JUDGMENT OF THE GENERAL COURT (Third Chamber)

16 May 2011 *

In Case T-145/08,

Atlas Transport GmbH, established in Düsseldorf (Germany), represented by U. Hildebrandt, K. Schmidt-Hern and B. Weichhaus, lawyers,

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the General Court, being

* Language of the case: German.

Atlas Air, Inc., established in Wilmington, Delaware (United States), represented initially by R. Dissmann, then by R. Dissmann and J. Guhn, lawyers,

ACTION brought against the decision of the First Board of Appeal of OHIM of 24 January 2008 (Case R 1023/2007-1), relating to invalidity proceedings between Atlas Air, Inc. and Atlas Transport GmbH,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: C. Heeren, Administrator,

having regard to the application lodged at the Court Registry on 17 April 2008,

having regard to the response lodged at the Court Registry on 29 August 2008,

further to the hearing on 19 October 2010,

gives the following

Judgment

Legal context

1 Article 59 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (now Article 60 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)), provides:

'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.'

2 Article 61 of Regulation No 40/94 (now Article 63 of Regulation No 207/2009) provides:

'1. If the appeal is admissible, the Board of Appeal shall examine whether the appeal is allowable.

2. In the examination of the appeal, the Board of Appeal shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from the other parties or issued by itself.'

3 Rule 20(7)(c) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) provides:

'The Office may suspend opposition proceedings: … where a suspension is appropriate under the circumstances.'

4 Rule 48(1) of Regulation No 2868/95, headed 'Content of the notice of appeal', provides:

'1. The notice of appeal shall contain: …

(c) a statement identifying the decision which is contested and the extent to which amendment or cancellation of the decision is requested.'

5 Rule 49(1) of Regulation No 2868/95 provides:

'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 …'

Background to the dispute

6 On 5 January 2006, the applicant, Atlas Transport GmbH, obtained the registration of the Community word mark ATLAS, covering, inter alia, transport services in Classes 39 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.

7 On 21 July 2006, the intervener, Atlas Air Inc., submitted an application for a declaration that the applicant's mark was invalid ('the invalidity application of 21 July 2006'). That application was based, on the one hand — in accordance with Articles 52(1)(c) and 8(4) of Regulation No 40/94 (now Articles 53(1)(c) and 8(4) of Regulation No 207/2009) read in conjunction with certain provisions of national law — on a conflict with the trade names ATLAS AIR and ATLAS AIR Inc. used in Benelux, Germany, the United Kingdom and other European countries for air cargo services, and on the other hand — under Articles 52(1)(a) and 8(1)(b) or Regulation No 40/94 (now Articles 53(1)(a) and 8(1)(b) of Regulation No 207/2009) — on the existence of a likelihood of confusion with its Benelux figurative mark No 555184, registered on 19 April 1994 for 'Air transport services; air freight' in Class 39 of the Nice Agreement, reproduced below:



8 On 13 December 2005, the intervener had already submitted an application for a declaration that the Community word mark ATLAS TRANSPORT, registered under no 545 681, was invalid ('the invalidity application of 13 December 2005').

9 On 28 August 2006, the Cancellation Division rejected a request to join the proceedings relating to the invalidity applications of 13 December 2005 and 21 July 2006.

10 On 26 June 2007, the Cancellation Division allowed the invalidity application of 21 July 2006 on the ground that there was a likelihood of confusion, under Article 52(1)(a) of Regulation No 40/94 read in conjunction with Article 8(1)(b) of that regulation, with the earlier Benelux mark ('the decision at issue'). It accordingly found that there was no need to consider the earlier trade names.

11 On 29 June 2007, the applicant filed a notice of appeal with the Board of Appeal against the decision at issue, reserving a right to submit subsequently the written statement setting out the grounds of appeal.

12 On 15 October 2007, the applicant addressed to the Board of Appeal a letter — the first — including an undated draft of a writ of summons, with a translation, in which

a Benelux court competent for trade marks was petitioned to remove the intervener's earlier Benelux mark from its register. In that letter, the applicant stated:

'The appellant hereby files the writ of summons and its translation in which the competent Benelux Court is petitioned to strike the Benelux registration of the respondent from the register. This Benelux registration is the only basis for the decision of the Cancellation division presently contested.'

13 On 29 October 2007, the applicant addressed a letter — the second — to the Board of Appeal, in which it stated:

'The appellant respectfully refers to the submission of 15 October 2007 and presently files the grounds of appeal.

