publication, paragraphs 13 and 14; and Case T-99/95 *Stott* v *Commission* [1996] ECR II-2227, paragraph 22).

14 Under Article 63(6) of Regulation No 40/94, OHIM is required to take the measures necessary to comply with judgments of the Community Courts. Accordingly, it is not for the Court of First Instance to issue directions to OHIM. It is for the latter to draw the appropriate inferences from the operative part and grounds of the Court's judgments (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12; Case T-129/01 *Alejandro* v *OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 22; and Case T-164/03 *Ampafrance* v *OHIM — Johnson & Johnson (monBeBé)* [2005] ECR II-1401, paragraph 24).

15 The applicant's third head of claim is therefore inadmissible.

16 The applicant's first and second heads of claim, seeking annulment of the contested decision, are admissible.

Substance

17 In support of its action the applicant raises a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94 and manifest errors of assessment. That plea is divided into five parts.

First part, concerning erroneous determination of the relevant territory and public

Arguments of the parties

18 The applicant complains that, in the contested decision, the Board of Appeal assessed the likelihood of confusion, first, by taking the English public into account, even though English territory is not relevant in the present proceedings, and second, by referring only to a specialised public (pharmacists and doctors), even though the relevant public also includes 'end consumers', who are 'average consumers'.

19 In that regard, the applicant refers to a decision of the First Board of Appeal of 3 November 2003 (R 67/2003-1) in which OHIM stated that the attention paid by the average consumer when buying non-prescription medicine for mild disorders (e. g. dietetic problems) will not, when purchasing such goods, be very high. The applicant therefore concludes that there is a likelihood of confusion on the part of the average consumer in the present case.

20 OHIM responds that the Board of Appeal did not consider the United Kingdom to be the relevant territory since it states, on the contrary, that the relevant territories are Spain, France, Italy, Austria, Portugal and the Benelux countries (paragraphs 20 and 23 of the contested decision), nor did it base its analysis on the perception of a public composed of specialists. Rather, the Board referred to the view of the average consumer of the goods in question (paragraph 23 of the contested decision).

Findings of the Court

21 This first part of the plea has no factual basis, in so far as it makes allegations that are contradicted by the express terms of the contested decision. First, in paragraphs 20, 21 and 23 of the contested decision, the Board of Appeal expressly points out that the six relevant territories are Spain, France, Italy, Austria, Portugal and the Benelux countries. It identifies the public in the territories in question as the reference public for the purposes of the assessment of the likelihood of confusion.

22 Contrary to the applicant's submissions, the Board of Appeal did not base its assessment in that regard on evidence concerning the meaning of the word 'Echinacea' for the English-speaking public. It is true that in paragraph 18 of the contested decision the Board of Appeal referred to two definitions of the word in question taken from English dictionaries, but only in the context examining its Latin etymology. It concluded merely that it was the scientific name of a plant used in several languages, including those used by the public in the six reference territories.

23 Secondly, it is also apparent from paragraph 23 of the contested decision that the Board of Appeal did not consider the relevant public to be restricted to a specialist public composed of pharmacists and doctors. On the contrary, it referred expressly to the average consumer of the type of goods in question, namely medicinal plants and other pharmaceutical products, who is deemed to be reasonably well informed, observant and circumspect. That is therefore not a specialist public.

24 As regards OHIM's allegedly divergent practice in decisions, it must be pointed out that the legality of decisions of the Boards of Appeal is to be assessed purely by reference to Regulation No 40/94, as interpreted by the Community judicature, and not OHIM's practice in its earlier decisions (see Case T-117/02 *Grupo El Prado Cervera* v *OHIM — Debuschewitz heirs (CHUFAFIT)* [2004] ECR II-2073, paragraph 57, and the case-law cited).

25 Consequently, the first part of the plea must be dismissed.

Second part, concerning the application of a special criterion for the purposes of assessing likelihood of confusion due to the specific characteristics of pharmaceutical products

Arguments of the parties

26 The applicant points out that the products in dispute are in part identical and in part similar. 'Pharmaceutical and medical preparations' covered by the mark ECHINAID are products identical to 'chemical pharmaceuticals' referred to by the mark ECHINACIN, while 'vitamins, food supplements, herbal preparations' protected by the former mark are similar. It considers that since a mistake in the choice of a pharmaceutical product could have serious health consequences, the criterion for evaluating likelihood of confusion should be much stricter than for other goods and services.

27 OHIM objects that the purpose of the ground for refusal based on the likelihood of confusion, set out in Article 8(1)(b) of Regulation No 40/94, is to protect private rights, namely the exclusive rights conferred by the earlier trade mark. Consequently, dangers which might result from possible confusion cannot be taken into account for the purpose of determining whether there is a likelihood of confusion.

