JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

14 June 2007 *

In Case T-207/06,

Europig SA, established in Josselin (France), represented by D. Masson, lawyer,

applicant,

v

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

defendant,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 31 May 2006 (Case R 1425/2005-4) concerning an application for registration of the word mark EUROPIG as a Community trade mark,

* Language of the case: French.

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

composed of H. Legal, President, V. Vadapalas and N. Wahl, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 4 August 2006,

having regard to the response lodged at the Court Registry on 21 September 2006,

further to the hearing on 1 March 2007,

gives the following

Judgment

Background

1 On 4 May 2004 the applicant, formerly known as Olympig SA, filed an application for a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The mark for which registration was sought is the word mark EUROPIG.

3 The goods in respect of which registration was sought fall within Classes 29 and 30 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— 'Meat; poultry (not live); game; meat extracts; preserved cooked dishes based on meat and/or vegetables; meat, preserved; sausages; sausages; charcuterie; smoked meats; ham; bacon; rillettes (potted pork)', falling within Class 29;

— 'Meat pies; pies', falling within Class 30.

4 By decision of 28 September 2005, the examiner refused the application for a Community trade mark, under Article 38 of Regulation No 40/94.

5 On 25 November 2005 the applicant brought an appeal before OHIM against the examiner's decision, under Articles 57 to 62 of Regulation No 40/94.

6 By decision of 31 May 2006 ('the contested decision'), notified to the applicant on 8 June 2006, the Fourth Board of Appeal dismissed the appeal on the ground that the EUROPIG sign was descriptive of the products for which registration was sought

and devoid of any distinctive character within the meaning of Article 7(1)(b) and (c) of Regulation No 40/94. In addition, the documents which the applicant submitted do not lead to the conclusion that the trade mark which is sought has become distinctive through use for the purposes of Article 7(3) of Regulation No 40/94.

Forms of order sought by the parties

7 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

8 OHIM contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

9 In support of its action, the applicant puts forward three pleas in law: (i) infringement of Article 7(1)(c), (ii) infringement of Article 7(1)(b), and (iii) infringement of Article 7(3) of Regulation No 40/94.

The first plea, alleging infringement of Article 7(1)(c) of Regulation No 40/94

Arguments of the parties

10 The applicant claims that the mark applied for, taken as a whole and considered per se, is not in the least descriptive of the products referred to in the application for registration.

11 In the first place, the applicant takes issue with the Board of Appeal's assertion that the term 'euro' relates to the geographical origin of, or the production standards for, the products that are the subject of the application for registration.

12 The 'euro' element can never describe a geographical origin, since 'Europe' in itself cannot amount to an indication of geographical origin, not for consumers and even less so for businesses operating in the market. The applicant also stresses that, because of the words 'French pork' appearing on the packaging of the goods it markets, no one can be mistaken about the meaning of the 'euro' element.

13 Nor can the English-speaking public perceive that abbreviation as an indication that the products at issue are developed in accordance with the standards in force in Europe. Not only does a certification standard not fall under trade mark law, but consumers and — a fortiori — businesses operating in the sector identify the conformity of a product to such standards through use of the word 'CE' or 'EC'. Accordingly, the 'euro' element refers to the single European currency and evokes at the very most Europe in the general sense of the word.

14 Finally, the applicant claims that, if one had to follow the reasoning of the Board of Appeal, it would mean prohibiting any use of the word 'euro' as a constituent element of a trade mark. However, OHIM agreed to register the trade mark Euro Ice Cream for products falling within Classes 30 and 35, as well as the trade mark Euro-tea for products falling within Classes 5 and 30. Furthermore, during the oral hearing, the applicant pointed out that, on 23 January 2007, OHIM agreed to register the figurative mark Europig under number 4 818 043. That registration had been requested by the applicant and concerned products that are identical to those that are the subject of the trade mark application.

15 In the second place, the applicant submits that the mark applied for cannot be descriptive in so far as the word 'euro' is joined with the word 'pig'.

16 The English-speaking public uses the word 'pork' to refer to pig meat, and not the word 'pig'. Accordingly, only the name 'European pork' could be considered to be descriptive of the products at issue. Use of the term 'pig' could at the very most constitute an evocative, but never a descriptive element of the products claimed. This is demonstrated by the fact that the mark EUROPIG was registered under number 2 380 867 in the United Kingdom on 21 December 2004 for products and services that are identical to those that are the subject of the trade mark application. Likewise, by analogy, the mark EUROVEAU was registered in France in 1988, even though a French consumer immediately understands the term 'veau' (veal). Even though OHIM is certainly not bound by decisions taken by national offices, those decisions provide a serious indication that the mark applied for is devoid of any descriptive character.