1. The contested decision hinges around Benelux registration No. 555.184 of 4 May 1994. If this Benelux registration is cancelled, the respondent has no basis for his claim. The learned Board of Appeal now knows that this basis is being contested in a competent Court in Benelux, viz. the Court of The Hague.

2. Apart from this, there is the issue of use in Benelux of Benelux 555.184 in such a way that title to this mark was maintained. This evidenced use was filed in the Invalidity Proceedings pending before the Office under No. 1449C. Also in the present appeal the use is challenged. The appellant wishes to challenge the use, but at the same time wishes not to burden the Office with bulky documents. The appellant would not object if the respondent would simply make reference to the evidence on file in 1449C and that then the Office would hold that the evidence is deemed to be here instead. However, it is up to the Office to make a decision on this point.

3. Since the case will now be stayed pending the outcome of the national proceedings the appellant will refrain from voicing his objection to the attached decision. The appellant restricts his observation that the owner of the senior rights was put in the wrong which goes against natural justice.'

14 On 20 November 2007, in the context of the proceedings relating to the invalidity application of 13 December 2005, the applicant filed with OHIM a copy of the petition lodged at the rechtbank van 's Gravenhage (the Hague District Court) (Netherlands). That petition corresponds to the draft petition attached to the letter of 15 October 2007 during the proceedings relating to the invalidity application of 21 July 2006.

15 By decision of 24 January 2008, the First Board of Appeal of OHIM dismissed as inadmissible the applicant's appeal brought on 29 June 2007 further to the invalidity application of 21 July 2006 ('the contested decision'). The Board of Appeal stated as grounds for its decision that, under Article 59 of Regulation No 40/94 (now Article 60 of Regulation No 207/2009), the notice of appeal must be supplemented with a statement setting out the grounds within a time-limit of four months. That statement should contain at least a succinct presentation of the facts and the relevant questions of law and should explain how the decision at issue is flawed. Neither the appellant's letter of 15 October 2007 nor that of 29 October 2007 meets those conditions. On the contrary, in the letter of 29 October 2007, the applicant expressly declines to raise any objection to the decision at issue. Moreover, the Board of Appeal took the view that the request for suspension could not be granted since it was based only on a draft writ of summons before a court with jurisdiction for Benelux trade marks and there was no evidence that proceedings were actually brought before that court. The Board of Appeal further recalled that the invalidity application of 21 July 2006 was not based exclusively on an earlier Benelux trade mark, but also on other earlier rights under Article 8(4) of Regulation No 40/94.

Forms of order sought

16 The applicant claims that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

17 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

18 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Decision

Introduction

19 In the context of this action, the applicant puts forward two pleas, alleging breach of Article 59 of Regulation No 40/94, and breach of Article 61 of Regulation No 40/94 in conjunction with Rule 20(7) of Regulation No 2868/95.

Breach of Article 59 of Regulation No 40/94

Arguments of the parties

20 The applicant submits that the Board of Appeal breached Article 59 of Regulation No 40/94 on two counts. On one hand, the applicant submits that the Board of Appeal wrongly applied very restrictive conditions to the statement of grounds of appeal. On the other hand, it submits that the Board of Appeal erred in requiring the grounds to be explicit. Implicit grounds are sufficient.

21 Thus, the applicant's first argument is that, from the obligation to set out the grounds of appeal before the Board of Appeal under Article 59 of Regulation No 40/94, the General Court has inferred requirements which are 'the most limited imaginable'.

22 More specifically, the applicant states that, in Case T-308/01 *Henkel* v *OHIM - LHS (UK) (KLEENCARE)* [2003] ECR II-3253, the Court held that the purpose of the obligation to set out the grounds of an appeal before the Board of Appeal laid down by Article 59 of Regulation No 40/94 is simply to facilitate the smooth running of the appeal process, which does not mean the view should be taken that the extent of the examination which the Board of Appeal is required to conduct of the decision under appeal is limited or determined by the grounds relied on by the party bringing the appeal. Further, he claims, the Court states that the Board of Appeal is required to conduct an examination of the decision under appeal, even if a specific plea has not been raised by the party (*KLEENCARE*, paragraphs 31 and 32).

