JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 April 2011 *

In Case T-28/10,

Euro-Information — Européenne de traitement de l'information, established in Strasbourg (France), represented by A. Grolée, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 11 November 2009 (Case R 635/2009-2), relating to an application for the registration of the word sign EURO AUTOMATIC PAYMENT as a Community trade mark,

* Language of the case: French.

THE GENERAL COURT (Fourth Chamber),

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

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 26 January 2010,

having regard to the response lodged at the Court Registry on 16 April 2010,

having regard to the reply lodged at the Court Registry on 28 June 2010,

having regard to the fact that no application for a hearing to be fixed was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to give a ruling without an oral procedure, pursuant to Article 135a of the Rules of Procedure of the General Court,

gives the following

Judgment

Background to the dispute

1 On 18 July 2008, the applicant, Euro-Information — Européenne de traitement de l'information, filed an application for registration of a Community trade mark at the Office for Harmonisation 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 (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

2 The mark in respect of which registration was sought is the word sign EURO AUTOMATIC PAYMENT.

3 The goods and services in respect of which registration was sought are in Classes 9, 35 to 38, 42 and 45 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.

4 By decision of 6 April 2009, the examiner granted the application for registration for all services in Classes 35, 37, 38, 42 and 45 and for certain goods and services in Classes 9 and 36. On the other hand, registration of the mark was refused for other goods and services in Classes 9 and 36, on the basis of the combined provisions of Article 7(1)(b) and (c) and Article 7(2) of Regulation No 40/94 (now Article 7(1)(b) and (c) and Article 7(2) respectively of Regulation No 207/2009). Those goods and services correspond to the following description for each of those Classes:

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

— Class 36: 'Banking; financial affairs; monetary affairs; credit card services; debit card services; exchange transactions; clearing (exchange); stockbroking; credit; electronic transfer of funds financial transactions; electronic payment services; services for the electronic transfer of assets, funds, capital, shares, currency and any other financial security; online payment services on an electronic communication network; brokerage and transactions on an online electronic communications network'.

5 On 5 June 2009 the applicant lodged an appeal before OHIM against the examiner's decision refusing registration of the trade mark applied for relating to the goods and services of Classes 9 and 36 as described in paragraph 4 above.

6 By decision of 11 November 2009 ('the contested decision'), the Second Board of Appeal of OHIM dismissed the appeal.

7 On the basis of the perception of the trade mark in question by all average and professional English-speaking consumers in the European Community, the Board of Appeal found that the examiner's finding concerning the meaning of the three words constituting the trade mark was correct. The Board of Appeal found, first, that the term 'euro automatic payment' directly designated the intended use of the goods in Class 9 namely, enabling automatic payments in euros, and, secondly, that the term provided direct information on the purpose of the services in Class 36, namely, making or obtaining automatic payments in euros. Therefore the Board of Appeal concluded that the trade mark sought was descriptive within the meaning of Article 7(1)(c) of Regulation No 207/2009.

Forms of order sought

8 The applicant claims that the Court should:

— annul the contested decision;

— register the mark sought in relation to all the goods and services in Classes 9 and 36;

— order OHIM to pay the applicant's costs before OHIM and before the General Court.

9 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility of the second head of claim

10 OHIM raises a preliminary plea of inadmissibility concerning the second head of claim in the application in so far as the Court is asked to direct OHIM to register the mark sought for all the goods and services in question.

11 By the second head of claim, the applicant asks the Court to register the trade mark sought.

12 The application may give rise to two interpretations. On the one hand, it may be understood as asking the Court to order OHIM to carry out the registration of the mark sought. It has consistently been held that, under Article 63(6) of Regulation No 40/94 (now Article 65(6) of Regulation No 207/2009), OHIM is required to take the measures necessary to comply with judgments of the Union Courts. Accordingly, the General Court is not entitled to issue directions to OHIM. It is for the latter to draw the conclusions from the operative part of this judgment and the grounds on which it is based (see Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-164/03 *Ampafrance* v *OHIM - Johnson & Johnson (monBéBé)* [2005] ECR II-1401, paragraph 24; and Case T-35/04 *Athinaiki Oikogeniaki Artopoiia* v *OHIM - Ferrero (FERRÓ)* [2006] ECR II-785, paragraph 15).

