JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

15 October 2008 *

In Case T-405/05,

Powerserv Personalservice GmbH, formerly Manpower Personalservice GmbH, established in Sankt Pölten (Austria), represented by B. Kuchar, avocat,

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, and intervener before the Court of First Instance, being

* Language of the case: German.

Manpower Inc., established in Milwaukee, Wisconsin (United States), represented initially by R. Moscona, Solicitor, subsequently by R. Moscona and A. Bryson, Barrister, and lastly by A. Bryson and V. Marsland, Solicitor,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 22 July 2005 in Case R 499/2004-4 relating to an application for a declaration that Community trade mark No 76059, MANPOWER, is invalid,

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

composed of: M. Vilaras, President, F. Dehousse and D. Šváby (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 14 November 2005,

having regard to OHIM's response lodged at the Registry of the Court of First Instance on 3 March 2006,

having regard to the intervener's response lodged at the Registry of the Court of First Instance on 23 February 2006,

further to the hearing on 11 December 2007,

gives the following

Judgment

Facts

1 On 26 March 1996, the intervener — Manpower Inc. — filed an application for a Community trade mark with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) under 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 trade mark in respect of which registration was sought is the word sign MANPOWER.

3 The goods and services in respect of which registration was sought are in Classes 9, 16, 35, 41 and 42 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 for each of those classes:

— ‘audio cassettes; audio-visual teaching apparatus; audio compact discs; video compact discs; computer software; computer programs; tape recorders; video tapes; video recorders; parts and fittings for all the aforesaid goods’, in Class 9;

— ‘books; printed matter; handbooks; manuals; magazines; printed publications; transparencies; instructional materials; teaching materials; parts and fittings for all the aforesaid goods’, in Class 16;

— ‘employment agency services; temporary personnel services’, in Class 35;

— ‘arranging and conducting of conferences and seminars; rental of movie projectors and accessories; rental of video recordings, audio recordings and cine-films; organisation of exhibitions; production of video and audio tapes; educational, instructional, teaching and training services, all relating to the tuition and assessment of office, industrial, driving and technical staff; information and advisory services, all relating to the foregoing’, in Class 41;

— ‘professional consultancy and expert services, all relating to personnel vocational testing and guidance, personality testing, psychological examination and career advice; personality and psychological testing services; career and vocational counselling; testing individuals to determine employment skills; occupational psychology services; computer software design and development; consultancy services relating to the assessment, development and application of human resources; provision of temporary accommodation; information and advisory services and preparation of reports, all relating to the aforesaid; catering services’, in Class 42.

4 The OHIM examiner raised objections to the mark applied for, which he found to be descriptive for the purposes of Article 7(1)(c) of Regulation No 40/94. In response, Manpower Inc. submitted evidence that the trade mark had acquired distinctive character in the United Kingdom and Germany. The trade mark was therefore accepted for registration on 13 January 2000 and published, under No 76059, in the *Community Trade Marks Bulletin* of 28 February 2000.

5 On 27 October 2000, the applicant — Powerserv Personalservice GmbH, formerly Manpower Personalservice GmbH, although at that time its name was still PDV Beteiligungs GmbH — filed an application for a declaration of invalidity on the basis of Article 51(1) of Regulation No 40/94, on the grounds that Manpower Inc.'s trade mark had been registered in breach of Article 7(1)(c) and Article 7(3) of that regulation, and that the documents produced in support of the assertion that the trade mark had acquired distinctive character through use did not demonstrate that this was so in all the relevant substantial parts of the European Community. Manpower Inc. responded, inter alia, by producing other evidence relating to the distinctive character acquired by its trade mark. By Decision of 29 April 2004, the Cancellation Division of OHIM rejected the application for a declaration of invalidity ('the Cancellation Division's decision'). The grounds for that decision were the fact that, since the word 'manpower' is descriptive only in English, consumers outside the United Kingdom and Ireland would not identify it as descriptive and that, as regards those two countries, the proprietor of the trade mark had proved that it had acquired distinctive character through use. In that connection, the Cancellation Division also took into account evidence before it which post-dated the registration of the trade mark.

6 The applicant's appeal against the Cancellation Division's decision was dismissed by the Fourth Board of Appeal of OHIM by decision of 22 July 2005 ('the contested decision'). In the contested decision, the Board of Appeal stated, among other things, first, as regards the descriptiveness of Manpower Inc.'s trade mark, that the word 'manpower' was, in English, descriptive of the services of an employment agency or temporary personnel services since it was a word commonly used in the context of human resource management. According to the Board of Appeal, 'manpower' was also descriptive of most of the goods and services in Classes 9, 16, 41 and 42 of the Nice Agreement because it would be understood as indicating the content of those

goods and services when used in connection with employment agency services. The word had also 'entered into German business language'.

7 The Board of Appeal stated, secondly, as regards the relevant consumers and territory, that the descriptive meaning of the word 'manpower' was known to a substantial proportion of the relevant consumers, namely 'possible employers of temporary staff and people in charge of such employment', in the United Kingdom, Ireland, Germany, Austria, the Netherlands, Sweden, Denmark and Finland. According to the Board of Appeal, the services of an agency for temporary personnel are offered not only to people looking for employment but also to employers seeking employees. Such employers might even be the more important client group for service providers, whose turnover is generated by the income derived through the hiring of staff. In the Board of Appeal's view, 'manpower' is a descriptive word, not only for those consumers in the United Kingdom and Ireland, 'where English is the mother-tongue', and in the German-speaking countries, where the word is listed in dictionaries, but also in the Member States in which a substantial proportion of those clients has sufficient knowledge of and practice in business English. The Board of Appeal stated that, in its experience, such knowledge and use of English can be found particularly in Sweden, Denmark, Finland and the Netherlands. It emphasised that English was the world's common business language and the official working language of many international companies. It considered that, particularly in smaller countries, business students were often confronted with English texts throughout their studies and that, after finishing their university studies, they would go to work in human resource departments or in other positions in companies responsible for employing temporary staff. The Board of Appeal stated that it had found much evidence supporting that assumption, and set that evidence out. It went on to state that, with respect to the other 'old' Member States of the European Union, experience showed a certain reluctance to use English and that, accordingly, it considered that, in those Member States, the people for whom the word 'manpower' would bear a descriptive meaning did not constitute a substantial proportion of the relevant public. The Board of Appeal stated that, pursuant to Article 159(a)(2) of Regulation No 40/94, it did not need to consider the new Member States listed in Article 159(a)(1) of that regulation.

8 Thirdly, as regards the distinctive character acquired by Manpower Inc.'s trade mark at the date it was filed, the Board of Appeal stated that, because of the descriptive nature of that trade mark in the Member States referred to above, it had been incumbent on Manpower Inc. to prove that, in that part of the Community, its trade mark had acquired distinctive character through use, for the purposes of Article 7(3) of Regulation No 40/94. The Board of Appeal stated that it is clear from Case T-173/00 *KWS Saat* v *OHIM* ('*Orange*') [2002] ECR II-3843, paragraphs 24 to 27, that if a trade mark is regarded as not being registrable under Article 7(1)(b) to (d) of Regulation No 40/94, it is necessary, in order to render it registrable, to demonstrate that the trade mark has acquired distinctive character through use in the substantial part of the Community in which it was devoid of any such character under Article 7(1)(b) to (d) of Regulation No 40/94. Acquired distinctive character has therefore to be shown in that part of the Community in which there is an absolute ground for refusal, to such an extent that any part where that situation remains can no longer be regarded as 'substantial'. The Board of Appeal held that Manpower Inc. had not proved that the distinctive character of its trade mark had been acquired at the date of filing the application for registration, since the evidence that it had submitted covered only the United Kingdom and Germany. According to the Board of Appeal, that evidence was insufficient, since it had to be considered that the territory in which the trade mark was used as a descriptive expression also included Austria, the Netherlands, Denmark, Sweden and Finland.

