JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
19 April 2005 *

In Joined Cases T-380/02 and T-128/03,

Success-Marketing Unternehmensberatungsgesellschaft mbH, established in Linz (Austria), represented by G. Secklehner and C. Ofner, avocats, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by J. Weberndörfer and G. Schneider, acting as Agents,

defendant,

* Language of the case: German.

the other party to the proceedings before the Board of Appeal of OHIM, intervening before the Court of First Instance in Case T-128/03, being

Chipita International SA, established in Athens (Greece), represented by P. Hoffmann, avocat,

ACTIONS for annulment brought, first, against the decision of the First Board of Appeal of OHIM of 26 September 2002 (Case R 26/2001-1) rejecting the application by the applicant for restitutio in integrum and, secondly, of the decision of 13 February 2003 and/or the decision of 13 March 2003 of the First Board of Appeal of OHIM (Case R 1124/2000-1) concerning opposition proceedings between Success-Marketing Unternehmensberatungsgesellschaft mbH and Chipita International SA,

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

composed of M. Vilaras, President, M. E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2004,

gives the following

Judgment

Legislation

1 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, includes the following provisions:

'Article 59

Time-limit and form of appeal

Notice of appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. The notice shall be deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed.

...

Article 77

Notification

The Office shall, as a matter of course, notify those concerned of decisions and summonses and of any notice or other communication from which a time-limit is reckoned, or of which those concerned must be notified under other provisions of this Regulation or of the Implementing Regulation, or of which notification has been ordered by the President of the Office.

Article 78

Restitutio in integrum

1. The applicant for or proprietor of a Community trade mark or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time-limit vis-à-vis the Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress.

2. The application must be filed in writing within two months from the removal of the cause of non-compliance with the time-limit. The omitted act must be completed within this period. The application shall only be admissible within the year immediately following the expiry of the unobserved time-limit. In the case of non-submission of the request for renewal of registration or of non-payment of a renewal fee, the further period of six months provided in Article 47(3), third sentence, shall be deducted from the period of one year.

...

4. The department competent to decide on the omitted act shall decide upon the application.

...'

2 Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) includes the following provisions:

'Rule 49

Rejection of the appeal as inadmissible

(1) If the appeal does not comply with Articles 57, 58 and 59 of the Regulation and Rule 48(1)(c) and (2), the Board of Appeal shall reject it as inadmissible, unless each deficiency has been remedied before the relevant time-limit laid down in Article 59 of the Regulation has expired.

...

(3) If the fee for appeal has been paid after expiry of the period for the filing of appeal pursuant to Article 59 of the Regulation, the appeal shall be deemed not to have been filed and the appeal fee shall be refunded to the appellant.

...

Rule 61

General provisions on notifications

(1) In proceedings before the Office, any notifications to be made by the Office shall take the form of the original document, of a copy thereof certified by, or bearing the seal of, the Office or of a computer print-out bearing such seal. Copies of documents emanating from the parties themselves shall not require such certification.

(2) Notifications shall be made

(a) by post in accordance with Rule 62;

(b) by hand delivery in accordance with Rule 63;

(c) by deposit in a post box at the Office in accordance with Rule 64;

(d) by telecopier and other technical means in accordance with Rule 65;

(e) by public notification in accordance with Rule 66.

Rule 62

Notification by post

(1) Decisions subject to a time-limit for appeal, summonses and other documents as determined by the President of the Office shall be notified by registered letter with advice of delivery. Decisions and communications subject to some other time-limit shall be notified by registered letter, unless the President of the Office determines otherwise. All other communications shall be ordinary mail.

...

Rule 65

Notification by telecopier and other technical means

(1) Notification by telecopier shall be effected by transmitting either the original or a copy, as provided for in Rule 61(1), of the document to be notified. The details of such transmission shall be determined by the President of the Office.

...

Rule 68

Irregularities in notification

Where a document has reached the addressee, if the Office is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by the Office as the date of receipt.

...'

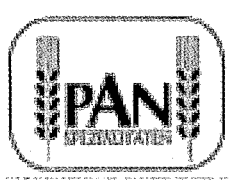
Background to the dispute

3 On 16 September 1997 the applicant applied to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) for a Community trade mark under Regulation No 40/94. The form completed in this connection contained inter alia the details of the applicant's representative including his fax number.