Findings of the Court

28 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

29 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (Case T-31/03 *Grupo Sada* v *OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1667, paragraph 42, and Case T-126/03 *Reckitt Benckiser (España)* v *OHIM — Aladin (ALADIN)* [2005] ECR II-2861, paragraph 78).

30 According to the same line of case-law, the likelihood of confusion on the part of the public must be assessed globally by reference to the perception which the relevant public has of the signs and of the goods or services in question, taking into account all factors relevant to the circumstances of the case (see *GRUPO SADA*, paragraph 29 above, paragraph 43, and *ALADIN*, paragraph 29 above, paragraph 79, and the case-law cited).

31 The global assessment referred to in paragraph 30 above must be carried out objectively and cannot be influenced by considerations that are unrelated to the commercial origin of the goods in question.

32 Any harmful consequences linked to the incorrect use of a pharmaceutical product result from possible confusion on the part of the consumer as regards the identity or characteristics of the good at issue and not as regards their commercial origin in the sense of the ground for refusal laid down in Article 8(1)(b) of Regulation No 40/94.

33 In any case, in so far as the considerations relating to the consequences of incorrect use of a product are relevant for the purposes of assessing the likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, it must be pointed out that those considerations were taken into account by OHIM in the way it determined the characteristics of the consumers concerned. As OHIM rightly stated in the contested decision, the relevant public in the present case is made up of the average consumers of two types of product. As regards pharmaceutical products, it is apparent that the Board of Appeal shares the reasoning of the Opposition Division that consumers are assisted in their choice by highly qualified professionals. In relation to herbal medicinal products, consumers are deemed to be reasonably well informed, observant and circumspect, and used to using products whose name contains the prefix 'echina-'. It may be assumed that consumers who are interested in that type of product take particular care of their health so that they are less likely to confuse different versions of such products. In other words, any risk of a mistaken choice and subsequent incorrect use of a product giving rise to certain harmful consequences is compensated for by the high degree of awareness on the part of, and attention paid by, the average consumers concerned.

34 The second part of the plea must therefore also be dismissed.

Third part, concerning the lack of descriptive character of the prefix 'echina-'

Arguments of the parties

35 The applicant considers that the Board of Appeal erred in its assessment in considering that the prefix 'echina-' has descriptive character, or at least that it is not distinctive.

36 It states that the word 'Echinacea' is not Latin but English, although the relevant public is not English, and only a minority of the English-speaking public would understand the word 'Echinacea' and make the connection with the prefix 'echina'.

37 The number of marks registered in various countries containing the prefix 'echin-' or 'echina-', featuring on a list supplied by Optima Healthcare Ltd, is not very high and is thus not sufficient to prove that the prefix is 'commonly' used or that it would be understood by the relevant consumers.

38 Moreover, the part of the signs at issue which will be perceived by consumers as the most striking in phonetic terms, namely 'echina-', is identical in both cases. Thus, it is clear that consumers will not be able to distinguish between the two.

39 Finally, the applicant cites a decision of 18 June 2003 of the Fourth Board of Appeal (R 121/2002-4) in which it was concluded that there was a likelihood of confusion between the marks SELENIUM-ACE and Selenium Spezial A-C-E. According to that decision, the word 'Selenium', designating a chemical element, was not only

part of the former mark but would be perceived by the average consumer as its most significant element and therefore had to be regarded as sufficiently distinctive. It followed that there was a likelihood of confusion.

40 OHIM explains that 'Echinacea' is not an English word but is 'modern' Latin, which is not connected with any country or territory in particular. It is customary to use Latin in both the pharmaceutical industry and everyday medicine.

41 OHIM considers that the list, supplied by Optima Healthcare Ltd, of more than 30 marks containing the prefix 'echin-' or 'echina-' registered in one or more of the territories relevant to the present case proves the descriptive character of the word 'Echinacea' and thus, of the prefix 'echin-' in the mind of the public in those territories. OHIM also submits that the applicant did not challenge those arguments during the proceedings before the Opposition Division.

42 That descriptive character is, furthermore, confirmed by a search carried out on the internet on the word 'Echinacea' for each of the languages concerned. That search generated 1 940 results for Spanish web pages, 2 630 results for French web pages, 6 080 results for Italian web pages, 1 160 results for Portuguese web pages, 36 600 results for German web pages, and 7 360 results for Dutch web pages.

43 Given its descriptive character, the prefix 'echina-' has little, if any, capacity to distinguish goods as coming from a particular undertaking. Thus, the average consumer who is reasonably well informed and observant cannot rely on that prefix to differentiate between the competing marks. That consumer will not be led to assume that ECHINACIN and ECHINAID come from the same undertaking on the

basis of the common prefix 'echina-'. That prefix is a clear and straightforward reference to the composition and characteristics of the products in dispute and not an indication of their respective manufacturers.