9 Fourthly, as regards the distinctive character acquired by Manpower Inc.'s trade mark after its registration, the Board of Appeal stated that the evidence submitted by Manpower Inc. had allowed it to be concluded that, in the eight Member States in which the trade mark was considered to be descriptive, it had acquired distinctive character for the purposes of Article 51(2) of Regulation No 40/94 at the date on which the application for a declaration of invalidity was filed. The Board of Appeal held that all the evidence submitted by Manpower Inc. was admissible in so far as it allowed it to be concluded that the sign had distinctive character at that date. The Board of Appeal took the view that it was not required to take account solely of the evidence submitted during the registration procedure. It observed that, under Article 51(2) of Regulation No 40/94, the relevant question was whether the trade mark had acquired distinctive character through use at any time subsequent to its registration. Furthermore, according to the Board of Appeal, the application of Article 51(2) of Regulation No 40/94 is not excluded on the ground that it does not expressly mention Article 7(3) of that regulation, the provision which, in the case before it, had been 'wrongly assessed' in the registration procedure. The Board of Appeal added that the fact that, through the application of Article 51(2) of Regulation No 40/94, the proprietor receives a priority date which is earlier than the one it would

have received if it had applied once the trade mark had actually acquired a secondary meaning is not decisive for the construction of that provision. Article 51(2) of Regulation No 40/94, which expressly prohibits a declaration of invalidity in respect of a trade mark which has acquired distinctive character after its registration, necessarily acknowledges, in the view of the Board of Appeal, that a trade mark can have a priority date that it would not have been accorded had the registration procedure been conducted correctly.

10 Fifthly, as regards the assessment of the evidence, the Board of Appeal found that Manpower Inc. had filed ample evidence showing the use of its trade mark within most of the countries of the European Union. It stated that it was aware of the fact that some of the evidence post-dated the application for a declaration that the trade mark was invalid. However, since, in its view, the evidence was sufficient to show acquired distinctive character in the relevant territory at the date on which the application for a declaration of invalidity was filed, it did not need to decide whether the relevant date for assessing acquired distinctive character for the purposes of Article 51(2) of Regulation No 40/94 was the date of the application for a declaration of invalidity or the date of the final decision on that application. Moreover, some of the evidence post-dating the application actually relates to the period before the application date. Where that is not the case, the evidence from a later date can, in some cases, allow conclusions as to distinctive character to be drawn in relation to the relevant period. The Board of Appeal stated that it was fully aware that the evaluation of such evidence has to be performed very carefully. In addition, the Board of Appeal observed that it had taken into consideration the fact that Manpower Inc. operated worldwide, which enabled it to be concluded that its business would also be partially known in countries where it had only a few offices, or none at all. According to the Board of Appeal, that finding was supported by one of the consumer surveys from Austria showing that many consumers were aware that the term 'manpower' was a trade mark used by a company which was not Austrian. Secondly, the Board of Appeal noted that 'in none of the countries, except for the United Kingdom and Ireland, is English the native language' and that expressions from a foreign language, albeit known to most of the relevant consumers, were not necessarily known by all of them. For those people, the word 'manpower' was likely, in its view, to appear as a trade mark. That is demonstrated by the consumer surveys from Germany and Austria. According to the Board of Appeal, those considerations had to be taken into

account particularly in countries in which the evidence was weaker than in others. The Board of Appeal stated, also, that it was bound neither by national trade mark registrations nor by decisions of national courts.

11 Lastly, after evaluating the evidence relating to the trade mark's distinctive character acquired through use in the United Kingdom, Ireland, Germany, Austria, Sweden, the Netherlands, Finland and Denmark, the Board of Appeal concluded that Manpower Inc. had shown that its trade mark possessed a secondary meaning for temporary employment services in those parts of the Community where the trade mark had not already been distinctive. Manpower Inc.'s trade mark could not, therefore, be declared invalid pursuant to Article 51(2) of Regulation No 40/94. The Board of Appeal held that the acquired distinctive character also accrued to all the goods and services protected by the registration, for which the trade mark would be descriptive only in so far as it indicated the content of those goods and services. In that regard, the Board of Appeal pointed out, first of all, that Manpower Inc. had shown that it used many of those goods and services in connection with the provision of temporary staff; and, secondly, that since the word 'manpower' had a secondary meaning for temporary employment services, the relevant consumers would regard, for example, a book or a conference with that name as referring to Manpower Inc. and its services.

Forms of order sought by the parties

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

— annul the contested decision;

— declare the intervener's trade mark invalid for all the goods and services it protects;

— in the alternative, annul the contested decision in so far as it has not been shown that the intervener's trade mark has acquired distinctive character through use, and refer the case back to the Board of Appeal;

— order OHIM and the intervener to pay their own costs, together with those incurred by the applicant in the present proceedings;

— order OHIM and the intervener to pay the costs incurred by the applicant in the proceedings before OHIM.

13 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

14 The intervener contends that the Court should:

— dismiss the action;

— alter the contested decision in accordance with the indications set out in its response;

— order the applicant to pay the costs.

Admissibility of the applicant's fifth claim

15 By its fifth claim, the applicant seeks an order requiring OHIM and the intervener to pay the costs incurred by the applicant in the proceedings before OHIM, without specifying whether it is referring only to those incurred before the Board of Appeal in the course of the appeal or also to those incurred before the Cancellation Division in the course of the invalidity proceedings.

16 It should be pointed out in that regard that, under Article 136(2) of the Rules of Procedure of the Court of First Instance, '[c]osts necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal and costs incurred for the purposes of the production, prescribed by the second subparagraph of Article 131(4), of translations of pleadings or other documents into the language of the case shall be regarded as recoverable costs'. Consequently, costs incurred in invalidity proceedings cannot be regarded as recoverable costs (see Joined Cases T-160/02 to T-162/02 *Naipes Heraclio Fournier* v *OHIM — France Cartes* (A sword in a pack of cards, a knight of clubs and a king of swords) [2005] ECR II-1643, paragraphs 22 and 24 and the case-law cited).

17 The applicant's fifth claim must therefore be dismissed as inadmissible to the extent that it refers to the costs incurred in the invalidity proceedings before the Cancellation Division.

Substance

18 In the application, the applicant raised three pleas in law in support of its claims. At the hearing, however, the applicant stated that it abandoned the second part of its second plea, alleging breach of Article 74(2) of Regulation No 40/94, as well

as its third plea, alleging breach of Article 159a of that regulation. The applicant's statement was formally noted in the record of the hearing.

19 Accordingly, the applicant now raises only two pleas in law. By the first, it submits that the contested decision should be annulled for breach of Article 7(1)(b) and (c) of Regulation No 40/94, on the ground that the intervener's trade mark is devoid of any distinctive character and is descriptive, throughout the Community, of the goods and services for which it was registered, that is to say, it is descriptive also in the countries for which the Board of Appeal concluded in the contested decision that it was not descriptive.

20 By the second plea, the applicant alleges breach of Articles 51(2) and 74(1) of Regulation No 40/94.

21 In addition, the intervener has contended that the Court of First Instance should alter the contested decision in accordance with the indications set out in its response. In the relevant part of its response, the intervener argues, in essence, that the Board of Appeal wrongly concluded that, in the United Kingdom, Ireland, the Netherlands, Germany, Austria, Sweden, Denmark and Finland, the term 'manpower' is descriptive of the goods and services covered by its trade mark.

22 The Court considers it appropriate to reclassify that claim as an independent application by the intervener for alteration of the contested decision.

23 By the contested decision, the Board of Appeal in fact adopted two measures in the form of a single act: one holding that the absolute ground for refusal under Article 7(1)(c) of Regulation No 40/94 precluded registration of the intervener's trade mark in view of its descriptiveness in the eight countries referred to above, and the other dismissing the claim for a declaration that that trade mark is invalid, on the ground that, in consequence of the use made of the trade mark after its registration, it had acquired distinctive character in those eight countries for the purposes of

Article 51(2) of Regulation No 40/94 (see, to that effect, Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 23).

24 Since the intervener was successful as regards the second aspect of the contested decision — the part challenged in the present action — it is entitled, under the second subparagraph of Article 134(2) of the Rules of Procedure, to apply for an independent form of order on the basis of independent pleas in law, seeking alteration of the contested decision as regards the first aspect, to the effect that Article 7(1)(c) of Regulation No 40/94 does not preclude the registration of its trade mark MANPOWER, since it is not descriptive in any of the eight countries referred to above (see, to that effect, *Procter & Gamble* v *OHIM*, cited in paragraph 23 above, paragraph 26). If the independent pleas are upheld, and the independent form of order sought by the intervener granted, the applicant's action will have to be dismissed, without it being necessary to examine the applicant's second plea in law which, on that hypothesis, would be otiose.