4 The mark in respect of which registration was applied for is the word mark PAN & CO for goods and services in Classes 11, 30, 35, 37 and 42 within the meaning of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

5 The Community trade mark application was published in *Community Trade Marks Bulletin* No 54/1998 of 20 July 1998.

6 On 19 October 1998 Chipita International SA (hereinafter 'the intervener') filed opposition proceedings under Article 42(1) of Regulation No 40/94 which was given reference number B 92 413. The ground relied on in support of the opposition was the likelihood of confusion under Article 8(1)(b) of Regulation No 40/94 between the mark sought and the intervener's Community trade mark application. The latter, filed on 30 August 1996 for goods in Class 30 of the Nice Agreement, is depicted as follows:



7 The opposition was directed solely against registration of the word mark PAN & CO for goods in the abovementioned class.

8 By Decision No 799/1999 of 22 September 1999, the Opposition Division refused the applicant's Community trade mark application but only with regard to goods in Class 30 of the Nice Agreement.

9 By fax of 21 February 2000, OHIM asked the applicant to pay the registration fee.

10 Following a telephone conversation between an OHIM official and the applicant's representative, the Opposition Division's decision of 22 September 1999 was sent to the latter by e-mail of 25 April 2000.

11 By letter of 23 June 2000 received by OHIM on 26 June 2000, the applicant filed an application for restitutio in integrum under Article 78 of Regulation No 40/94 and an application for access to the file and reimbursement of costs incurred.

12 In support of its application for restitutio in integrum the applicant argued that it had not been informed by OHIM of the opposition proceedings under reference number B 92 413 and that it only became aware of them when it paid the registration fee. This meant that it was unable to comply with the deadline for filing observations on the opposition to the Community trade mark application or with the period for appealing the decision of the Opposition Division of 22 September 1999. It asked for its rights to be re-established to reflect the stage of the proceedings one year before the filing of the application for restitutio in integrum; it also submitted as an annex to that application observations on the opposition by the intervener.

13 In that letter the applicant further requested that those observations be accepted as an appeal against Decision No 799/1999 of the Opposition Division of 22 September 1999 in the event that OHIM were to take the view that it was impossible for it to have its rights re-established and enclosed a cheque to cover the appeal fee.

14 By Decision No 2480/2000 of 25 October 2000, the Opposition Division declared that it lacked jurisdiction, under Article 78(4) of Regulation No 40/94, to determine the application for restitutio in integrum in so far as it concerned non-observance of the period for bringing an appeal against its decision of 22 September 1999. It also rejected the application as inadmissible because it was brought more than a year

after the expiry on 6 February 1999 of the unobserved time-limit of three months afforded to the applicant by OHIM by letter of 6 November 1998 for filing observations on the opposition. It also stated that the application was in any event unfounded because the documents relating to opposition proceedings under reference number B 92 413 had been duly communicated to the applicant.

15 By letter of 29 November 2000, OHIM informed the applicant that its application of 23 June 2000 would also be treated as an appeal against Decision No 799/1999 of the Opposition Division of 22 September 1999 (Case R 1124/2000-1).

16 On 2 January 2001 the applicant brought proceedings with OHIM under Article 59 of Regulation No 40/94 against Decision No 2480/2000 of the Opposition Division of 25 October 2000 (Case R 26/2001-1).

17 On 2 August 2002 OHIM requested the applicant to submit its observations on the reports attesting correct transmission issued by fax machine, first, concerning the communication of 6 November 1998 notifying the opposition and inviting submission of observations on the opposition within a period of three months and, secondly, of Decision No 799/1999 of the Opposition Division of 22 September 1999. The applicant acceded to that request by letter dated 2 October 2002.

18 By decision of 26 September 2002, the First Board of Appeal rejected the appeal by the applicant against Decision No 2480/2000 of the Opposition Division of 25 October 2000 on the ground that the application for restitutio in integrum had not been lodged within the time-limits laid down in Regulation No 40/94.

19 The decision of the First Board of Appeal of 26 September 2002 was first sent for information purposes to the applicant by fax of 2 October 2002, and then notified to the applicant's representative by registered letter with acknowledgement of receipt which was duly signed on 10 October 2002.

20 By decision of 13 February 2003, which was notified to the applicant on 19 February 2003, the First Board of Appeal dismissed the action brought by the applicant against Decision No 799/1999 of the Opposition Division of 22 September 1999 on the ground that that action had not been brought within the period laid down in Article 59 of Regulation No 40/94, which expired on 22 November 1999.

21 By decision of 13 March 2003, which was notified to the applicant on 24 March 2003, the First Board of Appeal rectified the abovementioned decision, taking the view, in particular, that the action at issue was deemed, under Article 49(3) of Regulation No 2868/95, not to have been brought.

Procedure and forms of order sought by the parties

22 By applications lodged at the Registry of the Court of First Instance on 18 December 2002 and 18 April 2003 and registered respectively under references T-380/02 and T-128/03, the applicant brought the present proceedings.