23 The applicant infers from the judgment in *KLEENCARE* (paragraph 22 above) that the obligation to set out the grounds of appeal under Article 59 of Regulation No 40/94 is fulfilled where the appellant writes 'something about the dispute which goes beyond the mere application.'

24 The applicant submits that, in the present case, it fulfilled that 'requirement to set out grounds'. It relies on the letter of 15 October 2007 in which it provided OHIM with a draft petition for annulment of the intervener's mark and the letter of 29 October 2007 in which it challenged the use of the earlier mark and referred to the pending proceedings before the Hague District Court. In support of its argument, the applicant refers to the decision of the Fourth Board of Appeal of OHIM of 31 January 2006 (Case R 440/2004-4), and the opinion of the Rapporteur of the Board of Appeal, author of the contested decision and a work of professional literature.

25 Moreover, the applicant maintains that the simplification of procedure brought about by a statement of grounds of appeal does not constitute an argument against its interpretation of the limited extent of the 'requirement to set out grounds' contained in Article 59 of Regulation No 40/94. The simplification of procedure brought about by

a statement of grounds of appeal can be of essential importance to the Board of Appeal and can, of itself, entail the inadmissibility of the appeal in the case where there are no grounds at all.

26 Finally, the applicant argues that Article 59 of Regulation No 40/94 must be interpreted in the light of the fact that legal representation is not required before the Boards of Appeal of OHIM. Accordingly, that provision must be interpreted with account being taken of the fact that it is addressed not only to specialists, but to any citizen of the European Union, who in many cases will be able to put forward only general observations on 'his case'.

27 The applicant's second argument is that the Board of Appeal breached Article 59 of Regulation No 40/94 by requiring a formal and explicit statement of the grounds of the appeal.

28 The applicant denies that it should have stated explicitly that the decision at issue could not be upheld. It submits that the Board of Appeal could certainly have understood — had it wished — the applicant's reasoning set out in the letter of 29 October 2007 explicitly headed 'statement of grounds of appeal', in which it relied on the fact that the intervener's mark was itself being challenged and, as the case may be, invalid, and in which it explicitly objected that the earlier mark had not been used. Admittedly, the applicant did not, by those statements, explicitly deal with the decision at issue; however, it dealt with it implicitly, and implicitly concluded that it could not be upheld.

29 More specifically, the applicant submits, in the first place, that to an informed reader, the submission of the petition made to the Hague District Court could only mean that the applicant wished to refer to the likely annulment of the single mark of the intervener which was the basis for the decision at issue. The consequence of such annulment would be that the decision at issue could no longer be given. The applicant

submits that it thus implicitly referred to the fact that the decision at issue adopted by the Cancellation Division could not be upheld.

30 The applicant asserts, in the second place, that the fact that it objected that the earlier mark had not been used was to be understood as meaning that that objection had already been raised before the Cancellation Division. The applicant submits that, since under Rule 22(1) of Regulation No 2868/95 the non-use of a mark could not be challenged for the first time before the Board of Appeal, the fact that the applicant put forward the non-use objection before the Board of Appeal could only be interpreted by the latter as meaning that the applicant had already put forward the non-use objection before the Cancellation Division.

31 The applicant also states that such an implicit statement of grounds of appeal before a Board of Appeal meets the requirements of Article 59 of Regulation No 40/94, having regard to the following matters.

32 First, OHIM is a multinational body; for that reason, the European legislature has always strived to avoid formalities as much as possible and to organise procedures 'in a simple and user-friendly manner'. In that context, a person expressing himself in a language which is not his mother tongue cannot be expected to provide such direct and precise grounds (Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283, paragraph 93 et seq.).

33 Second, persons addressing themselves to OHIM come from different legal backgrounds and thus different cultural backgrounds; they have different linguistic habits, according to which direct criticism is not always customary and considered polite. In many cases, an indirect or implicit formulation is preferred for reasons of politeness.

In the present case, the statement of grounds for the appeal of the applicant's former representative obviously adhered to such standards of politeness. Moreover, the applicant submits that, setting aside that issue of legal culture, it is probably always the case that, in 'communication between human beings' (and therefore in a statement of grounds of appeal), the addressee 'understands only what he is willing to understand'. Language does not reflect reality exactly, but depends on 'interaction between the maker of the statement and the addressee'. In that regard, there is no fundamental difference between implicit and explicit reasoning. Accordingly, it is certainly not obligatory to reject reasoning which is simply implicit.