25 In those circumstances, the Court considers that it should first of all examine, together, the applicant's first plea in law and the intervener's arguments in support of its application for alteration of the contested decision.

The applicant's first plea in law and the intervener's application for alteration

Arguments of the parties

26 The applicant submits, first, that OHIM did not take account of the real, present and serious need for 'everyone, including competitors' to be able to use the word

'manpower', in business, for employment agency services, temporary personnel services and for all the other goods and services registered. In the applicant's submission, it is therefore necessary that the word 'manpower' be allowed to remain available.

27 The applicant maintains that the public interest is based on the fact that the word 'manpower' is purely descriptive, for the purposes of Article 7(1)(c) of Regulation No 40/94, not only in English and German, but also in most of the other Community languages and that it should be kept available as an expression in the current language, and particularly in the specialised language of the field of human resources. The word 'manpower' is understood on the Internet as the international multilingual designation of 'the work-force'.

28 The applicant maintains that even if only German and English had to be taken into account, the word 'manpower' is descriptive throughout the Community. It argues that, according to statistics of the Commission of the European Communities concerning knowledge of foreign languages in the Community, 32% of the persons in question speak German and 47% speak English.

29 Secondly, the public interest and the requirement of availability are based, in the applicant's submission, on the fact that the word 'manpower' has no distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, because it cannot serve to distinguish the employment agency and temporary personnel services of a particular undertaking. That word is used on the employment market to designate 'the work-force'.

30 The applicant maintains that a legally valid trade mark must have distinctive character throughout the Community. In the contested decision, distinctive character throughout the Community was not evaluated. The applicant argues that it is

unacceptable to consider a large number of the older Member States, such as France, Italy, Spain, Luxembourg, Belgium and Greece, as States in which a substantial section of the public speaks neither English nor German. It submits that, according to the Court, it is established that a certain number of German-speaking persons are established in Spain temporarily or even permanently.

31 OHIM contends, as regards the alleged breach of Article 7(1)(c) of Regulation No 40/94, that the Board of Appeal concluded that the intervener's trade mark was perceived as descriptive only in certain parts of the Community.

32 Thus, according to OHIM, first, the Board of Appeal held that, in the English-speaking areas of the Community, the word will be understood by everyone — in any event, in the field of human resources management — and that it will be understood by professionals working in personnel services also in the countries where business English is usually used.

33 OHIM argues, secondly, that by taking into account 'Germany, Austria, the Netherlands, Sweden, Denmark and Finland' as countries where business English is usually used, the Board of Appeal extended the geographical area in which the public may perceive the word 'manpower' as descriptive, as compared with the Cancellation Division, which considered only the countries in the English-speaking areas. According to OHIM, the justification for broadening the application of Article 7(1)(c) of Regulation No 40/94 is dubious.

34 OHIM argues, thirdly, that the applicant's argument that a substantial section of the relevant public speaks fluent English in most of the Member States is incor-

rect in substantive terms. On the facts, that argument was not substantiated by the applicant.

35 The intervener argues, first, that the question of conformity with Article 7(1)(b) and (c) of Regulation No 40/94 arises only in respect of the services in Class 35 under the Nice Agreement (employment agency services, temporary personnel services). In English, it is neither current nor natural to designate the services in question by the word 'manpower'. In the intervener's submission, the applicant's efforts to appropriate the MANPOWER trade mark, particularly for Austria, are the best proof of its value and distinctive character.

36 In that regard, the intervener submits that the Cancellation Division stated correctly that, in English, the term 'manpower' was not a common expression for designating staff recruitment services (paragraph 10 of the Cancellation Division's decision). Such services are described by the words 'employment', 'recruitment' or 'placement' ('employment services', 'employment agency services', 'recruitment agency services', 'staffing services' or 'placement services'). The intervener states that the word 'manpower' is not the usual way of designating staff recruitment services and does not describe those services in such a way that the word could not fulfil the function of identifying the undertaking that markets them. To prove those assertions, the intervener refers to various publications dealing with human resources matters.

37 The intervener maintains that it is unlikely that third parties, and more particularly its own competitors, use, in the course of their business and without improper motives, the MANPOWER trade mark or any similar trade mark to designate the services they supply.

38 The intervener asserts that the Board of Appeal was wrong to conclude that the word 'manpower' was also descriptive of the goods and services in Classes 9, 16, 41 and 42 under the Nice Agreement, protected by the trade mark in question.

39 The intervener argues, secondly, that there was no evidence before the Board of Appeal to support its finding that for consumers in six non-English-speaking Member States of the Community, the word 'manpower' was descriptive of staff recruitment services. There is no evidence to suggest that for consumers in non-English-speaking countries that word has no distinctive character. The Cancellation Division stated correctly that, outside the United Kingdom and Ireland, the term 'manpower' is seen as a fanciful or suggestive expression that can serve to designate the source of the goods and services in question (paragraph 10 of the Cancellation Division's decision).

40 In particular, as regards Germany and Austria, the intervener contends that the sole fact that the word 'manpower' appears in a single German dictionary does not mean that it is in general use and generally understood by the German-speaking population or that it is known by a significant proportion of that population. In the intervener's view, an average German-speaking consumer would have to perform complex trains of thought to detect the meaning of that word. Even if it is accepted that the word 'manpower' has entered the German business language, of which there is no real evidence, that does not mean that where it is used in connection with staff recruitment services, the word is perceived by the relevant German-speaking consumers as merely descriptive of the services. The word 'Arbeitskraft' does not mean the same as the expression 'recruitment services'.

41 In the intervener's submission, there is no evidence establishing that the word 'manpower' is used on the Internet in any language other than English, except as a reference to itself and its business. Even on English-language websites, in at least nine cases out of ten the word is used to make such a reference. The search results submitted by the intervener only support its assertions regarding its extensive international reputation.

Findings of the Court

42 As regards the alleged breach of Article 7(1)(b) of Regulation No 40/94, concerning trade marks devoid of any distinctive character, OHIM contends that, in its appeal before the Board of Appeal, the applicant did not rely on breach of that provision. That part of the first plea in law must, OHIM maintains, be dismissed as inadmissible.

43 In that regard, the Court finds that it is clear from an examination of OHIM's file in the present case, and from the contested decision, that the applicant did not, in its appeal before the Board of Appeal, put forward a complaint alleging breach of Article 7(1)(b) of Regulation No 40/94 by the Cancellation Division. The Board of Appeal did not analyse the applicability of that provision. It follows from Article 135(4) of the Rules of Procedure that the parties to the proceedings before that board may not change the subject-matter of the proceedings, as it was defined before the Board of Appeal. Accordingly, that part of the first plea in law, alleging breach of Article 7(1)(b) of Regulation No 40/94, must be dismissed as inadmissible.

44 As regards the alleged infringement of Article 7(1)(c) of Regulation No 40/94, it is to be noted that, under the terms of that provision, the following are not be registered: 'trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service'.

45 According to settled case-law, Article 7(1)(c) of Regulation No 40/94 pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may freely be used by all (see Case T-207/06 *Europig* v *OHIM (EUROPIG)* [2007] ECR II-1961, paragraph 24 and the case-law cited).

46 Furthermore, Article 7(1)(c) of Regulation No 40/94 refers to signs that are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the product or service 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 (see *EUROPIG*, cited in paragraph 45 above, paragraph 25 and the case-law cited).

47 The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are those which may serve, in normal usage from the point of view of the target public, to designate — either directly or by reference to one of their essential characteristics — the goods or service in respect of which registration is sought (see *EUROPIG*, cited in paragraph 45 above, paragraph 26 and the case-law cited).

48 It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see *EUROPIG*, cited in paragraph 45 above, paragraph 27 and the case-law cited).

49 It is appropriate, first, to examine whether the Board of Appeal correctly decided that the intervener's trade mark was descriptive in the part of the Community where the majority language of the relevant public is English, that is to say, in the United Kingdom and Ireland — an assertion which the intervener disputes.