23 OHIM lodged its reply at the Registry of the Court of First Instance on 15 July 2003 in Case T-380/02 and on 11 September 2003 in Case T-128/03.

24 On 18 August 2003 the intervener lodged a reply in Case T-128/03 in which it sought suspension of proceedings pending judgment in Case T-380/02. The applicant and OHIM opposed the application for suspension and stated that they favoured instead joinder of the two cases concerned.

25 By order of the President of the Fourth Chamber of the Court of First Instance of 3 February 2004, Cases T-380/02 and T-128/03 were joined for the purposes of the oral procedure and the judgment in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

26 On hearing the views of the Judge-Rapporteur the Court of First Instance decided to open the oral procedure and, in the context of the measures of organisation of procedure, requested the parties to reply to certain questions and to produce certain documents, which they did within the period allowed.

27 The applicant and OHIM made submissions and answered the questions put to them at the hearing on 14 December 2004.

28 At that hearing the applicant stated that in Case T-380/02 it was seeking annulment of the decision of the Board of Appeal of 26 September 2002 and not of 2 October 2002 as erroneously indicated in its application. In that connection OHIM made no observation.

29 In Case T-380/02 the applicant claims that the Court should:

— annul the decision of the Board of Appeal of 26 September 2002;

— declare that the defendant is liable to 'effect restitutio in integrum';

— order OHIM to pay all the costs.

30 In Case T-128/03 the applicant claims that the Court should:

— annul the decision of the Board of Appeal of 13 February 2003 and/or the decision of the Board of Appeal of 13 March 2003;

— order OHIM to pay all the costs.

31 In both cases OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Arguments of the parties

Case T-380/02

32 The applicant explains, first, that, having received on 21 February 2000 a request by OHIM for payment of the registration fee, it noticed that a class of products was missing in contrast to the content of its claim. It states that, following requests for explanations, OHIM sent to it, under cover of an e-mail of 25 April 2000, Decision No 799/1999 of the Opposition Division of 22 September 1999, which apprised it of the existence of an opposition to its Community trade mark application.

33 It claims to have learned of the opposition proceedings on reading the decision of 25 October 2000 of the Opposition Division, which mentions four documents said to have been transmitted to it by OHIM, namely:

— a fax dated 6 November 1998 giving notification of the opposition and laying down a three-month period expiring on 6 February 1999 for the submission of any observations;

— a fax dated 3 June 1999 informing it that the earlier mark on which the opposition was based had in the mean time been entered in the register of Community trade marks and that a decision would be taken in light of the sole items of evidence available;

— a fax of 22 September 1999 providing notification of Decision No 799/1999 of the Opposition Division of the same date;

— a fax of 11 January 2000 giving notification of the entry into force of the decision referred to above and commencement of a period of three months for lodging a request for partial amendment of the Community trade mark application.

34 However, none of those documents reached the office of the applicant's representative whose internal organisation precluded any possibility of losing no fewer than four documents. The applicant was thus deprived of the right to be heard inasmuch as it was not possible for it to enter into contact with the opponent during the conciliation period, to submit observations or bring an appeal against Decision No 799/1999 of the Opposition Division within the period prescribed. The applicant maintains that, in those circumstances and though having shown all due diligence necessitated by the circumstances, it was deprived of the possibility of observing the time-limits laid down by OHIM, which justifies its claim for restitutio in integrum.

35 The applicant states that it is precisely because of its ignorance of the state of the opposition proceedings that it requested OHIM for its rights to be re-established to reflect the stage of the proceedings one year prior to lodgement of the application for restitutio in integrum.

36 Secondly, it claims that OHIM's argument that the periods of time for challenging the opposition had expired more than a year prior to introduction of the application for restitutio in integrum cannot be upheld.

37 In that regard the applicant observes that on 26 June 1999, that is to say one year before lodgement of the abovementioned application, OHIM had not yet ruled on the opposition and that it was only the decision of the competent division which closed the opposition proceedings. It alleges that until that decision periods of time elapsed during which it might have been able to accomplish procedural acts, such as an application for suspension of the opposition proceedings, withdrawal of the application for registration or limitation of the products and services claimed, or settlement with the opponent. Under those circumstances, restitutio in integrum ought, in the applicant's view, to be granted to it, in view of the fact that it also lost the possibility of exercising its right of action against the decision of the Opposition Division.