34 Third, the applicant submits that interpretation, by the Court of Justice and the General Court, of the obligation to set out grounds before OHIM or in court proceedings is by reference to the possibility for the addressee to understand the reasoning. The applicant submits that the Court of Justice and General Court 'interpret benevolently' the requests and arguments of parties and bear in mind implicit requests, basing their judgments on 'what the parties actually wanted'. The applicant asserts that the Court of Justice and General Court have in several cases held that OHIM can give implicit grounds for its decisions. The applicant maintains that if stricter requirements do not apply in respect of the grounds for decisions of OHIM and the General Court, they must not apply in respect of the grounds supplied by legal practitioners either.

35 Fourth, the applicant submits that Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and Article 1 of the additional protocol to the ECHR would be infringed indirectly if requirements relating to the statement of grounds of appeal were too strict. If the parties to a proceeding can understand a given body of reasoning, no purpose of a procedural nature can justify other restrictions. Additional reasoning requirements for an appeal before OHIM restrict access to other courts and thus the Courts of the European Union, in breach of Article 6 of the ECHR. Further, in the present case, they interfere with the applicant's right to property.

36 The defendant and intervener dispute the applicant's arguments.

Findings of the Court

— The extent of the obligation to set out the grounds of appeal in the written statement filed with the Board of Appeal

37 Under Article 59 of Regulation No 40/94, notice of appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed.

38 Further, Rule 48(1)(c) of Regulation No 2868/95 states that the notice of appeal must contain a statement identifying the decision which is contested and the extent to which amendment or cancellation of the decision is requested.

39 Finally, Rule 49 of Regulation No 2868/95 states that, if the appeal does not comply with the conditions provided by Article 59 of Regulation No 40/94 and Rule 48(1)(c) and (2) of Regulation No 2868/95, the Board of Appeal is to reject it as inadmissible, unless each deficiency has been remedied before the relevant time-limit laid down in Article 59 of Regulation No 40/94 has expired.

40 A systematic reading of those provisions shows that an appellant wishing to bring an appeal before the Board of Appeal is required, within the prescribed time-limit, to file with OHIM a written statement setting out the grounds for its appeal, failing which his appeal is to be dismissed as inadmissible, and that those grounds involve more than an indication of the decision appealed and of the fact that the appellant wishes it to be amended or annulled by the Board of Appeal.

41 Further, it follows from a literal reading of the word 'grounds' used in the last sentence of Article 59 of Regulation No 40/94 that the appellant before the Board of Appeal must set out in writing the reasons for his appeal. It is not for the Board of Appeal to determine, by means of inferences, what are the grounds on which the appeal is based. It must therefore be possible to understand from the appellant's statement why he is requesting the Board of Appeal to annul or amend the decision.

42 The applicant submits, however, that, in *KLEENCARE* (paragraph 22 above), the Court set requirements relating to the statement of grounds of appeal which were 'the most limited that can be imagined', such that 'it is sufficient for an appellant to write something about the dispute' which goes beyond the notice of appeal itself in order to satisfy the 'duty to set out grounds' laid down in Article 59 of Regulation No 40/94.

43 Such an interpretation of *KLEENCARE* (paragraph 22 above) must be rejected. That judgment does not directly concern the issue of the obligation to set out the grounds of appeal contained in Article 59 of Regulation No 40/94, but the scope of the Board of Appeal's review where it is properly seised of an appeal. In that judgment, the General Court stated that the extent of that examination in that regard of the decision appealed is not, in principle, determined by the grounds relied on by the party who has brought the appeal (paragraphs 29 to 32). The fact that the General Court found, in that context, that the written statement provided for by Article 59 of Regulation No 40/94 facilitates the smooth running of the appeal process and that the Board of

Appeal is not restricted in its review by the pleas put forward in that statement does not by any means imply that the obligation on the appellant to provide grounds under Article 59 of Regulation No 40/94 is reduced. By taking the view that the written statement provided for by Article 59 of the regulation 'facilitates the smooth running of the appeal process', the Court confirmed the raison d'être of that obligation as well as its substantive nature. The obligation to set out the grounds of appeal contained in Article 59 of Regulation No 40/94 facilitates the smooth running of the appeal process by enabling the Board of Appeal and, as the case may be, the other party to the first administrative procedure to know the grounds of the appellant's appeal. Accordingly, the applicant is wrong to infer from the case-law flowing from the judgment in *KLEENCARE* (paragraph 22 above) that the requirement to set out the grounds of appeal under Article 59 of Regulation No 40/94 is met where the appellant 'writes something about the dispute' and does not confine himself just to the application itself.