17 The applicant concludes from this that the mark EUROPIG, taken as a whole, does not have a precise, constant and immediate meaning for the English-speaking public and, consequently, cannot be considered to be descriptive within the meaning of Article 7(1)(c) of Regulation No 40/94. On the contrary, that mark may be interpreted in several ways. However, it is clear from the case-law that, pursuant to this provision, registration can only be refused for signs that enable the public

immediately and without further reflection to detect the description of one of the characteristics of the goods in question (Case T-193/99 *Wrigley* v *OHIM (DOUBLEMINT)* [2001] ECR II-417; Case T-359/99 *DKV* v *OHIM (EuroHealth)* [2001] ECR II-1645, and Case T-334/03 *Deutsche Post EURO EXPRESS* v *OHIM (EUROPREMIUM)* [2005] ECR II-65). The Court has also made it clear that descriptiveness must be determined not only in relation to each word composing the mark but also in relation to the whole which they form (Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 40).

18 OHIM contends that, with regard to the perception of the elements 'euro' and 'pig' by the relevant public — that is, the average English-speaking consumer — the Board of Appeal rightly found that the mark applied for is descriptive of the products concerned.

19 In the first place, as regards the element 'euro', OHIM contends that it describes, with at least one of its possible meanings, one relevant characteristic of the foodstuffs concerned, namely their geographical origin. Furthermore, that element could be understood to be a reference to regulations governing products produced by the pig-farming industry within the European Community.

20 In the second place, as regards the verbal element 'pig', OHIM contends that the fact that the English word 'pork' might appear more appropriate for describing foodstuffs is irrelevant, since it does not exclude the possibility that, for the average English-speaking consumer, the term 'pig' describes the raw material from which those foodstuffs are prepared.

21 Finally, as regards the compound word 'europig', OHIM observes that the fact that it is a neologism — which the Board of Appeal itself found to be the case — does not imply that it is a lexical invention with an unusual structure.

22 Therefore, the trade mark requested is a straightforward combination of two descriptive elements, which does not create an impression sufficiently far removed from that produced by the mere combination of the elements of which it is composed. Moreover, the applicant has not shown that the compound word 'europig' has become part of everyday language and has acquired a meaning of its own.

Findings of the Court

23 As set out in Article 7(1)(c) of Regulation No 40/94, 'trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service' shall not be registered. In addition, Article 7(2) of that regulation states that 'Paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community'.

24 According to settled case-law, Article 7(1)(c) of Regulation No 40/94 pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all (Case C-191/01 P *OHIM* v *Wrigley* [2003] ECR I-2447, paragraph 31; Case T-219/00 *Ellos* v *OHIM (ELLOS)* [2002] ECR II-753, paragraph 27; Case T-348/02 *Quick* v *OHIM (Quick)* [2003] ECR II-5071, paragraph 27, and Case T-316/03 *Münchener Rückversicherungs-Gesellschaft* v *OHIM (MunichFinancialServices)* [2005] ECR II-1951, paragraph 25; see also, by analogy, Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 25; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraphs 54 and 95, and Case C-265/00 *Campina Melkunie* [2004] ECR I-1699, paragraph 35).

25 Furthermore, Article 7(1)(c) of Regulation No 40/94 refers to signs that are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the product or service to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (*ELLOS*, paragraph 28).

26 The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are those which may serve, in normal usage from the point of view of the target public, to designate, either directly or by reference to one of their essential characteristics, the goods or service in respect of which registration is sought (see Case T-19/04 *Metso Paper Automation* v *OHIM (PAPERLAB)* [2005] ECR II-2383, paragraph 24, and the case-law cited there).

27 It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see *PAPERLAB*, paragraph 25, and the case-law cited there).

28 For a trade mark which consists of a neologism or a word produced by a combination of elements to be regarded as descriptive within the meaning of Article 7(1)(c) of Regulation No 40/94, it is not sufficient that each of its components may be found to be descriptive. The word or neologism itself must also be found to be so (see *PAPERLAB*, paragraph 25, and the case-law cited there).

29 A trade mark consisting of a neologism or a word composed of elements each of which is descriptive of characteristics of the goods or services in respect of which registration is sought is itself descriptive of the characteristics of those goods or services for the purposes of Article 7(1)(c) of Regulation No 40/94, unless there is a perceptible difference between the neologism or the word and the mere sum of its parts. That assumes that, because of the unusual nature of the combination in relation to those goods or services, the neologism or word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of those parts. In that connection, an analysis of the term in question in the light of the relevant lexical and grammatical rules is also useful (see *PAPERLAB*, paragraph 27, and the case-law cited there).

30 It is also important to bear in mind that the distinctiveness of a mark may only be assessed, first, in relation to the understanding of the mark by the relevant public and, second, in relation to the goods or services concerned (see *MunichFinancial-Services*, paragraph 26, and the case-law cited there).

31 In the present case, the products for which registration was sought are 'Meat; poultry (not live); game; meat extracts; preserved cooked dishes based on meat and/or vegetables; meat, preserved; sausages; sausages; charcuterie; smoked meats; ham; bacon; rillettes (potted pork)', falling within Class 29, and 'meat pies; pies', falling within Class 30.