38 The applicant claims, thirdly, that OHIM did not prove that the four documents at issue were in fact notified to its representative, since the production of two transmission reports is in that regard insufficient, as the transmission of the faxes may have been defective. It states that transmission reports in general, and those of OHIM in particular, are in no way appropriate as proof of notification. In such a context, the restrictive interpretation of Article 78 of Regulation No 40/94 adopted by the Board of Appeal means that there would be no possibility of restitutio in integrum in so far as where a document is not notified restitutio in integrum is never possible because no period of time can begin to run where there has been no notification.

39 Finally, the applicant observes that, in its decision of 25 October 2000, the Opposition Division did not determine the question of restitutio in integrum in regard to the expired period for bringing an appeal and states that it wrote to OHIM on 22 November 2000 in order to obtain a ruling on that part of the application.

40 OHIM states that the Board of Appeal was right to reject the application for restitutio in integrum under the third sentence of Article 78(2) of Regulation No 40/94 in so far as that application was filed more than one year after the expiry of the unobserved time-limit, namely on 6 February 1999.

Case T-128/03

41 The applicant relies essentially on three pleas in support of its application for annulment.

42 First of all, it criticises the Board of Appeal for having altered substantially both the grounds and operative part of its initial decision of 13 February 2003 contrary to Rule 53 of Regulation No 2868/95 which only allows corrections of manifest errors. That alteration must be regarded as null and void in law.

43 Secondly, it claims that OHIM did not correctly notify its communications and decisions.

44 At the hearing the applicant stated that OHIM did not enjoy full freedom of choice in regard to the methods of notification set out in Rule 61(2) of Regulation No 2868/95 and that in the present case it ought to have complied with Rule 62(1) of that regulation, which provides for notification by post.

45 It points out that, by way of proof of notification of the four documents mentioned at paragraph 33 above, which the applicant says it never received, OHIM merely produced reports of fax transmission which can in no event prove notification in proper and regular form. Those are merely indications of a notification.

46 Moreover, one of those reports, namely that relating to the communication of 6 November 1998 on the opposition to the Community trade mark application, is manifestly incorrect inasmuch as the telephone dialling code for Austria does not appear on it. The statement 'OK' appearing on that report demonstrates that it is possible for there to be a confirmation that a fax has been correctly sent even where there is an error in the fax transmission. The applicant observes that, in its decision of 13 February 2003, the Board of Appeal does not refer to the report at issue and examines only the confirmatory report concerning transmission of the decision of the Opposition Division of 22 September 1999.

47 The applicant stresses that, in any event, experience shows that it is possible for there to be a report confirming the sending of the fax even though the fax never arrived at its destination.

48 Moreover, an examination of the practices of the various national offices and of the European Patent Office shows that the sending of official communications, at least of those under which a period of time begins to run, by post or by means of fax machines equipped with additional security machinery, is in keeping with not only European but also international norms. Where a document is only sent by fax proof of correct notification can never be adduced.

49 Thirdly, the applicant essentially pleads an infringement of the rights of the defence since access to the file on the opposition proceedings requested on 12 July 2002 has still not been granted to it.

50 OHIM contends that all the pleas raised by the applicant should be rejected as unfounded.

51 The intervener asserts that the Board of Appeal was right to consider in the decision of 13 February 2003 that existing indications were sufficient to prove that the decision of the Opposition Division of 22 September 1999 was in fact notified to the applicant on the same date and that consequently the action brought against it was inadmissible.

52 It observes that the applicant has adduced no evidence, in particular the daily records of items sent and received concerning its fax machine, which might be such as to call in question actual receipt of the notification referred to above.

Findings of the Court

53 It is common ground that both the application for restitutio in integrum and the action brought against Decision No 799/1999 of the Opposition Division of 22 September 1999, upholding the opposition to the Community trade mark application, were rejected on the ground that they had not been brought within the periods provided for in that connection. In fact, OHIM considered that the periods of time at issue had begun to run with effect from notification to the applicant by fax of the communication of 6 November 1998 informing it of the opposition to its trade mark application and of the commencement of a period of three months within which to submit any observations, and of Decision No 799/1999 of the Opposition Division of 22 September 1999 which was accompanied by a letter advising it that that decision could be appealed against within a period of two months of its notification.

54 Apart from the fact that it claims not to have received any of those faxes, the applicant asserts that OHIM ought to have complied with Rule 62(1) of Regulation No 2868/95 providing for notification by post, and that transmission reports in regard to faxes can under no circumstances prove notification in proper form which alone is capable of initiating the running of periods of time.