13 On the other hand, the applicant's second head of claim may be understood as asking the Court to alter the contested decision within the meaning of Article 65(1) of

Regulation No 207/2009, by adopting the decision which the Board of Appeal ought to have taken, in accordance with the provisions of Regulation No 40/94. The competent bodies of OHIM do not adopt formal decisions recording the registration of a Community trade mark which could be the subject of an appeal. Consequently the Board of Appeal does not have power to take cognisance of an application that it should register a Community trade mark. Nor, in those circumstances, is it for the Court to take cognisance of an application for alteration requesting it to amend the decision of a Board of Appeal to that effect (order in Case T-285/08 *Securvita* v *OHIM (Natur-Aktien-Index)* [2009] ECR II-2171, paragraphs 14 and 17 to 23).

14 The applicant's second head of claim must therefore be dismissed as inadmissible.

Admissibility of the documents produced in Annex 9 to the application

15 OHIM submits that Annex 9 to the application is inadmissible in so far as it contains evidence which was not produced in the course of the procedure before OHIM.

16 The applicant does not deny that the evidence in question is new.

17 In that connection it must be observed that, according to settled case-law, the purpose of the action before the General Court is to review the legality of a decision

of the Boards of Appeal of OHIM within the meaning of Article 65 of Regulation No 207/2009. It is therefore not the Court's function to re-evaluate the factual circumstances in the light of evidence adduced for the first time before it. To admit such evidence is contrary to Article 135(4) of the Rules of Procedure of the General Court, which prohibits the parties from changing the subject-matter of the proceedings before the Board of Appeal (see, to that effect, Case T-128/01 *DaimlerChrysler* v *OHIM (Grille)* [2003] ECR II-701, paragraph 18).

18 In the present case, it is not disputed that the evidence in Annex 9 of the application was produced for the first time before the General Court. Consequently that evidence must be rejected as inadmissible.

Substance

19 In support of its action, the applicant raises two pleas: (i) infringement of Article 7(1)(c) of Regulation No 207/2009 and (ii) infringement of Article 7(1)(b) of the same regulation.

Arguments of the parties

20 With regard to the first plea, the applicant submits that, from the viewpoint of the relevant public, there is no sufficiently direct and specific relationship between, on

the one hand, the contested sign and, on the other, the products and goods for which registration was refused. Therefore the trade mark sought is not descriptive within the meaning of Article 7(1)(c) of Regulation No 207/2009.

21 In the first place, regarding the meaning of the words constituting the sign at issue, the applicant submits that, first, the word 'euro' may be understood as referring to the single European currency and, secondly, that the word 'payment' means 'paiement' in French. Regarding the word 'automatic', which is translated as 'automatique' in French, the applicant submits that it means 'done without conscious thought'. The applicant adds that the word 'automatic' has no banking or financial connotations.

22 In the second place, regarding the meaning of the term 'euro automatic payment' as a whole, the applicant submits that the fact that the words forming it are immediately identifiable does not make the trade mark descriptive. The applicant claims that, although the Board of Appeal did not suggest a meaning for 'euro automatic payment', the meaning appears to be based on that proposed by the examiner, namely 'automatic payment in euros'. That expression, the applicant submits, has no direct, clear and immediately identifiable meaning for the relevant public in relation to the goods in question; 'euro automatic payment' is only a vague concept for consumers because it is at least unusual for a payment to be made automatically, that is to say, without conscious thought.

23 In the third place, the applicant submits that the trade mark sought is not descriptive of the goods in Class 9 for which the application for registration of the mark was refused.

24 First of all, with regard to, 'memory or microprocessor cards; magnetic stripe cards; magnetic stripe or microprocessor identification cards; magnetic stripe or microprocessor payment, credit or debit cards, electronic payment cards' ('cards in Class 9') and, secondly, 'magnetic data carriers; optical data carriers; information processing apparatus; intercommunication apparatus; (IT) interfaces; (IT) readers; (registered program) software; software designed for account management; monitors (computer programs); computers; computer peripheral devices; registered computer programs; registered operating system programs (for computers), central processing units (processors); IT programs and equipment to enable full remote banking, finance company and insurance services, namely computer equipment and appliances, secure payment software for online electronic communication networks; electronic payment apparatus and instruments, namely computer apparatus and instruments, computer equipment for electronic payment, software for electronic payment transactions, electronic payment cards, electric and electronic devices for the management of financial transactions' and 'radiotelephony sets; (audio, video) receivers; telephone apparatus; portable telephones; prepayment devices for television apparatus; time recording apparatus; (telecommunication) transmitters' ('goods belonging to the computing and telecommunications sectors in Class 9'), the applicant submits in essence that the Board of Appeal was not justified in applying general reasoning to the abovementioned goods because certain cards in Class 9 do not permit a payment to be made and certain goods belonging to the data processing and telecommunications sectors in Class 9 cannot incorporate a payment mechanism.