50 It is appropriate, having regard to the heterogeneous nature of the goods and services covered by that trade mark, to analyse those goods and services in two parts:

(i) 'employment agency services' and 'temporary personnel services' in Class 35; and (ii) the other goods and services covered by the trade mark in question (in Classes 9, 16, 41 and 42).

51 The Board of Appeal itself undertook such an analysis in two parts, stating, in paragraph 12 of the contested decision, first, that 'the word "manpower" is [in English] descriptive for the services of an employment agency and for temporary personnel services since it is a common word in human resource management' and, second, '[i]t is also descriptive for most of the goods and services [covered by the intervener's trade mark] in Classes 9, 16, 41 and 42, because the word would merely be understood as indicating the content of those goods and services when used in connection with employment agency services'.

52 The Board of Appeal stated that the word 'manpower' was an English word, meaning, according to *The New Shorter Oxford English Dictionary* (Thumb Index Edition, 1993), 'the power or agency of man in work; a unit of rate of performing work; the body of people available or needed for military service, work or other purposes; workers viewed as a quantifiable resource, labour'. In the view of the Board of Appeal, it is a common word in business English, widely used and well known within the field of human resource management.

53 In that regard, the Board of Appeal refers to the *Wideman Comparative Glossary of Project Management Terms*, according to which the term 'manpower' means the total number of people who are suited to a particular type of work. 'Manpower planning' is the process of estimating the organisation's manpower needs over time, in terms of both numbers and skills, and obtaining the human resources required to match the organisation's needs.

54 According to the Board of Appeal, there is no doubt, in the light of those definitions, that the services protected by the intervener's trade mark — temporary personnel services — can be referred to as 'providing manpower'. In paragraph 14 of the contested decision, the Board of Appeal observes that there is ample evidence showing the descriptive use of the word in question.

55 The Court notes that the Cancellation Division based its decision, as regards the United Kingdom and Ireland, on an entry in *Collins English Dictionary* (1996 edition), according to which the word 'manpower' means, in English, 'power supplied by man; a unit of power based on the rate at which a man can work; roughly 75 watts; the number of people needed or available for a job'. It took that entry as the basis for its statement that the word was used, in English, in relation to the work-force, while at the same time qualifying that statement and emphasising that the word 'manpower' was not, in that language, the most common expression to refer to the services in question.

56 The Court holds in that regard, first, that, in accordance with the case-law cited in paragraph 47 above, the assessment of the alleged descriptiveness of the intervener's trade mark consists in replying to the question whether the word 'manpower' can, in normal usage from the point of view of the target public, serve to designate — either directly or by reference to one of their essential characteristics — the goods or services protected by the intervener's trade mark.

57 Secondly, as regards the target public, it must be held that, in the present case, in view of the relatively broad specification of the services in question, it is made up of the entire population of working age. Both employers and employees, and persons actually working in the temporary sector as well as other persons of working age may have recourse to the services of an employment agency, or of a temporary personnel agency, protected by the intervener's trade mark.

58 The Court considers, taking account of all the above matters, and specifically, of the definitions cited by the Board of Appeal and the Cancellation Division of the meaning, in English, of the word 'manpower', that the Board of Appeal correctly concluded that that word was descriptive, in the United Kingdom and Ireland, of the services of an employment agency or a temporary personnel agency.

59 The English word 'manpower' actually has a sufficiently direct and specific relationship with the services in question to enable the relevant public in the United Kingdom and Ireland immediately to perceive, without further thought, a description of those services, as required under the case-law cited in paragraph 48 above.

60 None of the intervener's arguments can cast doubt on those findings.

61 As regards, first, the contention that the services in question are described in English by the words 'employment', 'recruitment', 'placement' or 'staffing', that contention cannot put in question the direct and specific link between the word 'manpower' and those very services, it being understood that, in English, it is usual to have various synonyms to designate the same semantic content.

62 Secondly, the intervener asserts that it is neither current nor natural, in English, to designate the services in question by the word 'manpower' and that, moreover, none of the definitions mentioned in the contested decision gives the word 'manpower' as corresponding to staff recruitment services. It must be held that even if the word 'manpower' meaning 'work-force' is not the most usual term in English to designate employment agency services or temporary personnel services, it may, none the less,

always be regarded as descriptive of those services, in the light of its direct relationship with them.

63 In that regard, the definitions referred to in the contested decision allow it to be concluded that 'manpower' has a meaning sufficiently close to the services in question, so that the relevant public in the United Kingdom and Ireland will establish immediately, without further thought, a direct and specific connection between the word and the services in question. It follows that that word may serve, in normal usage from the point of view of the target public, to designate those services. Moreover, in paragraph 14 of the contested decision, the Board of Appeal added actual examples of the use of the word 'manpower' in its descriptive sense, in business English. In any event, the question whether the word 'manpower' is actually used for such descriptive purposes is irrelevant, given that it is sufficient if it might be used for such purposes (see, to that effect, Joined Cases T-367/02 to T-369/02 *Wieland-Werke* v *OHIM (SnTEM, SnPUR, SnMIX)* [2005] ECR II-47, paragraph 40 and the case-law cited).

64 The evidence upon which the intervener relies to support its argument that the word 'manpower' is not habitually used in English to designate the services in question can at most lead to the conclusion that words other than 'manpower' are also used to designate those services. For Article 7(1)(c) of Regulation No 40/94 to apply to the intervener's trade mark, as a ground for refusing registration, it is irrelevant whether or not there are synonyms which also enable the designation of the goods and services in question (see, by analogy, *SnTEM, SnPUR, SnMIX*, cited in paragraph 63 above, paragraph 41).

65 Finally, the intervener's argument that it is unlikely that the trade mark MANPOWER would be used by third parties in connection with their own commercial activities (see paragraph 37 above) is irrelevant as regards the examination of whether the word 'manpower' is or is not descriptive, and consequently, it must also be rejected.

66 As regards the other goods and services covered by the intervener's trade mark, the Court holds, in respect of the United Kingdom and Ireland, that the Board of Appeal correctly stated that the word 'manpower' was also descriptive of most of the goods and services protected by the intervener's trade mark in Classes 9, 16, 41 and 42.

67 It should first be noted in that regard that, as the Board of Appeal pointed out, 'manpower' may be understood as indicating the content of those goods and services when used in connection with the services of a recruitment agency. In that context, the relevant public — which, for those goods and services, is the same, moreover, as that defined in paragraph 57 above — would therefore see in the intervener's trade mark a direct and specific reference to those goods and services.

68 Secondly, in so far as those goods and services include goods and services which are unrelated to recruitment services or temporary placement services, it should be observed that the intervener registered the word 'manpower' for each group of goods and services as a whole. It must be concluded, therefore, that the Board of Appeal did not make an error in finding that the intervener's trade mark was descriptive in the United Kingdom and in Ireland for all the goods and services protected by that mark (see, to that effect, Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraph 35, and the case-law cited).

69 It is appropriate, second, to determine whether that mark is descriptive also in one or more of the other Member States of the Union.

70 In that regard, the Cancellation Division and the Board of Appeal took different approaches. The Cancellation Division had found that the word 'manpower' was descriptive only in the United Kingdom and Ireland and not in the other countries of

the Union (paragraphs 9 and 10 the Cancellation Division's decision). In its view, the word in question, as a term existing only in English, was not regarded as a descriptive word outside those two English-speaking countries, given that the relevant consumers in the non-English-speaking countries would use words in their own language to refer to the concepts of work-force and labour-force. The Cancellation Division added that, besides, the word 'manpower' is not, in English, the most usual expression to refer to the services of a recruitment agency or a temporary staff agency. Accordingly, in the view of the Cancellation Division, the relevant consumers in the non-English-speaking countries would regard that word as being a fanciful or suggestive term that can serve as an indication of the origin of the goods and services protected by the intervener's trade mark.

71 The Board of Appeal, on the other hand, decided that the intervener's trade mark was descriptive not only in the United Kingdom and Ireland but also in the German-speaking countries, that is to say, in Germany and Austria, where the word 'manpower' has 'entered into German business language' (paragraphs 15 and 16 of the contested decision), and in the countries of the Union where English is well established, namely — according to the Board of Appeal — the Netherlands, Sweden, Denmark and Finland (paragraph 16 of the contested decision).