44 Moreover, it must be noted that, before the extent of the review of the Board of Appeal can even be called into question, it is necessary for the Board of Appeal to have been seised of an admissible appeal, which means that the appeal against the decision must contain, inter alia, a statement of grounds under Article 59 of Regulation No 40/94. The appellant's setting out the grounds for his appeal constitutes an essential condition precedent to the Board of Appeal carrying out its review of the decision. Thus, the relevance of the passages of the judgment in *KLEENCARE* (paragraph 22 above) cited by the applicant in the present case is also called into question since the assessment in those passages presupposes that an appeal duly supported by grounds has been filed with the Board of Appeal.

45 Finally, regarding the applicant's argument based on the absence of a requirement of legal representation before the Board of Appeal, it must be noted that the absence of a requirement applies to an appellant in the same way as any other party. Accordingly, it should be pointed out that, though the appellant's appeal is not required to contain pleas indicating precisely all the applicable legal provisions, the appellant must however state what matters of fact and/or of law, according to him, justify annulment or amendment of the decision he is challenging; the grounds of appeal must be

sufficiently clear so that any other party — as the case may be, without legal representation — may assess whether it is appropriate to submit observations and to respond to the appellant's arguments.

46 Accordingly, in light of all the foregoing, it should be held that, where Article 59 of Regulation No 40/94 requires an appellant to file a written statement setting out the grounds of his appeal, the appellant must set out, in writing and sufficiently clearly, what matters of fact and/or of law support its request to the Board of Appeal to annul and/or amend the decision challenged.

47 That interpretation of the extent of the obligation to set out the grounds of appeal under Article 59 of Regulation No 40/94 cannot be called into question by assessments made by the Board of Appeal in other cases or by the Rapporteur of the Board of Appeal in the present case. Those assessments do not bind the Court.

48 Further, the multinational nature of the OHIM administration provides no basis upon which to interpret Article 59 of Regulation No 40/94 in a sense contrary to its very wording. Presentation of the grounds of appeal before the Board of Appeal is an admissibility condition from which the appellant cannot depart. Further still, with regard to the applicant's singular arguments based on the legal-cultural differences between the persons addressing OHIM, it is sufficient to state that such differences require explicit grounds much more than they require the contrary.

49 Finally, the analogy with the requirement for the Board of Appeal to give grounds, on which the applicant relies, is not relevant for the interpretation of the requirement for an appellant to set out the grounds of appeal before the Board of Appeal, since those requirements are incumbent on an administration and a person respectively. Similarly, the interpretation, by the Court of Justice and the General Court, of the arguments of parties to court proceedings is not relevant for the purposes of defining the ambit of the requirement for the appellant to set out grounds of appeal, bearing in mind the difference in nature between the procedure before the Board of Appeal and the procedures before the Courts of the European Union.

— Compliance with the requirement to set out the grounds in the present case

50 The applicant filed two letters with OHIM, the first on 15 October 2007, the content of which is reproduced at paragraph 12 above, the second on 29 October 2007, the content of which is reproduced at paragraph 13 above.

51 Article 59 of Regulation No 40/94 provides for the filing of only one statement, not two, as appears to have been done in the present case.

52 However, the letter of 15 October 2007 does not set out the reasons for which the applicant requested the annulment of the decision at issue. That letter merely informs OHIM of the applicant's petition for annulment of the intervener's Benelux mark before the competent national court, and states that the Benelux mark constitutes the only basis for the decision at issue which it contests. In consequence, the letter of 15 October 2007 cannot constitute the written statement required by Article 59 of Regulation No 40/94. That finding does not of itself entail the inadmissibility of the applicant's appeal, however. Under Article 49(1) of Regulation No 2868/95, a deficiency can be remedied within the period of four months provided by Article 59 of

Regulation No 40/94. The letter of 29 October 2007 was filed within that time-limit for bringing an appeal.

53 Regarding the content of the letter of 29 October 2007, it should be noted that the applicant states, in the first two points of the letter, that the decision at issue was based on a contested Benelux mark and that it wished to challenge the use of the Benelux mark before the Board of Appeal. However, the applicant states in the third point of the letter that it refrains from contesting the decision at issue. By that sentence the applicant goes back on what it previously stated, meaning that the view cannot be taken that the two first points of the letter set out the grounds of appeal before the Board of Appeal.