55 In that connection it must be borne in mind that the probative value of a fax depends both on the degree of formality that the applicable provisions require for the act in question and the conditions governing the use of the fax transmission process, bearing in mind that, as a rule, the binding legal effects of the act are in no way affected by the fact that it is sent by fax. Where the applicable provisions require a particular degree of procedural formality for certain acts, consideration must be given to whether sending such acts by fax is compatible with those provisions (Case C-398/00 *Spain* v *Commission* [2002] ECR I-5643, paragraphs 21 and 22).

56 In the present case Rule 61(2) of Regulation No 2868/95 sets out the different possible methods of notification of OHIM decisions and communications including fax transmission. Separate provision is made for each of these methods of transmission whereby the conditions and detailed rules proper to each are elucidated.

57 Thus, notification by publication in the *Community Trade Marks Bulletin*, mentioned in Rule 66 of Regulation No 2868/95, may be effected only if it is not possible to know the address of the recipient or if the notification provided for in Rule 62(1) thereof has not been able to be effectuated even after a second attempt by OHIM. Notification by deposit in a post box at OHIM plainly presupposes that the addressee possesses such a box in which the document to be notified is to be deposited.

58 As regards notification by fax, Rule 65 of Regulation No 2868/95 provides that it is to be effected by the transmission either of the original or a copy under Rule 61(1) of that regulation 'of the document to be notified'. The general formulation implies that that mode of notification may be employed whatever the nature of the document to be notified. That conclusion is borne out by the terms of Article 1 of Decision EX-97-1 of the President of OHIM of 1 April 1997 determining the form of decisions, communications and notifications of OHIM, which lays down the manner of indicating the name of the body or of the division of OHIM together with the name of the official or officials responsible 'where a decision, communication or notification of OHIM is transmitted by fax'. Transmission by fax may therefore involve any decision or communication of OHIM.

59 In regard to notification by post, Rule 62(1) of Regulation No 2868/95 provides for different treatment depending on the type of document notified. In fact, it should be borne in mind that, under that rule, decisions under which a time-limit for bringing an action begins to run, summonses and all other documents in respect of which the President of OHIM prescribes notification by post are to be notified by registered letter with advice of delivery. Decisions and communications subject to some other time-limit are to be notified by registered letter, unless the President of OHIM determines otherwise. All other communications are to be by ordinary mail.

60 It follows from the wording of that rule, which covers the totality of documents notifiable by OHIM, that the detailed rules laid down therein apply only where it has been decided that notification should be effected by post. It would be to render devoid of effect the other modes of notification laid down in Rule 61(2) of Regulation No 2868/95 were the view to be taken that, save for notification by publication in the *Community Trade Marks Bulletin*, OHIM is obliged to effect notification solely by post of decisions subject to a time-limit for appeal and of communications subject to some other time-limit; the decision of the Opposition Division of 22 September 1999 and the communication of 6 November 1998 come within those respective categories.

61 OHIM was therefore entitled to effect notification of the abovementioned documents by means of fax. Accordingly, it is appropriate to assess the probative value of the items thus sent in light of the conditions of use of the transmission process itself.

62 In any event, the same analysis must be conducted even on the supposition that due notification of the communication of 6 November 1998 and of the decision of the Opposition Division of 22 September 1999 necessitated, as the applicant asserts, transmission by post under Rule 62(1) of Regulation No 2868/95 which it is common ground was absent in this case.

63 In that connection it should be recalled that, under Rule 68 of Regulation No 2868/95, expressly entitled 'Irregularities in notification', where a document has reached the addressee, if the OHIM is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document is deemed to have been notified on the date established by OHIM as the date of receipt.

64 That provision, taken as a whole, must be construed as affording to OHIM the possibility of establishing the date on which a document reached its addressee, if it is not possible to prove due notification or the provisions relating to its notification have not been observed; OHIM must be entitled therefore to attach to that proof the legal effects of due notification.

65 Since Rule 68 of Regulation No 2868/95 lays down no formalities for adducing that proof, it may be adduced by means of a fax provided that the conditions for the use of that method of transmission confer probative value to it.

66 OHIM produced in its pleadings several annexes including a letter dated 22 September 1999 in which OHIM notified to the applicant Decision 799/1999 of the Opposition Division of the same date and the communication of 6 November 1998 to which are appended the corresponding fax transmission reports.

67 The transmission report relating to the notification of Decision No 799/1999 of the Opposition Division of 22 September 1999 contains the following particulars:

— '0004336122221918', 'TELEFONO CONEXION' (telephone connection), the number being the fax number of the law offices of the applicant's representative indicated in the application form for a Community trade mark and preceded by a '0' for a communication external to OHIM;

— 'DR. LINDMAYR', 'ID CONEXION' (identification of the connection) a member of the same law firm as Dr Secklehner, the applicant's representative;

— '22/09 16:14' being the date and time of the connection;

— '9' being the number of pages transmitted, that is to say the eight pages of Decision No 799/1999 of the Opposition Division of 22 September 1999 together with the notification letter of the same date;

— 'RESULTADO OK' attesting to the fact that the fax was correctly sent.