72 Before the Court, the parties to the present dispute disagreed as regards the geographical area over which the relevant public might perceive the word 'manpower' as descriptive.

73 It should be noted that, in accordance with the case-law cited in paragraph 47 above, in order to ascertain whether the intervener's trade mark is descriptive of the goods and services in question in the non-English-speaking Member States, it must be determined whether, in those States, it can serve in normal usage, from the point of view of the target public, to designate — either directly or by reference to one of their essential characteristics — the goods or services protected by the intervener's trade mark.

74 That test can produce a positive answer in two possible situations.

75 The first possible situation would be where the English word 'manpower' has been received into the language of the country in question and can be used to replace whatever word or phrase in that language means 'work-force' or 'labour', at the very least so far as the relevant public is concerned. In fact, in such a situation, members of that public, confronted in their national linguistic context with the word 'manpower', would perceive it at once as a reference to the 'work-force' or to 'labour'.

76 The second possible situation would be where, in the context of the goods and services protected by the intervener's trade mark, English is used — albeit only as an alternative to the national language — to address the members of the relevant public. In such a situation, obviously, the term 'manpower', which is an English word, would be perceived as descriptive of those goods and services. However, the sole fact of a widespread knowledge of English, on the part of the relevant public or a significant section thereof, is not sufficient if English is not actually used in that context to address that public.

77 As regards the question whether the situation in one or more of the non-English-speaking Member States of the Union corresponds to one of the possible situations described in paragraphs 75 and 76 above, it should first be noted that the Board of Appeal stated in paragraph 15 of the contested decision that the word 'manpower', as a commonly-used expression in business English, had also 'entered into German business language'.

78 The intervener contends that the sole fact that the word 'manpower' appears in a single German dictionary does not mean that it is in general use and generally understood by the German-speaking population or that it is known by a significant section

of that population. It must be held in that regard that the Board of Appeal did not base its finding on the sole fact that the word 'manpower' appeared in the 'widespread "Duden" dictionary', but also on the fact that the word was mentioned in a list of 'superfluous' German words, and that it was used by the Students Board of the Bamberg Business School in Germany, as well as in a research project undertaken at the Technical University (TU) of Vienna (Austria) (paragraph 15 of the contested decision).

79 The above considerations, taken as a whole, lead to the conclusion that the Board of Appeal was right to find that the word 'manpower' was also descriptive in German, hence in Germany and Austria. As stated in the contested decision, that term is, according to the Duden dictionary, the equivalent of the term 'Arbeitskraft'. The relevant German-speaking consumers would therefore establish immediately, without further thought, a specific and direct connection between the word and employment agency services or temporary personnel services. All the more so when, as is clear from the introduction to the above list of superfluous German words, the word 'manpower' is a fashionable word in the German-speaking linguistic frame of reference.

80 As regards the goods and services in Classes 9, 16, 41 and 42 protected by the intervener's trade mark, the Court considers that the same reasoning as that adopted in paragraphs 66 to 68 above is valid in respect of Germany and Austria.

81 It is appropriate, next, to examine whether the intervener's trade mark can be regarded as descriptive in one or more of the other non-English-speaking Member States of the Community.

82 In that regard, the Board of Appeal stated in paragraph 16 of the contested decision that the intervener's trade mark was also descriptive in the Member States where a

'substantial' proportion of the clients have 'sufficient knowledge of and practice in business English', that is to say — according to the Board of Appeal — in the Netherlands, Sweden, Denmark and Finland.

83 The Board of Appeal based its analysis, first, on its 'experience', according to which such knowledge and use of English were to be found particularly in the abovementioned countries. Secondly, it stated that English was the world's common business language and also the official working language of many international companies. Thirdly, it declared that, particularly in smaller countries, business students are often confronted with English texts throughout their studies and that, after their university studies, they go to work in human resource departments or in other positions in companies responsible for employing temporary staff. Lastly, the Board of Appeal referred to 'much evidence' in support of its findings on that point (paragraphs 16 and 17 of the contested decision).

84 The Court considers that the above analysis by the Board of Appeal is erroneous.

85 It should be pointed out first in that regard that the relevant public consists of the entire population as defined in paragraph 57 above, and not only or 'principally' of employers who are seeking staff (in particular, their human resources departments) as taken into account by the Board of Appeal in its analysis in paragraph 16 of the contested decision.

86 As regards the question whether the trade mark can serve, in normal usage from the point of view of the target public, to designate the goods or services in question, it should be noted that such 'normal usage' may, obviously, differ according to whether

it is the way in which the language is used among themselves by specialists in the field of human resources, or the way in which the same language is ordinarily used by persons seeking employment, particularly temporary employment, and by other persons of working age who are not specialised in human resources.

87 It should be pointed out, secondly, that the Board of Appeal did not hold that, in Sweden, Denmark, Finland or the Netherlands, the word 'manpower' had been received into the language of the country for the purposes of the criteria referred to in paragraph 75 above.

88 Consequently, it falls only to determine whether the situation in those countries can be likened to the situation described in paragraph 76 above.

89 The Court considers that that is not the case. Apart from the fact, stated above, that the Board of Appeal did not take into consideration the entire relevant public, it has also failed to show that, in the context of the goods and services protected by the intervener's trade mark, English was used — albeit only as an alternative to the national language — to address the members of the public which it took into consideration.

90 Accordingly, it must be concluded that the Board of Appeal made an error of assessment in finding that, in the Netherlands, Sweden, Denmark and Finland, the intervener's trade mark was descriptive of the goods and services in question.

91 On the other hand, as regards the remaining non-English-speaking Member States of the Community, the Board of Appeal correctly held that the intervener's trade mark was not descriptive there.

92 In that regard, none of the allegations put forward by the applicant can undermine those conclusions. First, the statistics concerning the percentage of the Community's inhabitants who speak English or German obviously cannot show that English is used — albeit only as an alternative to the national language — to address the members of the relevant public in those countries in the context of the goods and services protected by the intervener's trade mark.

93 Secondly, as regards the applicant's allegation that many workers returning from English-speaking and German-speaking Member States to their countries of origin bring back the vocabulary they have acquired, and that tourism by English and German citizens generates linguistic exchange, it must be held that those assertions are far too vague to establish that the word 'manpower' has been received into the language of one of the European countries not taken into consideration by the Board of Appeal in its analysis.

94 It follows that, in accordance with Article 63(3) of Regulation No 40/94, the contested decision must be altered to the effect that the intervener's trade mark is not descriptive, in the Netherlands, Sweden, Denmark or Finland, of the goods and services for which it was registered. Consequently, to that extent, the intervener's independent application must be upheld.

95 The remainder of the intervener's independent application is not well founded.

96 In addition, in the light of the foregoing, the applicant's first plea in law must be rejected as unfounded in so far as it alleges breach of Article 7(1)(c) of Regulation No 40/94.

The second plea in law, alleging breach of Articles 51(2) and 74(1) of Regulation No 40/94 concerning the use of the intervener's trade mark in the United Kingdom, Ireland, Germany and Austria

Arguments of the parties

97 As regards, first, breach of Article 51(2) of Regulation No 40/94, the applicant submits that that provision refers to Article 7(1)(b) to (d) of that regulation and does not apply to initial defects affecting the assessment under Article 7(3) of that regulation. Accordingly, the initial defect of registration could not have been remedied. Even if Article 51(2) of Regulation No 40/94 applied, the contested decision would, in the applicant's submission, be wrong. The applicant argues that it was by taking as its basis the wrong public — because too narrowly construed — that the Board of Appeal reached the conclusion that the trade mark MANPOWER, registered initially in breach of Article 7(1)(c) of that regulation, had subsequently acquired distinctive character. The applicant submits that it is for that reason that the Board of Appeal went on to assess inaccurately the reputation required for distinctive character under Article 51(2) of Regulation No 40/94.