Findings of the Court

44 The Court finds that OHIM correctly concluded that the prefix 'echina-' was descriptive and that, consequently, the public in the relevant territories, when confronted with the mark applied for for goods in Class 5, would regard it as referring to goods derived from the plant 'Echinacea'.

45 That conclusion concerning the descriptive character of the mark applied for is justified by the factors analysed by the Board of Appeal in particular in paragraphs 18 to 21 of the contested decision. The word 'Echinacea' is the scientific name in Latin of a plant used for pharmaceutical products and herbal medicine. It is common to use the Latin names of plants in those areas. That is confirmed by the large number of registrations of the prefix 'echin-' or 'echina-' in the territories concerned. OHIM was therefore justified in finding that the prefix 'echina-' refers, as far as the average consumer is concerned, to the composition of the product rather than to its commercial origin.

46 Consequently, the third part of the plea cannot be upheld.

Fourth part, concerning the incorrect assessment of the likelihood of confusion

Arguments of the parties

47 The applicant complains, first, that the Board of Appeal, which classed the endings of the marks in issue, that is to say '-id' and '-cin', as dominant elements, did not make a comparison of the signs as they will be perceived by consumers, namely as a whole. It points out that, according to the Court of Justice, the average customer perceives the trade mark as a whole and does not proceed to analyse its various details (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23).

48 Second, the applicant complains that the Board of Appeal misapplied the concept of 'the average consumer' in taking only professionals and not the end consumer into account. That error is said to be apparent from paragraph 23 of the contested decision, in which the Board of Appeal observes that consumers of that type of goods are used to marks containing the prefix 'echina-'. However, that type of goods is not very common in trade. Moreover, it is conceivable that such a public, which only rarely has the chance to make a direct comparison between the different marks, but has to place its trust in the imperfect image of them that it has retained in its mind, may regard the products under the conflicting marks as belonging, admittedly, to two distinct ranges of products but as coming, none the less, from the same manufacturer (Case T-104/01 *Claudia Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 49).

49 In concluding its application, the applicant refers to a decision of 25 April 2001 of the Third Board of Appeal (R 816/1999-3). In that decision the Board of Appeal

considered that there was a likelihood of confusion for the average consumer between two marks designating pharmaceutical products, namely A-MULSIN and ALMOXIN, which have more or less the same composition and are used for the same purposes. In that case the Board stated in particular that as regards medicines for mild disorders, such as painkillers, sleeping pills or healing ointments, the degree of attention of the average consumer will be very low. The average consumer will generally buy that type of product without reading the leaflet and without necessarily asking the pharmacist for advice, but it is at the time of purchase that confusion may arise. The Board of Appeal concluded that although an attentive consumer was capable of distinguishing between the marks at issue visually, particularly by reason of the existence of a hyphen, the average consumer would not, by contrast, be able to memorise the slight phonetic differences between the two marks.

50 On the first point OHIM considers, on the contrary, that although the sign must be considered in its totality it is also crucial to consider the various elements of each sign when carrying out a global assessment (Case T-224/01 *Durferrit* v *OHIM — Kolene (NU-TRIDE)* [2003] ECR II-1589). According to the Court's case-law, the distinctiveness of the mark is one of the factors that must be taken into account in assessing likelihood of confusion (*SABEL*, paragraph 24; Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 18; and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 25). In determining the distinctive character of a mark account should be taken of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraphs 49 and 51, and *Lloyd Schuhfabrik Meyer*, paragraphs 22 and 23). The visual, aural or conceptual similarity of the marks must be based on the overall impression created by them, bearing in mind in particular their distinctive and dominant components (*SABEL*, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraphs 22 and 23).

51 It follows that where a mark is composed of a descriptive element, that element cannot be regarded as the dominant element because otherwise a finding of likelihood of confusion could be based only on elements that cannot be protected as trade marks. OHIM therefore considers that the Board of Appeal was right to conclude that the presence of the prefix 'echina-' in the two marks was insufficient to justify a finding of likelihood of confusion.

52 As regards the second point, OHIM points out that the Board of Appeal took the perspective of the average consumer of vitamins, food supplements, herbal preparations and pharmaceutical and medical preparations into account rather than that of a professionally skilled public, namely doctors or pharmacists. If those products may be bought without prescription that is because health authorities deem the average consumer to be sufficiently informed about them to be able to make their own choices. In addition, the average consumer of those products, who is typically a consumer of, and interested in, health products based on natural substances, is likely to possess the minimum knowledge of those products required to be aware of the particular properties of products containing Echinacea.