25 Secondly, the applicant claims that, contrary to the statements in the contested decision, transactions carried out by means of 'banknote dispensers', 'counterfeit coin detectors', 'automated banking machines' and 'bar code readers' which are referred to separately in the application for a trade mark cannot be described as payment transactions. Accordingly the applicant submits that the conflicting trade mark is not descriptive of those goods or of any of their characteristics.

26 Third, the applicant claims that, contrary to the statements in the contested decision, the 'statement of account and account summary dispensers' referred to by the application for a trade mark are not inseparably related to 'banknote dispensers' and that, in any case, even if they were, the latter are not, in themselves, as 'statement of account and account summary dispensers', unconnected with payment transactions.

27 Fourth, with regard to 'automated dispensers' and 'ticket dispensers', since the payment made in order to obtain the service offered by those machines is not effected automatically, but voluntarily, the association of the word 'automatic' with the words 'euro' and 'payment' makes the term merely evocative, and not descriptive, with regard to those goods.

28 Fifth, the applicant submits that, by claiming protection for the trade mark applied for separately in relation to each of the products within Class 9, the applicant sought to obtain separate protection for, first, products enabling a payment transaction to be carried out and, secondly, those unconnected with payment transactions.

29 In the fourth place, the applicant submits that the trade mark applied for is not descriptive of the services in Class 36, as shown in paragraph 4 above, for which the trade mark application was refused ('services in Class 36').

30 First, regarding 'stockbroking' services, the applicant alleges that they relate to the profession of intermediaries who act on a stock exchange for trading securities. The applicant submits that the trade mark applied for is not descriptive of the subject-matter of such services or of any of their characteristics. According to the applicant, the same applies to services for 'brokerage on an online electronic communication network'.

31 Secondly, with regard to 'exchange transactions', the applicant disputes the Board of Appeal's finding that they entail the making of a payment. Therefore, according to the applicant, the trade mark applied for is not descriptive of those services or of any their characteristics.

32 In the fifth place, the applicant claims, first, that, regarding the goods and services covered by the trade mark application and belonging in the banking and financial sector, in relation to which the terms 'payment' and 'euro' may be evocative, while the phrase 'euro automatic payment' has no direct, clear and immediately identifiable meaning, it is at least evocative, after due consideration on the part of the relevant public, of the banking and financial sector. According to the applicant, the goods and series in question are:

— with regard to Class 9, the 'magnetic stripe or microprocessor payment, credit or debit cards; automated payment machines; automated banking machines; pre-payment devices for television apparatus, IT programs and equipment to enable full remote banking, finance company and insurance services; namely electronic payment apparatus and instruments, secure payment software for online electronic communication networks, computer apparatus and instruments, computer equipment for electronic payment, software for electronic payment transactions;

electronic payment cards, electric and electronic devices for the management of financial transactions';

— with regard to Class 36: all the services mentioned in paragraph 4 above, with the exception of 'exchange transactions; clearing (exchange), stockbroking; credit, electronic transfer services for shares and any other financial security on an on-line electronic communication network'.

33 According to the applicant, as a vague and incomprehensible term is used for the goods and services in question, the trade mark sought cannot be considered descriptive. In support of its argument, the applicant refers to the earlier practice of OHIM in claiming that a sign which is merely evocative cannot be refused registration under Article 7(1)(c) of Regulation No 207/2009.

34 Secondly, with regard to the other goods and services concerned which, according to the applicant, do not belong in the banking and finance sector, the terms 'euro' and 'payment' are not evocative, but arbitrary. Accordingly the word combination 'euro automatic payment' is meaningless. Therefore it is not descriptive either of the goods or the services in question or of any of their characteristics.

35 Consequently the applicant asserts that the trade mark applied for is not descriptive of the goods and services which were refused registration, but that it is arbitrary and is merely evocative of them.

36 In the sixth place, the applicant complains that the Board of Appeal did not show in what way the trade mark sought is 'commonly used for the marketing of the goods or services concerned'; the Board of Appeal did not show that the sign in question was used, or could be used in the future, for descriptive purposes.

37 OHIM disputes the applicant's arguments.

Findings of the Court

38 Under Article 7(1)(c) of Regulation No 207/2009, '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' are not to be registered. Such descriptive signs are deemed incapable of fulfilling the indication-of-origin function of the trade mark (see Case C-191/01 P *OHIM* v *Wrigley* [2003] ECR I-12447, paragraphs 29 and 30).

39 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 relevant public to designate, either directly or by reference to one of their essential characteristics, goods or services in respect of which registration is sought (see Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 39, and Case T-19/04 *Metso Paper Automation* v *OHIM (PAPERLAB)* [2005] ECR II-2383, paragraph 24).