54 The finding that there were no grounds to support the appeal before the Board of Appeal in the letter of 29 October 2007 is not called into doubt by the fact that, having stated that it refrained from contesting the decision at issue, the applicant states that it 'restricts [its] observation [to pointing out that] that the owner of the senior rights was put in the wrong which goes against natural justice'. It is not possible to understand on the basis of that sentence the reasons for which the applicant was bringing an appeal before the Board of Appeal against the decision at issue. Neither the identity of the holder of the earlier rights, nor the basis on which he holds them, nor the manner in which he has suffered an injustice can be discerned. Even admitting that the applicant is, as it maintained at the hearing, the holder of the earlier rights, it is not apparent from the letter of 29 October 2007 what rights are in question. The only earlier right referred to in that letter is the earlier Benelux mark relied on in the first and second points of the letter. However, in relation to the applicant's mark, the Benelux mark is either earlier or invalid. The earlier right of which the applicant claims to be the holder is therefore neither the applicant's mark nor the Benelux mark. Accordingly, the final sentence of the letter of 29 October 2007 cannot be regarded as sufficient grounds for the applicant's appeal before the Board of Appeal.

55 In light of the absence of clear and intelligible grounds set out in the letters of 15 October and 29 October 2007, and given that the statement of grounds before the Board of Appeal must, inter alia, enable a potential intervener, unassisted by a lawyer, to assess whether it would be appropriate for it to respond to the arguments contained in the appellant's appeal, it should be concluded that the applicant's appeal before the Board of Appeal does not meet the requirements of Article 59 of Regulation No 40/94. The applicant did not set out the grounds of appeal sufficiently clearly, in either the document by which it brought the appeal or any subsequent document filed with the Board of Appeal within the prescribed time-limit, for any of these to constitute a statement of grounds of appeal within the meaning of Article 59 of Regulation No 40/94.

56 None of the applicant's other arguments regarding the obligation to provide grounds can call that assessment into doubt. The applicant fails to demonstrate how the obligation to provide grounds set out at paragraph 46 above and its application in the present case constitute a violation of Article 6 of the ECHR. In addition, the obligation to provide grounds is proportionate to the objective of facilitating procedure and, in view of the content of the letters of 15 October and 29 October 2007, it cannot be considered that those letters facilitated the procedure before the Board of Appeal. Moreover, arguments based on the psychology of parties, politeness and linguistic theory are unfounded given the extent of the obligation to provide grounds before the Board of Appeal defined at paragraph 46 above and the content of the letters of 15 October and 29 October 2007. That assessment is confirmed by the circumstance that, in the present case, the applicant was in fact legally represented in the procedure before the Board of Appeal, as is apparent from the signature of the letters of 15 October and 29 October 2007. It is implicit in the fact of a lawyer representing his clients that he is capable of setting out clearly the reasons for which his client seeks annulment of the decision at issue.

57 However, it must still be considered whether the applicant's argument based on its application for suspension is capable of affecting the consequences of the infringement of Article 59 of Regulation No 40/94 in the present case.

Breach of Article 61 of Regulation No 40/94 in conjunction with Rule 20(7) of Regulation No 2868/95

Arguments of the parties

58 The applicant submits that the procedure before the Board of Appeal should have been suspended as a result of its letter of 15 October 2007, in which the applicant stated that the intervener's Benelux mark was the subject of an action before the relevant court and would probably be annulled. According to the applicant, that fact ruled out the possibility for the Board of Appeal to uphold the decision at issue. Moreover, as the Benelux mark was the sole basis for the decision at issue, the procedure should necessarily have been suspended pending judgment on the validity of the Benelux mark. The failure to suspend the procedure in the present case constitutes a misuse of powers.

59 The applicant further submits that, had the procedure been suspended on 15 October 2007, that suspension would have forestalled the expiry of the time-limit for filing the statement setting out the grounds of appeal. In consequence, that time-limit would still not yet have expired, with the result that the appeal before the Board of Appeal could not have been dismissed as inadmissible for 'lack of grounds'.