53 OHIM considers that the average consumer of the products in question is aware of those properties and will perceive the prefix as referring to the kind of product rather than to its commercial origin. While the average consumer's level of attention varies according to the nature of the goods concerned (*Lloyd Schuhfabrik Meyer*, paragraph 26), there is no reason, as far as health products are concerned, to believe that the average consumer is inattentive when making his selection of goods, and still less reason if, as the applicant claims, serious health risks could ensue if the products in dispute were confused.

Findings of the Court

54 The Court points out that the public will not generally consider a descriptive element forming part of a complex mark to be the distinctive and dominant element of the overall impression conveyed by that mark (*BUDMEN*, paragraph 53).

55 In the present case, as the Court has already noted in paragraph 44 above, since the prefix common to the two signs concerned, namely 'echina-', is descriptive in character, it does not enable the commercial origin of the products to be distinguished. Therefore OHIM rightly found that the respective endings of the signs at issue, namely '-id' and '-cin', were to be regarded as the distinctive and dominant elements which attract the attention of consumers.

56 As regards the alleged misapplication of the concept of 'the average consumer', which the applicant infers from paragraph 25 of the contested decision, it is sufficient to note that the paragraph in question does not refer to professionals but to 'the public concerned'. That expression is defined in paragraph 23, in which the Board of Appeal refers expressly to the average consumer of the products in question, who is deemed to be reasonably well informed, observant and circumspect. Contrary to the applicant's submission, OHIM did not, therefore restrict its examination of the likelihood of confusion to professional consumers but clearly took account of the perception of the end consumers of the goods at issue.

57 Although it is correct, as submitted by the applicant, that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to place his trust in the imperfect image of them that he has retained in his mind, given the descriptive character of the prefix 'echina-' that argument cannot be upheld in the present case.

58 Finally, in relation to the applicant's citing of a decision of the Third Board of Appeal, reference is made to paragraph 24 of this judgment.

59 It follows that the fourth part of the plea must be dismissed.

Fifth part, concerning failure to take account of the 'rule of interdependence'

Arguments of the parties

60 The applicant complains that the Board of Appeal did not apply the 'rule of interdependence'. According to that 'rule', a global assessment of the likelihood of confusion implies some interdependence between the relevant factors. In particular, a lesser degree of similarity between the products or services in question may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, paragraphs 15 to 18).

61 The applicant considers that, in the present case, the high degree of similarity between the products should have been considered by the Board of Appeal as sufficient to offset the slight differences existing between the signs.

62 OHIM acknowledges that the global assessment of likelihood of confusion includes the extent of interdependence between the factors taken into account, and that in the present case, the goods covered by the marks at issue are identical. However, the fact that the goods are identical should be weighed against the degree of distinctiveness of the marks. Since the marks at issue are composed of a descriptive prefix, the distinctiveness of the marks is limited to their endings, the part on which consumers will tend to focus their attention. Consequently, the scope of protection of the earlier mark is considerably limited.

Findings of the Court

63 It is settled case-law that the global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular similarity between the trade marks and between these goods or services covered. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, paragraph 17, and Case T-3/04 *Simonds Farsons Cisk* v *OHIM — Spa Monopole (KINJI by SPA)* [2005] ECR II-4837, paragraph 33).

64 The applicant submits that the assessment carried out by OHIM of the likelihood of confusion in this case is vitiated by error, since the contested decision does not mention what the applicant terms the 'rule of interdependence', established by the case-law (*Canon*, paragraph 17).

65 It must be observed that, in so far as that argument should be understood as meaning that the case-law concerned defines the 'rule of interdependence' as constituting an autonomous rule of law, it is not well founded. The considerations

relating to that 'rule' constitute merely the expression of one of many factors which need to be taken into account when a global assessment of the likelihood of confusion is carried out in a particular case. It follows that the mere absence of a reference to that factor in the contested decision cannot lead to a presumption that the assessment of the likelihood of confusion set out therein is vitiated by an error.

66 In the light of all the factors taken into account for the purposes of assessing the likelihood of confusion, as set out in the contested decision, and, in particular, the evidence referred to therein of the coexistence in the relevant territories of several marks composed of the prefixes 'echin-' or 'echina-' with various endings, the applicant's arguments are not such as to indicate any error in the Board of Appeal's reasoning.

67 It follows that the fifth part of the plea necessarily has to be dismissed. Consequently, the action must be dismissed in its entirety.

Costs

68 Under Article 87(2) of the Rules of Procedure, 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 incurred by OHIM, as applied for by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Cooke Labucka Trstenjak

Delivered in open court in Luxembourg on 5 April 2006.

E. Coulon J.D. Cooke

Registrar President