40 It follows that, for a sign to be caught by the prohibition set out in Article 7(1)(c) of Regulation No 40/94, there must be a sufficiently direct and specific relationship between the sign and the goods or services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods or services in question or one of their characteristics (see *PAPERLAB*, cited in paragraph 39 above, paragraph 25).

41 Accordingly, the distinctiveness of a mark may only be assessed, first, in relation to the understanding of the mark by the relevant public and, second, in relation to the goods or services concerned (see Case T-207/06 *Europig* v *OHIM (EUROPIG)* [2007] ECR II-1961, paragraph 30).

42 In the present case, the parties agree that the Board of Appeal was right to find that the relevant public consisted of the English-speaking consumers in the Community and of professionals and non-professionals, and that the relevant public was considered to be reasonably well informed and observant. In the same way, it is common ground that the three verbal elements forming the trade mark applied for are English words understood by the same public.

43 First of all, the applicant's argument (see paragraph 36 above) that the Board of Appeal did not show that the sign in question was used, or could be used in the future, for descriptive purposes must be rejected as unfounded.

44 It has consistently been held that, while Article 7(1)(c) of Regulation No 207/2009 pursues an aim which is in the public interest, namely that signs or indications which are descriptive of the characteristics of goods or services in respect of which registration is sought may be freely used by all (see *OHIM* v *Wrigley*, cited in paragraph 38

above, paragraph 31), nevertheless the application of that provision does not depend on there being a real, current or serious need to leave a sign or indication free (see Case T-106/00 *Streamserve* v *OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 39).

45 Therefore, in accordance with the case-law cited in paragraph 40 above, it is necessary to consider whether the trade mark applied for is caught by the prohibition in Article 7(1)(c) of Regulation No 207/2009. For that purpose, the Court must consider the mark as a whole (see, to that effect, Case C-273/05 P *OHIM* v *Celltech* [2007] ECR I-2883, paragraphs 78 to 80).

46 With regard to the term 'euro automatic payment', it must be observed that it does not diverge from the syntactic or lexical rules of the English language, with which it conforms (see, to that effect, Case T-356/00 *DaimlerChrysler* v *OHIM (CARCARD)* [2002] R II-1963, paragraph 29). On that point, the parties agree that the adjective 'automatic' clearly qualifies the noun 'payment'.

47 Regarding the meaning of the elements forming the mark applied for, it is common ground, first, that 'euro' may be understood as referring to the single European currency and, secondly, that 'payment' commonly means, taking account of the relevant public, the payment of a sum of money to discharge a pecuniary obligation. With regard to the meaning of 'automatic', the word refers, according to the applicant, to an action which takes place independently of the will. Therefore, according to the applicant, the term 'euro automatic payment' has no direct, clear and immediately identifiable meaning.

48 However, whilst 'automatic' refers to a mechanism which is capable of performing an action by itself or using a procedure autonomously, that does not mean that the said mechanism cannot be started, and kept going, by the human will. This applies, for example, to the standing order for a payment to a third party through a bank. Therefore, contrary to the applicant's submission, 'euro automatic payment' may be interpreted as referring to the use of an automatic procedure for payment in euros entailing the user's choosing to use it voluntarily, whether occasionally or regularly.

49 In addition, contrary to the applicant's submission, OHIM correctly asserts that the word 'automatic', which is derived from the family of English words with the root 'automat', is frequently used in English in the banking and financial sector. For example, 'automat' commonly designates an automatic dispenser of banknotes and the term 'automated teller machine' designates an automatic teller or automatic dispenser of banknotes. Therefore the relevant public will see nothing surprising or unusual in the use in the English language of the words 'automatic' and 'payment' together in the banking and financial sector.

50 Finally, the fact that the trade mark applied for may have other meanings, as the applicant claims, does not preclude the absolute ground for refusal laid down in Article 7(1)(c) of Regulation No 207/2009. It has consistently been held that a word sign must be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned (see *OHIM* v *Wrigley*, cited in paragraph 38 above, paragraph 32, and judgment of 9 March 2010 in Case T-15/09 *Euro-Information* v *OHIM (EURO AUTOMATIC CASH)*, not published in the ECR, paragraph 39).

51 Consequently it must be concluded that the Board of Appeal correctly found that the meaning upheld by the examiner of the term 'euro automatic payment', namely, an automatic payment in euros, was correct. Accordingly such a term must be interpreted as referring to a mechanism for payment in euros which a consumer has voluntarily chosen to use on a particular occasion or regularly, and which is capable of performing an action by itself or using a procedure autonomously. It must be observed that that meaning can be perceived by the relevant public and there is no need for further thought or reasoning processes.