60 OHIM and the intervener contest the applicant's arguments.

Findings of the Court

61 In the present case, the Board of Appeal dismissed the applicant's application for suspension on the following grounds:

'Suspension, in principle accepted under Rule 20(7) CTMIR applied by analogy to cancellation proceedings (cf. decision of the Boards of 24 January 2008 in Case R 285/2005-1 — Le Meridien), is not an automatic right. It is a decision, which will be taken if the suspension is appropriate, after balancing the interests of the various parties. In the present case, the request for suspension was not duly reasoned and only supported by an undated draft of a writ of summons. There is no evidence in the present file that an action against the earlier Benelux trade mark was ever lodged at the competent court. Even taking into consideration the document filed in the parallel cancellation proceedings, the Board notes that the relevant part was not translated. Thirdly, the cancellation request was not exclusively based on the Benelux trade mark but also on three other earlier rights in accordance with Article 8(4) CTMR. Only if the cancellation request had to be also rejected with respect to the rights under Article 8(4) CTMR, the validity of the earlier Benelux trade mark would have been decisive for the outcome of the present proceedings' (paragraph 16 of the contested decision).

62 In that regard, it should be pointed out that suspension of the proceedings before the Board of Appeal has no impact on the time-limit of four months for the filing of the grounds of appeal with the Board of Appeal provided by Article 59 of Regulation No 40/94. More specifically, that time-limit has the same characteristics as a time-limit for bringing an appeal, in that neither the parties nor the Board of Appeal can alter it. Unlike other provisions such as Rule 49(2) and Rule 71(1) of Regulation No 2868/95, Article 59 of Regulation No 40/94 fixes that time-limit and does not

grant OHIM the power to do so. Further, Article 78a(2) of Regulation No 40/94 (now Article 82(2) of Regulation No 207/2009) rules out the possibility for the party who brought the appeal to obtain a continuation of proceedings from OHIM when that party has failed to comply with one of the time-limits provided by Article 59 of Regulation No 40/94. Finally, Rule 49(1) of Regulation No 2868/95 provides that the Board of Appeal is to reject as inadmissible an appeal of which it is seised if that appeal does not comply with the conditions provided in Article 59 of Regulation No 40/94, unless each deficiency has been remedied before the relevant time-limit laid down in Article 59 of Regulation No 40/94 has expired.

63 Accordingly, even if the view were taken that, in the present case, the Board of Appeal should have suspended the procedure before it, that circumstance could not have had the effect of extending the four-month time-limit for the filing of the applicant's grounds of appeal. Thus, on the facts of this case, following upon the analysis of the statement of grounds put forward by the applicant, it must be concluded that the applicant did not duly provide grounds for its appeal before the Board of Appeal within the prescribed period. Such a failure to comply with the obligation to provide grounds of appeal contained in Article 59 of Regulation No 40/94 must result in the appeal being declared inadmissible. In consequence, the Board of Appeal could take no other decision than to declare the appeal manifestly inadmissible.

64 It follows that the plea by which the applicant criticises the Board of Appeal for not having suspended the appeal of which it was seised pending judgment of the Hague District Court before which the applicant had applied for a declaration of invalidity in respect of the earlier Benelux mark must be dismissed as ineffective.

65 Even if that plea were not ineffective, the following must be stated regarding the merits of the applicant's arguments in support of the plea.

66 As a preliminary matter, it should be pointed out that the Board of Appeal was not expressly granted the power to suspend invalidity proceedings by the applicable provisions of the regulatory framework. However, Article 79 of Regulation No 40/94 (now Article 83 of Regulation No 207/2009) provides that, in the absence of procedural provisions in that regulation, the implementing regulation, namely Commission Regulation (EC) No 2869/95 of 13 December 1995 on the fees payable to OHIM (OJ 1995 L 303, p. 33), or Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of OHIM (OJ 1996 L 28, p. 11), OHIM is to take into account the principles of procedural law generally recognised in the Member States. The possibility for a decision-making authority to suspend proceedings of which it is seised where that is appropriate in the circumstances must be regarded as a principle generally recognised in the Member States. That general principle finds expression in Rule 20(7) of Regulation No 2868/95 and Article 8 of Regulation No 216/96, which provide for the possibility of suspension of the procedure before the Board of Appeal respectively in opposition proceedings and as a result of an opinion of the Registrar of the Board of Appeal on the admissibility of an appeal before it.