98 In the applicant's submission, since Article 51(2) of Regulation No 40/94 does not apply to the situations covered by Article 7(3) of that regulation, the relevant date for the assessment of distinctive character is the date of filing the application for registration of the trade mark. At that date, according to the applicant, the sign MANPOWER had no reputation. The applicant argues that, even if Article 51(2) of Regulation No 40/94 did apply, OHIM could not take into account as the relevant date for determining whether distinctive character had been acquired 'any date after the registration of the trade mark'. In the applicant's submission, the relevant date is that of the decision on the application for a declaration of invalidity.

99 The applicant maintains that, even if the intervener's trade mark was widely known, its priority should have been 'corrected' to the date of the determination as to whether it had acquired distinctive character through use. The applicant argues that the effects of subsequently-acquired distinctive character and its consequences on priority have not yet been the subject of a decision in Community law. The applicant refers to the solution adopted on that point of law in Germany. It maintains that according to that solution, subsequently-acquired distinctive character is not applicable retrospectively to the date of the application for registration of the trade mark in question, thus guaranteeing the existence of more recent marks created after the date of the application for registration of the earlier trade mark, but before the latter mark was widely known.

100 The applicant maintains that Article 51(2) of Regulation No 40/94 refers tacitly to Article 7(2) of that regulation, so that registration is precluded where the grounds for refusal obtain in only part of the Community. In the applicant's submission, a single Member State represents such a part of the Community.

101 The applicant submits, secondly, that under both Article 7(3) and Article 51(2) of Regulation No 40/94, distinctive character and therefore reputation must exist throughout the Community.

102 The applicant maintains that the Board of Appeal did not take account of the fact that the acquisition, by the intervener's trade mark, of eligibility for registration by reason of its use required that at least a significant proportion of the public identify the word 'manpower' as referring to the intervener and to its goods and services and not only that consumers make no association with the word 'manpower'. Indeed, all substantial sections of the public concerned in the relevant territory must, in the applicant's submission, identify the goods and services in question as emanating from the intervener. That has not been proved.

103 Consequently, in the applicant's submission, the Board of Appeal did not comply with the mandatory requirements for the acquisition of distinctive character through use for the purposes of Article 7(3) of Regulation No 40/94 and the combined provisions of Article 51(2) and Article 7(1)(c) of that regulation, which are narrower than those of Article 7(1)(b) thereof.

104 The applicant maintains, thirdly, that the public concerned must be determined by reference to the nature of the goods and services. It argues that recruitment agency and temporary staff services are everyday services and that the average consumer in question will apply only a rather low level of attention to the signs and trade marks relating to them. Very strong market penetration is therefore necessary, in its submission, for consumers to understand the word 'manpower' as a trade mark. That word does not overcome the 'obstacle to registration' constituted by Article 7(1)(b) and (c) of Regulation No 40/94.

105 The applicant disputes, fourthly, that it is possible to extend the reputation of certain goods and services to others (paragraph 34 of the contested decision). It submits that, in accordance with Article 51(3) of Regulation No 40/94, the invalidity of a trade mark which is not distinctive or which is descriptive should be declared, at least for the goods and services for which reputation has not been proved.

106 The applicant maintains that, since the intervener attempted to prove distinctive character based on the reputation of its trade mark only for temporary personnel services, even if the Court were to decide that the trade mark had acquired distinctive character for those services, it would have to uphold the application for a declaration of invalidity in respect of the other goods and services covered by the mark, for the use of which the intervener has produced no evidence.

107 The applicant argues, fifthly, that, in breach of Article 74(1) of Regulation No 40/94, OHIM did not require from the intervener sufficient proof of the reputation of its trade mark throughout the Community and gave an incorrect ruling on the basis of insufficient documentary evidence.

108 In that regard, it submits that the Board of Appeal did not respect the requisite conditions for the acquisition of distinctive character set out by the Court of Justice in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, by taking account, in paragraph 27 of the contested decision, only of turnover and advertising in newspapers and telephone directories (Case T-402/02 *Storck* v *OHIM* (Shape of a sweet wrapper) [2004] ECR II-3849, paragraph 82 et seq.).

109 In the applicant's submission, the Board of Appeal decided, in the absence of any proof or detailed assessment, that it was very probable that the Community trade mark proprietor's position in the United Kingdom — which was questionable anyway — was in future going to extend to Ireland. The argument that reputation can extend from one State to another and that 'a strong reputation in a larger neighbouring State' is sufficient to bestow distinctive character in other States (the applicant refers to paragraphs 32 and 33 of the contested decision) reduces the question of reputation in a substantial part of the Community to absurdity. The applicant maintains that, in such a case, if evidence of reputation were adduced for a single Member State, that reputation could be assumed to exist also in the neighbouring States. That would also have repercussions as regards Article 8(5) of Regulation No 40/94. The assumption of an 'extension' of reputation is therefore unacceptable. The same applies to the assumption that reputation can be inferred from an application for a national trade mark without proof of reputation (paragraph 33 of the contested decision).

110 The applicant argues that the fact that the Board of Appeal also acted in breach of the rule referred to above by taking account of advertising in a single country only, by then deciding that it was sufficient that the intervener's trade mark be used on

an international scale for its reputation to be recognised and that it was always appropriate to base the decision on the mother tongue (the applicant refers to paragraph 32 of the contested decision). To found on the international use of a Community trade mark as regards reputation within the Community is unacceptable circular reasoning. The 'mother-tongue' argument is contradicted in paragraph 16 of the contested decision, in any case for Finland. The applicant maintains that it is held in that paragraph that, in Sweden, Denmark and Finland, the word 'manpower' is purely descriptive and without distinctive character.

111 For the United Kingdom, the applicant submits, the Board of Appeal did not assess what percentage of the public concerned would understand the intervener's trade mark as distinguishing its goods and services. In the applicant's submission, OHIM should have asked for objective opinions from chambers of commerce and industry, and trade and professional associations, and it should have relied on consumer surveys.

112 So far as concerns Germany, the applicant argues that, whereas the Board of Appeal refers to a survey showing that 54% of persons working in the human resources sector were familiar with the MANPOWER trade mark and finds that that survey was representative of the public concerned, that is contradicted by paragraph 16 of the contested decision. There the question is of 'relevant consumers, namely possible employers of temporary staff and people in charge of such employment', which is considerably wider than 'people working in human resource departments' (paragraph 28 of the contested decision). The applicant maintains that the Board of Appeal did not take account of the fact that the public concerned also included, in any event, temporary staff, perhaps even all workers, employers and persons in training as persons potentially in search of employment. In addition, the Board of Appeal wrongly made a connection between the 54% of persons questioned who knew the 'trade mark' and the 70% who knew the descriptive word 'manpower' (paragraph 28 of the contested decision). According to the applicant, those percentages do not relate to the same group of persons questioned and cannot therefore be compared.

113 OHIM submits, first, that under Article 51(2) of Regulation No 40/94, which should be applied to the present case, a Community trade mark registered in breach of Article 7(1)(b), (c) or (d) of that regulation may not be declared invalid if it has acquired a distinctive character in consequence of the use made of it. It is clear from all the language versions, save the German, that such 'implantation' may also take place after registration.

114 OHIM argues, secondly, that as regards the relevant territory, it is established that the trade mark needs to have acquired distinctive character through use only in the territory where the ground for refusal existed. Following the same logic, distinctive character acquired through use need be proved, in OHIM's submission, only for the goods and services in respect of which the relevant absolute ground for refusal is operative. OHIM contends that the Board of Appeal examined abundant evidence relating to the use of the intervener's trade mark and that it correctly arrived at the conclusion that that trade mark had acquired distinctive character through use in the countries in question.

115 OHIM contends, thirdly, that the Board of Appeal assessed the implantation of the intervener's trade mark on the basis of a detailed examination of the evidence. A re-examination of that evidence is not necessary, given that the Board of Appeal referred to it repeatedly in the contested decision.

116 In OHIM's submission, as regards the United Kingdom, there can be no doubt as to the implantation of the intervener's trade mark, in view of the intervener's turnover, the number of its branches (292 offices in 2000) and the innumerable press reports. In the light of that evidence, it was unnecessary to produce other documents or independent opinions from chambers of commerce.