52 Consequently the applicant's argument that the term 'euro automatic payment' has no direct, clear and immediately identifiable meaning must be dismissed as unfounded.

53 Therefore it is now necessary to decide whether, in the light of the meaning that must be attached to 'euro automatic payment', the term is descriptive of the goods and services for which the registration of the trade mark is sought.

54 In that connection, first, with regard to the substantive requirements for the examination of an application for a Community trade mark, it is clear from the case-law that, regarding the obligation to state reasons, first, an examination of the absolute grounds for refusal must be carried out in relation to each of the goods and services for which trade mark registration is sought and, secondly, that the decision of the competent authority refusing registration of a trade mark must, in principle, state reasons in respect of each of those goods or services (see Joined Cases T-405/07 and T-406/07 *CFCMCEE* v *OHIM (P@YWEB CARD and PAYWEB CARD)* [2009] ECR II-1441, paragraph 54 and the case-law cited). In addition, the Court of Justice has pointed out that this duty to state reasons arises from the essential requirement for any decision of an authority refusing the benefit of a right conferred by Community law to be subject to judicial review which is designed to secure effective protection for that right and which, accordingly, must cover the legality of the reasons for the decision. However, where the same ground of refusal is given for a category or group of

goods or services, that authority may use only general reasoning for all the goods and services concerned (see Case C-239/05 *BVBA Management, Training en Consultancy* [2007] ECR I-1455, paragraphs 34 to 37, and *P@YWEB CARD and PAYWEB CARD*, paragraph 54).

55 None the less, the fact that OHIM is able to use general reasoning with regard to the application of an absolute ground for refusal to a category or group of goods or services must not frustrate the objective of the duty to state reasons under Article 253 EC and the first sentence of Article 75 of Regulation No 207/2009, which is to subject a decision refusing registration of a Community trade mark to effective judicial review. Accordingly, the goods or services concerned must be interlinked in a sufficiently direct and specific way, to the point where they form a category or group of goods or services sufficiently homogeneous to permit OHIM to use general reasoning. The mere fact that the goods or services in question come within the same class of the Nice Agreement is not sufficient for that purpose, since the classes often contain a wide variety of goods or services which are not necessarily interlinked in a sufficiently direct and specific way (see *P@YWEB CARD and PAYWEB CARD*, cited in paragraph 54 above, paragraph 55 and the case-law cited).

56 Secondly, with regard to the substantive examination of an application for a Community trade mark, it is clear from the case-law that, under Regulation No 207/2009, OHIM must examine the application in relation to all the goods or services on the list of goods or services for which registration is sought, on the understanding that, if the list includes one or more categories of goods or services, OHIM is not under any obligation to make an assessment of each of the goods or services coming within each category, but must direct its examination to the category in question, as such (see, to

that effect, Case T-304/06 *Reber* v *OHIM - Chocoladefabriken Lindt & Sprüngli (Mozart)* [2008] ECR II-1927, paragraphs 22 and 23 and the case-law cited).

57 Therefore, third, in the light of the case-law cited in paragraphs 54 and 55 above, it must be concluded, by analogy, that, with regard to the substantive requirements for the examination of an application for a Community trade mark, as stated in paragraph 56 above, OHIM may carry out a general examination for each category of goods or services only if the goods or services concerned are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services.

58 It is in the light of those principles that it must be determined whether the Board of Appeal examined to the requisite legal standard the descriptive character of the trade mark sought for the goods and services concerned.

— The cards in Class 9

59 With regard to the cards in Class 9, namely, 'memory or microprocessor cards, magnetic stripe cards, magnetic stripe or microprocessor identification cards, magnetic stripe or microprocessor payment, credit or debit cards and electronic payment cards', the Board of Appeal found, in paragraph 20 of the decision, that, as the cards could be used to make payments, the trade mark applied for was descriptive of the intended use of the goods in question.

60 As all those goods, which are directed at the same public, namely the general public, as well as professionals, take the form of a card fitted with a magnetic strip, a microprocessor or a microchip capable of recording and transmitting information by means of a (digital) tool to read and process data, the said goods constitute, by reason of their characteristics and their similar or even identical functions, a homogeneous group of products.

61 Such cards enable the information and data recorded on them to be transferred within a communication network such as the internet, or a cable or satellite network, to a service provider, in order to enable the latter to identify their holder and confirm his or her right of access. The transfer of such information and data may enable the cardholder, where appropriate, for payment, to access the communication network in question in order to make electronic payments (see, by analogy, *P@YWEB CARD and PAYWEB CARD*, cited in paragraph 54 above, paragraph 59 and the case-law cited).