68 The transmission report relating to the communication of 6 November 1998 includes the following particulars:

— '036122221918', 'TELEFONO CONEXION' (telephone connection);

— 'DR LINDMAYR', 'ID CONEXION' (identification of the connection);

— '06/11 18:20' being the date and time of the connection;

— '11' being the number of pages transmitted, comprising the text of the opposition lodged by the intervener together with the letter from OHIM of 6 November 1998 providing notification of the opposition and commencement of a period of three months for submission of any observations;

— 'RESULTADO OK' attesting to the fact that the fax was correctly sent.

69 In regard to the transmission report relating to the notification of Decision No 799/1999 of the Opposition Division of 22 September 1999 the presence of the various elements mentioned in paragraph 67 above, which are all referred to by the Board of Appeal in its decision of 13 February 2003 (see paragraph 23 et seq. of the decision), enables probative value to be attached to the transmission report produced by OHIM, in view of the fact that, in the course of the present proceedings, the applicant formulated no specific plea against that report in connection with the particulars mentioned in it.

70 In that regard it should be noted that, to the extent to which reference is made globally therein to the arguments contained in the pleadings lodged in the context of the administrative procedure, the application moreover in Case T-128/03 and Case T-380/02 does not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure and cannot therefore be taken into consideration (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 33, and Case T-20/02 *Interquell* v *OHIM — SCA Nutrition (HAPPY DOG)* [2004] ECR II-1001, paragraph 20).

71 In regard to the transmission report concerning the communication of 6 November 1998 the applicant states that it is an 'extremely dubious' document inasmuch as the part preceding the local identification number was rendered illegible by means of a pencil.

72 In that regard it is sufficient to state that the document produced by the applicant in its annexes is in actual fact a copy of an original document appearing on page 40 of the administrative file concerning the procedure before OHIM which includes a trace of a fluorescent marking pen alongside the number '036122221918' but not masking any detail.

73 Secondly, the applicant alleges that the telephone dialling code for Austria, where the applicant's representative has its offices, does not appear and that notwithstanding the statement 'OK' it is impossible, under those circumstances, for the fax concerned to have reached it.

74 First of all, it should be observed that, both in the decision of the Board of Appeal of 13 February 2003 and in the reply by OHIM, it was stated that reference to the name of one of the lawyers of the firm representing the applicant, as well as the number of the addressee appearing on the transmission report, is the result of a setting on the fax receiving machine. Both in its application and at the hearing the applicant adduced no evidence to contradict OHIM's assertion.

75 It should then be recalled, most importantly, that the applicant's conclusion reproduced at paragraph 73 above is contradicted by its own statements in the present proceedings.

76 In fact, in reply to a question put by the Court of First Instance seeking to verify the admissibility of the action in Case T-380/02, the applicant expressly stated that it had received the decision of the Board of Appeal of 26 September 2002 from OHIM by fax of 2 October 2002. Yet the number of the addressee on the transmission report concerning the fax of 2 October 2002 is exactly the same as that mentioned on the transmission report concerning the fax of 6 November 1998, namely the number '036122221918'.

77 Moreover, the file submitted to the Court of First Instance includes four other transmission reports indicating the abovementioned number relating to faxes which the applicant has never denied having received, namely:

— the fax of 25 October 2000 in which OHIM notified the applicant of the decision of the Opposition Division of the same date rejecting its application for restitutio in integrum;

— the fax of 21 December 2000 containing a letter of the same date from Mr Geroulakos, of the Opposition Division at OHIM, indicating to the applicant's representative in reply to a letter from that representative of 28 November 2000 that that division was no longer competent to intervene in the case at issue;

— the fax of 2 August 2002 in which OHIM notified to the applicant's representative a communication from the rapporteur of the First Board of Appeal of the same date;

— the fax of 17 October 2002 in which OHIM transmitted to the applicant's representative by way of information a communication from the rapporteur of the First Board of Appeal addressed to the opponent's representative.

78 It thus appears that indication of the dialling code for Austria on the transmission reports does not constitute an essential element in establishing successful transmission of the faxes to the applicant's representative.