117 OHIM contends that the situation is also clear in Germany, in view of the number of the intervener's branches (126 in 1999), its annual turnover and the press articles

produced. It notes the consumer survey from which it emerges that 54% of the relevant consumers are aware of the trade mark. OHIM disputes the applicant's allegation that those figures are too low. It argues that the Board of Appeal undertook, correctly, a differentiated examination of the evidence, taking account of the nature of the goods and services as well as of the specific market, when it compared the figures cited with the number of consumers likely to perceive the English word 'manpower' as descriptive. OHIM contends that the evidence produced for Austria demonstrates the implantation of the intervener's trade mark also in that State.

118 The intervener contends, in essence, first, as regards the relevant date for determining the acquisition of distinctive character through use, that the Board of Appeal based itself correctly on the wording of Article 51(2) of Regulation No 40/94, and that distinctive character acquired through use applies 'back' to the date of the application for a Community trade mark (priority date) and not to the date on which it acquired distinctive character ('corrected' priority date). The rule as to a 'corrected' priority date is not, in the intervener's submission, compatible with the wording of Regulation No 40/94, which contains nothing to support it.

119 The intervener contends, secondly, that it submitted to OHIM a great deal of evidence illustrating its long-standing and intensive use of the trade mark in question in the Community, as well as its position as global market leader in the field of temporary employment agency services. Overall, that evidence provides a clear picture of the prominence and reputation of the MANPOWER trade mark in the areas of temporary employment and staff recruitment in the Community.

120 The intervener argues, thirdly, that the evidence it submitted covers all the relevant countries and provides a basis, where necessary, for concluding that its trade mark has acquired distinctive character in respect of consumers in the United Kingdom,

Ireland, France, Germany, Italy, Spain, Portugal, Austria, the Netherlands, Belgium, Luxembourg, Denmark, Sweden, Finland and Greece.

121 In that regard, it asserts that the mass of evidence produced also included samples of materials used in the Community for the diffusion of its Community trade mark though various media, namely, brochures, leaflets, marketing and advertising materials, as well as promotional gifts distributed to customers and corporate stationery. The intervener contends that such evidence, classified by country, contains representative, quantitative data on the distribution of its marketing and advertising materials and on its expenditure in that respect.

122 Fourthly, the intervener states that, during the examination phase, it was not required by the examiner to produce evidence of the acquisition of distinctive character other than in respect of the United Kingdom and Ireland. It volunteered, also, evidence concerning Germany. Evidence relating to the other countries of the Community was submitted only during the invalidity proceedings. There is no reason, therefore, to state that, because at the examination stage evidence had been submitted only for certain countries, the Community trade mark had not already acquired distinctive character through use in other countries. Furthermore, owing to the nature of the evidence in this type of case, it is always difficult to establish the position which a trade mark occupied in the market place several years earlier.

Findings of the Court

123 First, it must be held that, in the light of the alteration of the contested decision, the second plea in the law has become irrelevant in so far as it relates to the use of

the intervener's trade mark in the Netherlands, Sweden, Denmark and Finland. That plea in law therefore remains to be considered only in so far as it relates to the use of that trade mark in the United Kingdom, Ireland, Germany and Austria.

124 Secondly, the applicant's complaint alleging breach of Article 74(1) of Regulation No 40/94 must also be rejected. The applicant maintains, in essence, first, that the Board of Appeal could not, on the basis of the evidence provided by the intervener, establish the use, for the purposes of Article 51(2) of Regulation No 40/94, of the intervener's trade mark, in the eight countries in which, in the Board of Appeal's view, it is descriptive and, secondly, that, in view of the insufficiency of that evidence, the Board of Appeal should, under Article 74(1) of Regulation No 40/94, have required the intervener to produce additional evidence of the use of its trade mark. Suffice it to say that, if the first complaint, alleging breach of Article 51(2) of Regulation No 40/94 is well founded, that is sufficient to entail the annulment of the contested decision. Moreover, OHIM's alleged failure, assuming it to be so, to call on the intervener, under Article 74(1) of Regulation No 40/94, to provide additional evidence of the use of its trade mark, does not disadvantage the applicant, which therefore has no interest in raising it.

125 Thirdly, it is necessary to examine the applicant's argument that, in essence, it is not permissible under Article 51(2) of Regulation No 40/94, for the purposes of dismissing an application for a declaration that a trade mark is invalid, to take into account the possible distinctive character of that trade mark, acquired through use after registration.

126 That argument cannot be accepted. First, the applicant cannot usefully rely solely on the German version of Article 51(2) of Regulation No 40/94 in support of its line of reasoning. It is settled case-law that the need for a uniform interpretation of Community law means that, in cases of doubt, a particular provision must not be considered in isolation but must be interpreted and applied in the light of the other official languages (Case T-11/02 *Pappas* v *Commission* [2004] ECR-SC I-A-381

and II-1773, paragraph 34 and the case-law cited; and the order of the Court of First Instance of 11 December 2006 in Case T-392/05 *MMT* v *Commission*, paragraph 30). Most of the language versions of Article 51(2) of Regulation No 40/94, other than the German version, refer expressly to the use 'after registration' of the trade mark in respect of which a declaration of invalidity is sought.

127 Secondly, if that provision had to be understood as not covering the use, after registration, of the trade mark at issue in invalidity proceedings, it would be superfluous and meaningless. Indeed, pursuant to Article 7(3) of Regulation No 40/94, a descriptive sign which, by reason of the use made of it prior to the filing of the application for its registration as a Community trade mark, has acquired distinctive character for the goods or services covered by that application, is to be registered. A trade mark thus registered cannot be declared invalid under Article 51(1)(a) of Regulation No 40/94 since it is not a trade mark 'registered in breach of the provisions of Article 7'. Article 51(2) of Regulation No 40/94 is therefore wholly irrelevant to that situation. It follows that the latter provision covers only trade marks whose registration contravened the grounds for refusal in Article 7(1)(b) to (d) of Regulation No 40/94 and which, in the absence of such a provision, would have had to be declared invalid pursuant to Article 51(1) of Regulation No 40/94. The precise purpose of Article 51(2) of Regulation No 40/94 is to maintain the registration of such of those marks which, because of the use which made of them, have in the meantime — that is to say, after their registration — acquired distinctive character for the goods or services for which they were registered, in spite of the fact that, when it took place, such registration was contrary to Article 7 of Regulation No 40/94.

128 As regards the applicant's arguments relating to the priority of the intervener's trade mark, the contested decision did not determine any priority date for that mark. The issue relating to its priority is irrelevant in the context of the examination of an application for a declaration of its invalidity owing to the existence, in its case, of an absolute ground for refusal. Even if it is accepted that the priority of that trade mark can relate back only to a date subsequent to the filing of the application which

led to its registration, that fact alone is not sufficient to entail its invalidity. Indeed, the question of the priority which should be accorded to the intervener's trade mark becomes relevant only if that mark is relied upon in support of opposition proceedings against another trade mark (see Article 8(2)(a) and (b) of Regulation No 40/94). In the present case, there are no such proceedings.

129 Finally, as regards the applicant's arguments that the use of the intervener's trade mark, after its registration, was not proved in respect of the United Kingdom, Ireland, Germany or Austria, it should be borne in mind first that, according to the case-law on Article 7(3) of Regulation No 40/94, which is applicable also to distinctive character acquired through use under Article 51(2) of that regulation, the acquisition by a trade mark of distinctive character through use requires that, because of that mark, at least a significant proportion of the relevant public identifies the products or services concerned as originating from a particular undertaking (see the judgment of the Court of First Instance of 6 March 2007 in Case T-230/05 *Golf USA* v *OHIM (GOLF USA)*, paragraph 79 and the case-law cited).

130 In order to determine whether a mark has acquired distinctive character through use, the competent authority must assess globally the evidence which can show that the trade mark has become apt to identify the goods or services concerned as originating from a particular undertaking and therefore to distinguish those goods and services from those of other undertakings. In that regard, account must be taken, in particular, of: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons which, because of the mark, identifies the goods concerned as originating from a particular undertaking; statements from chambers of commerce and industry or other trade and professional associations as well as consumer surveys (see *GOLF USA*, cited in paragraph 129 above, paragraph 79 and the case-law cited).