62 Therefore the Board of Appeal was entitled to conclude, first, that that category of goods had common characteristics, including that of enabling payments to be made in euros, and consequently the Board of Appeal carried out a general examination, by category, of the application for registration of a Community trade mark sought for those goods. Secondly, the Board of Appeal considered that the relevant public, when confronted with goods in that category bearing the sign 'euro automatic payment', would immediately think, without further reflection, that the purpose of the cards was to make automatic payments in euros.

63 Consequently the Board of Appeal correctly found that the trade mark applied for was descriptive of the cards in question.

— The goods belonging in the computer and telecommunications sector in Class 9

64 With regard to the goods belonging in the computer and telecommunications sector in Class 9, that is to say, 'magnetic data carriers, optical data carriers, information processing apparatus, intercommunication apparatus, (IT) interfaces, (IT) readers; (registered program) software, software designed for account management, monitors (computer programs), computers, computer peripheral devices, registered computer programs, registered operating system programs (for computers), central processing units (processors), IT programs and equipment to enable full remote banking, finance company and insurance services, namely computer apparatus and instruments, secure payment software for online electronic communication networks, electronic payment apparatus and instruments, namely computer apparatus and instruments, computer equipment for electronic payment, software for electronic payment transactions, electric and electronic devices for the management of financial transactions', which belong in the computer sector, as well as 'radiotelephony sets, (audio, video) receivers, telephone apparatus, portable telephones, prepayment devices for television apparatus; (telecommunication) transmitters', which belong in the telecommunications sector, the Board of Appeal found, in paragraph 22 of the contested decision, that all those goods could incorporate an automatic payment mechanism and that consequently there was a sufficiently direct and specific connection between the trade mark sought and the goods mentioned.

65 First of all, regarding the goods belonging in the computer sector in Class 9, as all those goods, which are directed at the same public, namely the general public, as well as professionals, are capable of recording, storing, transmitting and retransmitting information and data, the goods, by reason of their characteristics and their similar or even identical functions, constitute a homogeneous group of products. For the same reasons as those set out in paragraph 61 above in relation to cards, those goods enable

persons using them to make electronic payments, including electronic payments for distance purchasing.

66 Therefore the Board of Appeal was entitled to conclude, first, that that category of goods had common characteristics, including that of enabling payments to be made in euros, and consequently the Board of Appeal carried out a general examination, by category, of the application for registration of a Community trade mark sought for those goods. Secondly, the Board of Appeal considered that the relevant public, when confronted with goods in that category bearing the sign 'euro automatic payment', would immediately think, without further reflection, that the goods were connected to a communication network, incorporating an automatic payment mechanism enabling payments in euros to be made directly through that network.

67 Secondly, regarding the goods belonging in the telecommunications sector in Class 9, as all those goods, which are directed at the same public, namely the general public, as well as professionals, are capable of recording, processing, transmitting and retransmitting information and data, the goods, by reason of their characteristics and their similar or even identical functions, constitute a homogeneous group of products. For the same reasons as those set out in paragraph 61 above in relation to cards, those goods enable persons using them to make electronic payments, including electronic payments for distance purchasing. The same is also true of 'coin-operated mechanisms for television sets' since those mechanisms, such as a decoder or a paid-for receiver box for television programmes offered on a cable or satellite network, are equipped both with a card (often referred to as a 'smart card') and with a device enabling the card to be inserted in order to authorise paid access to such a network (see, by analogy, *P@YWEB CARD and PAYWEB CARD*, cited in paragraph 54 above, paragraph 59 and the case-law cited).

68 The Board of Appeal was thus entitled to conclude, first, that that category of goods had common characteristics, including that of enabling payments to be made in euros, and consequently the Board of Appeal carried out a general examination, by category, of the application for registration of a Community trade mark sought for those goods (see, to that effect, judgment of 23 September 2009 in Case T-396/07 *France Télécom* v *OHIM (UNIQUE)*, not published in the ECR, paragraph 29) and, secondly, the Board of Appeal was entitled to conclude that the relevant public, when confronted with goods in that category bearing the sign 'euro automatic payment', would immediately think, without further reflection, that the goods were connected to a communication network, incorporating an automatic payment mechanism enabling payments in euros to be made directly through that network.

69 Consequently the Board of Appeal correctly found that the trade mark applied for was descriptive of the goods belonging in the computing and telecommunications sector in question.

— The other goods in Class 9

70 In the first place, with regard to 'automated payment machines' and 'automated banking machines', this Court finds, like the Board of Appeal in paragraph 15 of the contested decision, and contrary to the applicant's submission, that the purpose of the former, and the possible, and probable, purpose of the latter, is to make automatic payments.