79 It is also important to stress that it is common ground that, in the course of the procedures for registration of the Community trade mark applied for, opposition thereto and the appeal against the decisions of the Opposition Division, the applicant received a large number of faxes, both before and after the four faxes which it claims not to have received during the course of the opposition proceedings alone.

80 In regard, moreover, to the two other faxes which the applicant asserts it did not receive, namely those of 3 June 1999 and 11 January 2000 (see paragraph 33 above), it cannot but be noted that OHIM also produced transmission reports which included items conferring probative value on them.

81 It follows from the foregoing considerations that OHIM has established to the requisite legal standard, in particular, receipt by the applicant on 6 November 1998 of the communication of the same date providing notification of the opposition and of commencement of the three-month period for submission of any observations and, on 22 September 1999, of Decision No 799/1999 of the Opposition Division of the same date, and accompanying letter, together with the notice stating that an appeal may be brought against that decision within a period of two months of the date of notification.

82 That conclusion cannot be invalidated by mere considerations of a general nature raised by the applicant as to the alleged lessons of 'experience' to the effect that a report confirming that a fax has been sent may be issued by the issuing machine even though the fax has not reached its addressee.

83 Nor, moreover, does the applicant provide any evidence that the transmission reports produced by OHIM and more particularly those concerning the faxes of 6 November 1998 and 22 September 1999 do not relate to the documents forming the subject-matter of the transmission. On the contrary, it has been established that the total number of documents comprising each document transmitted corresponds to the indications appearing in the abovementioned transmission reports.

84 Moreover, it must be observed that, upon being requested on 2 August 2002 by the Board of Appeal to produce any item such as to prove non-notification of the communication of 6 November 1998 and of Decision No 799/1999 of the Opposition Division of 22 September 1999, the applicant did not, as that board stresses in its decision of 13 February 2003, adduce any evidence to that effect and, more specifically, did not produce, as it had been requested, copies of the log of e-mails sent and received relating to the days concerned, or even mention the reasons which might have prevented it from doing so. It was only in the application relating to Case T-128/03 that the applicant claimed for the first time that its representative's fax machine was at the time not set in such a way as to enable daily logs to be published.

85 In those circumstances, regard being had to the probative value of the transmission reports referred to at paragraphs 67 and 68 above, first, notification by fax of the communication of 6 November 1998 initiating the period of three months for the submission of any observations did in fact initiate that period and the expiry of that period on 6 February 1999 constitutes the point of departure of the period of one year for lodgement of the application for restitutio in integrum. Contrary to the

applicant's argument to the effect that the one-year period begins to run from the date of the decision of the Opposition Division of 22 September 1999, the 'unobserved time-limit' for the purposes of Article 78(2) of Regulation No 40/94 cannot be construed as a lapse of time without a predetermined date of expiry extending in the present case until the abovementioned decision.

86 Since the application for restitutio in integrum was lodged on 26 June 2000, that is to say more than a year after the expiry on 6 February 1999 of the unobserved three-month time-limit, it was therefore right that in its decision of 26 September 2002 the First Board of Appeal rejected the applicant's appeal against the decision of the Opposition Division of 25 October 2000 rejecting that application as not having been made within the period provided for in Article 78(2) of Regulation No 40/94.

87 Second, the notification by fax of Decision No 799/1999 of the Opposition Division of 22 September 1999 in fact initiated the two-month period for bringing an action, as laid down in Article 59 of Regulation No 40/94, and that period expired on 22 November 1999. Yet it is common ground that the applicant brought its action and paid the attendant fee only on 26 June 2000, that is to say out of time.

88 The latter conclusion renders inoperative the applicant's plea invoked in support of its claim for annulment of the decision of the Board of Appeal of 13 February 2003 'and/or' of the decision of the Board of Appeal of 13 March 2003 alleging infringement of Rule 53 of Regulation No 2868/95.

89 It is common ground that, having rejected in its decision of 13 February 2003 the action brought by the applicant as being out of time and thus inadmissible, the Board of Appeal on 13 March 2003 delivered a decision in which it not only rectified the erroneous dates of certain documents but also adopted a new ground of refusal, namely settlement of the appeal fee after expiry of the period for bringing an appeal and consequently a new operative part since the action is deemed not to have been brought which gives rise to reimbursement of that fee under Rule 49(3) of Regulation No 2868/95.

90 The applicant claims that, in so doing, the Board of Appeal infringed Rule 53 of Regulation No 2868/95 which authorises only rectifications of manifest errors.