131 The circumstances in which the condition as to the acquisition of distinctive character through use may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data, such as specific percentages (see Case T-141/06 *Glaverbel* v *OHIM* (Texture of a glass surface), not published in the ECR, paragraph 32 and the case-law cited).

132 Furthermore, the distinctive character of a mark, including distinctive character acquired through use, must also be assessed in relation to the goods or services in respect of which registration is applied for and in the light of the presumed perception of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (see Case T-237/01 *Alcon* v *OHIM* — Dr Robert Winzer Pharma (BSS) [2003] ECR II-411, paragraph 51, and the case-law cited).

133 It is to be noted, secondly, that, in the present case, the Board of Appeal found, inter alia, that the intervener had produced ample evidence showing the use of its trade mark in most of the countries of the European Union. In its view, the evidence was sufficient to show distinctive character acquired by that trade mark in the relevant territory at the date of filing of the application for a declaration of invalidity. Moreover, according to the Board of Appeal, some of the evidence post-dating the date of the application, but relating to the period before that date, allows conclusions to be drawn concerning distinctive character within the relevant time frame. In addition, the Board of Appeal took into consideration the fact that the intervener was an enterprise which operates worldwide.

134 As regards, specifically, the United Kingdom, the Board of Appeal stated in paragraph 26 of the contested decision that the intervener had submitted evidence showing significant annual turnovers steadily from 1990 to 1999; the number of branches, which grew from 162 in 1991 to 292 in 2000; figures on advertising expenses; the market share of 9% in 2000; sponsorship documents and innumerable press cuttings, many published around the date when the application for a declaration of invalidity had been filed. In the Board of Appeal's view, that evidence is more

than sufficient to support the conclusion that the trade mark is recognised in the United Kingdom not only as a descriptive word, but also as a trade mark for temporary employment services.

135 Having regard to all the evidence and in the light of the contents of the case-file, the Court considers that the Board of Appeal was correct in holding it to be established that the intervener's trade mark had acquired distinctive character in the United Kingdom through use.

136 The high number of the intervener's branches is, in particular, to be noted. That factor, taken into consideration with the nature of the goods and services offered by the intervener, is ground for considering that the intervener's undertaking was highly visible on the market in question. To that should be added the turnover, the high market share, the innumerable press cuttings, as well as the other evidence cited by the Board of Appeal, which sufficiently indicate the strong position of the intervener's trade mark in the United Kingdom.

137 That evidence is sufficient, overall — without the need, asserted by the applicant, to ask for opinions from chambers of commerce and industry, or other trade and professional associations, or to refer to consumer surveys — to show that, because of the intervener's trade mark, a significant proportion of the relevant public in the United Kingdom would identify the goods or services concerned as originating from one of the intervener's undertakings. It demonstrates the intensity, the long-standing nature and the broad geographical coverage of the use of the intervener's trade mark in the United Kingdom.

138 As regards Ireland, the Board of Appeal found in paragraph 27 of the contested decision that the intervener's trade mark had been used in that country as a trade

mark in the field of personnel recruitment for more than 25 years and that, in 1993, the intervener's business already generated a considerable turnover of 'more than GBP 897 000 which grew to more than GBP 1 million in 1995'. In addition, the Board of Appeal held that the intervener's trade mark had been promoted by advertisements in newspapers and telephone directories. In the Board of Appeal's view, it could not be disregarded that it was very likely that the reputation of the intervener's trade mark in the United Kingdom would also partially spill over to Ireland.

139 The Court considers, in the light of the case-file, that the long-standing use of the trade mark in Ireland and the turnover, as well as the evidence drawn from the advertisements in newspapers and telephone directories, enable it to be concluded that the Board of Appeal did not make an error of assessment in finding that the intervener's trade mark had acquired distinctive character in Ireland. It is appropriate to add that, in the circumstances of this case, the Board of Appeal cannot be accused of not taking into consideration all the matters mentioned in *Windsurfing Chiemsee*, cited in paragraph 108 above, paragraph 51.

140 As regards Germany and Austria, it must be held that the Board of Appeal was correct in holding that the intervener's trade mark had acquired distinctive character through use in those two countries. First, the Board of Appeal found, correctly, that the high number of the intervener's branches in Germany, its turnover in that country, the number of its client undertakings, including multinationals, the frequent appearance of the intervener's trade mark in various newspapers, some national, the various advertisements submitted, as well as the volume of marketing expenses and the geographic extent of the use of that trade mark led to the conclusion that it had acquired distinctive character through use in Germany.

141 Secondly, as regards Austria, the evidence on which the Board of Appeal based its decision also demonstrates, overall, the intensive and long-standing use of the intervener's trade mark, as well as its geographically varied nature and its frequent, regular appearance in advertising and, in consequence, enables it to be concluded that the

intervener's trade mark had acquired distinctive character in Austria, if it had to be regarded also as descriptive in that country.

142 The findings set out above, according to which the intervener's trade mark acquired distinctive character through use in the four countries referred to above, cannot be invalidated by the applicant's allegations that distinctive character acquired through use had not been demonstrated for the goods and services in Classes 9, 16, 41 and 42 protected by the intervener's trade mark.

143 In fact, as regards the distinctive character of the intervener's trade mark acquired through use for the other goods and services in question in Classes 9, 16, 41 and 42, the Board of Appeal stated, inter alia, in paragraph 34 of the contested decision that the intervener used many of those goods and services in connection with the provision of temporary staff and that, since the word 'manpower' had a secondary meaning for temporary employment services, the relevant consumers would regard, for example, a book or a conference with that name as referring to the intervener and its services.

144 The Court considers that the Board of Appeal was correct in concluding that the distinctive character acquired by the intervener's trade mark for the services in Class 35 had to extend to the goods and services protected by the trade mark, in the other classes.

145 Indeed, as is clear from paragraph 12 of the contested decision, the intervener's trade mark is descriptive only in relation to some of the goods and services in Classes 9, 16, 41 and 42. The word 'manpower' is likely to be understood as indicating the content

only of such of those goods and services as are used in connection with the services of an employment agency, and the consumer making the connection between the goods and services in Classes 9, 16, 41 and 42 and the services of an employment or temporary personnel agency could understand the intervener's trade mark as indicating that those goods and services originated with the intervener.

146 As regards the fact that the Board of Appeal took into account the wrong date as the decisive date for the determination as to whether distinctive character had been acquired through use, it must be held that, contrary to the applicant's assertions, the Board of Appeal took properly into account the date of filing of the application for a declaration of invalidity as the relevant date, in the light of which it had to be determined whether distinctive character had been acquired through use (paragraphs 22 and 25 of the contested decision). It therefore acted in accordance with the case-law, according to which the actual date which must be taken into account in the analysis of distinctive character acquired through use after registration is that of the application for the declaration of invalidity (see, to that effect, *BSS*, cited in paragraph 132 above, paragraph 53). Moreover, the Board of Appeal could, without inconsistency in its reasoning or error of law, take account of material which, even though it postdated the date of the application, enabled conclusions to be drawn regarding the situation as it was on that date (see, by analogy, Case C-192/03 P *Alcon* v *OHIM* [2004] ECR I-8993, paragraph 41).

147 It is clear from all the foregoing that the Board of Appeal made no error of assessment in holding that the intervener's trade mark had acquired distinctive character through use in the United Kingdom, Ireland, Germany and Austria. The applicant's second plea in law must therefore be rejected as unfounded in its entirety.

148 For all the foregoing reasons (see paragraphs 94 to 96 and 147 above), the action must be dismissed.

Costs

149 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 in accordance with the forms of order sought by OHIM and the intervener.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Alters the Decision of the Fourth Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 22 July 2005 in Case R 499/2004-4 relating to an application for a declaration that Community trade mark No 76059, MANPOWER, is invalid, to the effect that that trade mark is not descriptive, in the Netherlands, Sweden, Finland or Denmark, of the goods and services for which it was registered. The operative part of that decision is maintained.**

2. Dismisses, as to the remainder, the application by Manpower Inc. seeking alteration of the above decision of the Board of Appeal of OHIM.

3. Dismisses the action.

4. Orders Powerserv Personalservice GmbH to pay the costs.

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 15 October 2008.

Registrar President

E. Coulon M. Vilaras