71 Consequently the trade mark applied for will be perceived as designating a technical function of the goods in question, namely the possibility of making payments in euros, or as relating to one of their qualities, namely automaticity, which may be taken

into account in the choice of such goods by the relevant public. Therefore the trade mark sought informs the relevant public of the essential characteristics of the goods in question, namely that they have, or are likely to have, a mechanism which enables automatic payments to be made in euros.

72 It follows that, as the term 'euro automatic payment' is likely, from the viewpoint of the relevant public, to be commonly used in trade to designate a characteristic of 'automated payment machines' and 'automated banking machines', the Board of Appeal was right to find that the mark in question was descriptive of the intended use of those goods.

73 In the second place, regarding 'counterfeit coin detectors', 'automatic dispensers', 'ticket dispensers' and 'bar code readers', the Board of Appeal found, in paragraphs 17, 19 and 21 of the contested decision, that all those goods either incorporated an automatic payment mechanism or were incorporated in such a mechanism. Furthermore, in paragraphs 19 and 21 of the contested decision, the Board of Appeal added that 'counterfeit coin detectors' and 'bar code readers' were likely to be closely connected with automatic payment machines such as automatic dispensers of tickets or other objects, and that they could therefore have the same intended use as the latter.

74 Next, as stated at paragraph 51 above, an automatic payment in euros must be interpreted as referring to a mechanism which a consumer has voluntarily chosen to use on a particular occasion or regularly, and which is capable of performing an action by itself or using a procedure in an autonomous manner.

75 It follows from what has been said that, contrary to the applicant's submission, the automatic nature of a payment in euros by means of 'automatic dispensers' and 'ticket dispensers' does not exclude a manifestation of the consumer's will.

76 Consequently the Board of Appeal correctly found that the trade mark sought was descriptive of the intended use of 'counterfeit coin detectors', 'automatic dispensers', 'ticket dispensers' and 'bar code readers' in so far as the goods in question incorporate an automatic payment mechanism or are likely to be incorporated in such a mechanism.

77 In the third place, with regard to 'banknote dispensers', the Board of Appeal found, in paragraph 18 of the contested decision, that when a banknote dispenser delivered a certain amount of money to the holder of the bank card, the bank to which the dispenser was attached merely paid a sum of money in fulfilment of an obligation to pay a debt of the bank to the cardholder. Consequently the trade mark applied for is said to be descriptive of those goods, the intended use of which is closely connected with the concept of payment. It must be held that, contrary to the applicant's argument, the possibility cannot be ruled out that the relevant public, on reading the trade mark applied for, may perceive it as describing cash withdrawal operations, which are assimilated to payments.

78 In any case, it must be said, in agreement with OHIM, that banknote dispensers are capable of offering a wide range of functionalities going beyond the mere withdrawal of cash, such as carrying out payments or transfers or, as pointed out in paragraph 18 of the contested decision, providing statements of account. Therefore the relevant public will perceive as descriptive indications that certain goods are capable of enabling automatic payments in euros to be made, provided that that characteristic is relevant in relation to the type of goods concerned (see, to that effect, judgment of

9 March 2010 in Case T-77/09 *hofherr communikation* v *OHIM (NATURE WATCH)*, not published in the ECR, paragraph 30), which is obviously so in the present case.

79 Therefore the Board of Appeal rightly found that the trade mark applied for was descriptive of the intended use of 'banknote dispensers'.

80 In addition, it must be observed that the real, current and serious need, referred to at paragraph 44 above, for signs or indications which are descriptive of the characteristics of goods or services in respect of which registration is sought to be left free for use by all means that the applicant's competitors who may wish to incorporate in their banknote dispensers a mechanism for automatic payment in euros are free to use the term 'euro automatic payment'.

81 In the fourth place, regarding 'statement of account and account summary dispensers', the Board of Appeal found in essence, in paragraph 18 of the contested decision, that they were closely connected with 'banknote dispensers' as the two products are incorporated in one and the same apparatus and, consequently, that the trade mark applied for would be perceived with the same descriptive connotation for the two products in question.

82 It must be observed that 'statement of account and account summary dispensers' on the one hand and 'banknote dispensers' on the other are likely to be merged in a single machine and that, therefore, like the latter, the former are likely to offer the same functionalities. Consequently the relevant public will perceive the trade mark applied

for as describing an essential characteristic of the goods in question, namely that they are likely to incorporate a mechanism for automatic payment in euros.

83 Therefore the Board of Appeal rightly found that the trade mark applied for was descriptive of 'statement of account and account summary dispensers'.