91 Apart from the fact that Rule 49 of Regulation No 2868/95 including, under paragraph 3 thereof, rejection of the appeal on the ground of inadmissibility, it must be observed that the solutions adopted in succession by the Board of Appeal both demonstrate a positive response to the same problem, namely that of determining whether the applicant was or was not out of time in regard to its action against Decision No 799/1999 of the Opposition Division of 22 September 1999, in light of the same two-month period laid down in Article 59 of Regulation No 40/94.

92 In those circumstances, whether or not the view is taken that the Board of Appeal adopted the decision of 13 March 2003 in breach of Rule 53 of Regulation No 2868/95, it was in any event for the applicant to demonstrate that the Board of Appeal was wrong to consider that the applicant had not brought the appeal or paid the duty relating thereto within the period laid down in Article 59 of Regulation No 40/94, which it did not do, as has been established at paragraphs 53 to 87 above.

93 In support of its claim for annulment of the decision of the Board of Appeal of 13 February 2003 'and/or' of the decision of the Board of Appeal of 13 March 2003, the applicant further raises a plea of infringement of the rights of the defence inasmuch as access to the file on the opposition proceedings requested as early as 26 June 2000, and then on 12 July 2002, had still not been granted to it on the date when this action was brought.

94 In that regard it should be recalled that observance of the rights of the defence constitutes a general principle of Community law whereby the addressees of the decisions of public authorities significantly affecting their interests must be enabled effectively to make known their views (Case T-122/99 *Procter & Gamble* v *OHIM (Shape of soap)* [2000] ECR II-265, paragraph 42; Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 21; and Case T-79/00 *Rewe-Zentral* v *OHIM (LITE)* [2002] ECR II-705, paragraph 14).

95 The principle of protection of the rights of the defence is, moreover, enshrined in Article 73 of Regulation No 40/94 according to which the decisions of OHIM may be based only on grounds on which the parties have been able to express a view (*Shape of soap*, cited above, paragraph 40; *EURCOOL*, cited above, paragraph 20; and *LITE* cited above, paragraph 13) since that provision relates both to factual and legal grounds as well as to the evidence (Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraph 71).

96 In the present case it cannot but be noted that on 2 August 2002 OHIM transmitted to the applicant reports attesting correct transmission issued by fax machine of the communication of 6 November 1998 giving notification of the opposition and primarily of Decision No 799/1999 of the Opposition Division of 22 September 1999 and requested the applicant to submit its observations on those documents which the latter did by letter dated 2 October 2002.

97 Thus it is common ground that the applicant took cognisance of and effectively made known its view on the factual matter which constitutes the basis of the decisions of OHIM of 13 February and of 13 March 2003 and cannot therefore legitimately plead an infringement of the rights of the defence. The fact that it received on 4 July 2003, thus subsequently to the introduction of its action in Case T-128/03, other documents belonging to the file on the opposition proceedings including in particular the faxes of 3 June 1999 and 11 January 2000, which it claims not to have received on the dates indicated, is in that regard devoid of relevance.

98 Finally, it should be noted that the applicant mentions the fact that in its decision of 25 October 2000 the Opposition Division did not rule on the application for restitutio in integrum inasmuch as it concerns non-observance of the period for bringing an appeal against the decision of that division of 22 September 1999 and that it awaits a decision on that point.

99 In actual fact it appears that the Opposition Division declared itself incompetent under Article 78(4) of Regulation No 40/94 to rule on that part of the application for restitutio in integrum, taking the view that only the boards of appeal had jurisdiction to do so.

100 It is clear from the file that the applicant did not oppose that solution. Thus, by letter dated 22 November 2000, it requested OHIM for a decision to be made by a board of appeal on the application for restitutio in integrum in regard to non-observance of the period for bringing an appeal against the decision of the Opposition Division

of 22 September 1999. Moreover, the summary of the applicant's arguments in the decision of the Board of Appeal of 26 September 2002 ruling on the action brought by the applicant against the decision of the Opposition Division of 25 October 2000 makes no mention in that regard.

101 It must therefore be held that the situation described at paragraph 98 above does not correspond to the subject-matter of the dispute in Case T-128/03 and that its mere mention by the applicant without any other clear and specific indications as to a possible infringement of any provision of Regulation No 40/94 or of Regulation No 2868/95 cannot be regarded as an annulment plea either in Case T-128/03 or in Case T-380/02.

102 It follows from all the foregoing considerations that the actions brought by the applicant must be dismissed in their entirety.

Costs

103 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by OHIM as asked for by it. Conversely, since the intervener did not in its reply make any submissions as to the allocation of costs, it must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the actions;**

2. **Orders the applicant to pay its own costs as well as those incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM);**

3. **Orders Chipita International SA to bear its own costs.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 19 April 2005.

H. Jung M. Vilaras

Registrar President