67 Moreover, Rule 20(7)(c) of Regulation No 2868/95 can properly be applied by analogy in the context of invalidity proceedings, since both opposition proceedings based on Article 8(1)(b) of Regulation No 40/94 and proceedings based on relative grounds for invalidity under Article 52(1)(a) of Regulation No 40/94 are designed to assess the likelihood of confusion between two marks, and the possibility of suspending proceedings contributes to the effectiveness of those proceedings.

68 Accordingly, the Board of Appeal has the power to suspend invalidity proceedings where this is appropriate in the circumstances.

69 It must be observed, next, that the discretion of the Board of Appeal to suspend proceedings or not to is a broad discretion. Regulation No 20(7)(c) of Regulation No 2868/95 illustrates that broadness of discretion, stating that the Board of Appeal

can suspend proceedings where this is appropriate under the circumstances. Suspension remains optional for the Board of Appeal, which avails itself of the option only when it considers it appropriate (see, to that effect, Case T-342/02 *Metro-Goldwyn-Mayer Lion* v *OHIM - Moser Grupo Media (Moser Grupo Media)* [2004] ECR II-3191, paragraph 46). Proceedings before the Board of Appeal are therefore not automatically suspended as a result of a request for suspension by a party before it.

70 The circumstance that the Board of Appeal has a broad discretion to suspend proceedings before it does not take its assessment outside the scope of judicial review. That circumstance does, however, restrict judicial review on the merits to ensuring that there is no manifest error of assessment or misuse of powers.

71 In the present case, the applicant submits that the Board of Appeal's decision not to suspend proceedings constitutes a misuse of powers.

72 In that regard, it must be recalled that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 168, Case T-30/00 *Henkel* v *OHIM (Image of a detergent product)* [2001] ECR II-2663, paragraph 70, and Case T-247/01 *eCopy* v *OHIM (ECOPY)* [2002] ECR II-5301, paragraph 22). However, the applicant does not put forward any matter demonstrating that, by refusing to suspend the procedure, the Board of Appeal used its powers for a purpose other than that for which they were conferred on it, or that the non-suspension of proceedings was the result of a misuse of powers.

73 Accordingly, the applicant is wrong to allege that the contested decision is vitiated by a misuse of powers on the ground that its request for suspension of the proceedings before the Board of Appeal leading to the contested decision was rejected.

74 In addition, the applicant essentially submits that the Board of Appeal's decision not to suspend the proceedings in question is vitiated by a manifest error of assessment.

75 In that regard, it should be recalled that, in the contested decision, one of the Board of Appeal's reasons for not suspending the proceedings was the lack of sufficient evidence that the earlier Benelux mark was challenged before the competent court (see paragraph 61 above). The mere draft petition attached to the letter of 15 October 2007 in which the validity of the Benelux mark is contested is not evidence of the actual fact of a challenge to the earlier Benelux mark before the competent court. Accordingly, the Board of Appeal could base its decision to reject the request for suspension on that lack of evidence without making a manifest error of assessment.

76 Further, even if it were established that an action was pending before a national court calling into question the earlier mark on which the decision at issue was based, that fact would not, of itself, suffice to categorise the Board of Appeal's refusal to suspend proceedings as a manifest error of assessment. In exercising its discretion with respect to suspension of proceedings, the Board of Appeal must comply with the general principles governing procedural fairness within a community governed by the rule of law. Thus, in that exercise, the Board of Appeal must take into account not only the interests of the party whose Community mark is contested, but also those of the other parties. The decision whether or not to suspend must follow upon a balancing of the competing interests. In the present case, the intervener had a legitimate interest in obtaining, promptly, a decision on the alleged invalidity of the applicant's mark. Moreover, the applicant does not demonstrate that the Board of Appeal determined

the question of suspension taking into account considerations other than the balance of the various interests. In view of the foregoing, the applicant has not demonstrated that the Board of Appeal was wrong to refuse to suspend proceedings.

77 Moreover, if the applicant really took the view that the invalidity proceedings in the context of which it was challenging the validity of the earlier Benelux mark constituted an imperative condition precedent to its dispute before OHIM, it was for the applicant to bring those other proceedings and to wait until they reached their conclusion before filing its registration application with OHIM.

78 For all the foregoing reasons, each of the applicant's pleas must be rejected. Accordingly, the action must be dismissed in its entirety.

Costs

79 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

80 As the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by OHIM and the intervener.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Atlas Transport GmbH to bear its own costs and to pay those incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and Atlas Air, Inc.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 16 May 2011.

[Signatures]