84 It follows from what has been said that the Board of Appeal correctly found that, in the light of the provisions of Article 7(1)(c) of Regulation No 207/2009, the trade mark applied for was descriptive of the goods in Class 9, as referred to in paragraph 4 above.

— The services in Class 36

85 With regard to the services in Class 36, in the first place, they are all offered in the banking, financial and computing sectors for the purpose of commercial and financial transactions and, secondly, contrary to the applicant's submission, those services all entail a payment operation either by means of a card or, as the case may be, by electronic means.

86 In that respect, in view of the applicant's arguments (see paragraphs 30 and 31 above), that is the case, as the Board of Appeal correctly found, with stockbroking services or on-line services on an electronic communication network, which are likely to cause the authorised broker to carry out, in the interest of a recipient, payment operations in respect of securities on the market concerned. The Board of Appeal also found

correctly, in essence, that exchange services are based on a payment operation intended to convert currencies amongst themselves.

87 In those circumstances, the services in Class 36 all have a common characteristic or even subject-matter, so that it is possible to regard them as coming within a homogeneous group of services and a general examination, by category, such as that in paragraphs 25 to 27 of the contested decision, according to which the services in question offer the possibility of making or obtaining automatic payments in euros, is sufficient for the purpose of the substantive examination of the application for registration of the trade mark sought concerning them (see, by analogy, *P@YWEB CARD and PAYWEB CARD*, cited in paragraph 54 above, paragraph 80).

88 In the second place, from the viewpoint of the relevant public, there is a sufficiently direct and specific relationship between, on the one hand, the word sign 'euro automatic payment' and, on the other, the particular quality of all the services in Class 36, which is that they are likely to enable automatic payments in euros to be made or received, as the case may be, by electronic means, which is closely connected with the concept of automaticity in the context of commercial and financial transactions in the banking, financial and computing sectors.

89 In addition, it is necessary to dismiss the applicant's argument that, in earlier decisions, OHIM acknowledged that a trade mark which was merely evocative of the banking and financial sector to which the services in question related was not descriptive of those services. Decisions concerning the registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under Regulation No 207/2009 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly the legality of the decisions of Boards of Appeal must

be assessed solely on the basis of that regulation, as interpreted by the Union judicature, and not on the basis of a previous decision-making practice of those boards (see *STREAMSERVE*, cited at paragraph 44 above, paragraph 66).

90 Therefore it must be found, as did the Board of Appeal in paragraph 24 of the contested decision, that, as the term 'euro automatic payment' provides direct information on the subject-matter of the services in Class 36, the sign applied for is capable of constituting a simple description of the nature or subject-matter of those services.

91 In those circumstances, the Board of Appeal rightly found, with regard to the provisions of Article 7(1)(c) of Regulation No 207/2009, that the trade mark sought was descriptive of the services in Class 36, as referred to in paragraph 4 above.

92 The findings referred to in paragraphs 84 and 91 above cannot be called into question by the applicant's argument, set out in paragraphs 32 to 35 above, that the term 'euro automatic payment' is not descriptive, but evocative or even arbitrary, depending on whether the goods and services covered by the trade mark application belong in the banking and financial sector.

93 It is apparent from the case-law that, if the description corresponds to the direct designation of the subject-matter, quality or characteristics of the goods and services for which the trade mark is sought, in accordance with Article 7(1)(c) of Regulation No 207/2009, the evocation does not entail a sufficiently close connection between, on the one hand, the trade mark sought and, on the other, the goods or services

concerned, so that it does not go beyond the lawful scope of suggestion (see, to that effect, Case T-24/00 *Sunrider* v *OHIM (VITALITE)* [2001] ECR II-449, paragraphs 22 and 24).

94 Consequently, as it has been shown that the term 'euro automatic payment' is descriptive of the goods in Class 9 and the services in Class 36, the term is within the scope of description for the purposes of Article 7(1)(c) of Regulation No 207/2009 and cannot fall within the scope of evocation.

95 Therefore the Board of Appeal rightly found that the trade mark sought was descriptive of the goods and services in Classes 9 and 36, as shown in paragraph 4 above. Consequently the first plea must be dismissed as unfounded.

96 As it has been consistently held that, since Article 7(1) of Regulation No 207/2009 makes it very clear that it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign at issue not to be registrable as a Community trade mark (Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 29, and Case T-160/07 *Lancôme* v *OHIM - CMS Hasche Sigle (COLOR EDITION)* [2008] ECR II-1733, paragraph 51), it is no longer necessary to consider the second plea raised by the applicant alleging breach of Article 7(1)(b) of that regulation.

97 Accordingly, the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

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

Pelikánová Jürimäe van der Woude

Delivered in open court in Luxembourg on 12 April 2011.

[Signatures]