32 As regards the public in relation to which the absolute ground for refusal at issue has to be assessed, it consists — as the Board of Appeal stated in paragraph 10 of the contested decision and which the applicant does not dispute — of the average English-speaking consumer. On the one hand, the products that are the subject of the trade mark application — which are aimed both at businesses operating in the market and final consumers — are intended for general consumption; on the other hand, the sign at issue consists of words taken from the English language.

33 Accordingly, it must be considered whether, from the viewpoint of that public, there is a sufficiently direct and specific relationship between the sign EUROPIG and the goods in respect of which registration is sought.

34 Clearly, as rightly stated by the Board of Appeal, the sign EUROPIG consists of a combination of the abbreviation 'euro', one of whose possible meanings refers to the adjective 'European', and the word 'pig', which refers to the animal. The sign thus consists exclusively of indications that can be used to describe certain characteristics of the products at issue. That being the case, the relevant public could take the sign to be an indication that it concerns products made from pigs' meat and originating in Europe. This finding is not affected by the fact that the elements 'euro' or 'pig' can have other meanings, as pleaded by the applicant.

35 In addition, under the lexical rules of the English language, the neologism 'europig' is not unusual but common. Therefore, the mark applied for does not create, in the target public, an impression which is sufficiently far removed from that produced by the simple juxtaposition of the verbal elements of which it is composed, such as to alter the meaning or the scope.

36 It follows that, considered as a whole, the sign EUROPIG has a sufficiently direct and specific relationship with the products covered by the application for registration.

37 None of the arguments which the applicant has submitted is capable of affecting this finding.

38 First of all, the argument to the effect that, in English, pig meat is referred to as 'pork' and not as 'pig' has to be dismissed, since the type of animal that produces pig meat is still referred to by the latter term, and Article 7(1)(c) of Regulation No 40/94 treats as descriptive indications relating to the characteristics of the product, such as its raw material.

39 Further, the argument is irrelevant according to which the word 'euro' cannot be understood as an indication of geographical origin of the products because the words 'French pork' appear on the packaging of the products. In making this argument, the applicant refers to the conditions in which it plans to market its products. However, the descriptiveness of a word sign within the meaning of Article 7(1)(c) of Regulation No 40/94 must be assessed individually by reference to each of the categories of goods and/or services listed in the application for registration. Therefore, it is immaterial, for the purposes of assessing the descriptiveness of a sign in respect of a particular category of goods or services, whether the applicant for the trade mark in question is contemplating using or is actually using a particular marketing concept (see, to that effect, Case T-355/00 *DaimlerChrysler* v *OHIM (TELE AID)* [2002] ECR II-1939, paragraph 42; Case T-356/00 *DaimlerChrysler* v *OHIM (CARCARD)* [2002] ECR II-1963, paragraph 46, and Case T-358/00 *DaimlerChrysler* v *OHIM (TRUCKCARD)* [2002] ECR II-1993, paragraph 47).

40 Further, as regards the applicant's argument according to which OHIM has agreed to register, on the one hand, several trade marks containing the word 'euro' and, on the other hand, the figurative mark Europig, suffice it to say that, according to settled case-law, decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. The legality of decisions of the Boards of Appeal must therefore be assessed purely by reference to that regulation, as interpreted by the Community Courts, and not to

the practice of the Boards in earlier cases (Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraph 47, and Case T-36/01 *Glaverbel* v *OHIM (Surface of a plate of glass)* [2002] ECR II-3887, paragraph 35).

41 In any event, it appears that the registrations which the applicant refers to concern figurative marks, circumstances that alter the assessment of the registrability of a sign. Indeed, the presence of an additional figurative element can change the perception of the mark taken as a whole.

42 Finally, as regards the argument deriving from the registration of the mark EUROPIG in the United Kingdom and the mark EUROVEAU in France, it suffices to recall that the trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it and applies independently of any national system (Case T-32/00 *Messe München* v *OHIM (electronica)* [2000] ECR II-3829, paragraph 47). Accordingly, the registrability of a sign as a Community trade mark is to be assessed on the basis of the relevant legislation alone. Therefore, neither OHIM nor, as the case may be, the Community Courts are bound — even if they may take them into consideration — by decisions adopted in a Member State, especially decisions finding the sign to be registrable, and that even in a situation where the decisions were adopted under national legislation harmonised with the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), or in a country belonging to the linguistic area in which the word sign in question originated (see, to that effect, Case T-322/03 *Telefon & Buch* v *OHIM — Herold Business Data (WEISSE SEITEN)* [2006] ECR II-835, paragraph 30, and the case-law cited there).

43 It follows from all of the foregoing that the first plea in law, alleging infringement of Article 7(1)(c) of Regulation No 40/94, must be rejected.

The second plea, alleging infringement of Article 7(1)(b) of Regulation No 40/94

44 According to the applicant, the mark applied for has a distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94. Not only is the name 'Europig' not common in the market for cured meats, but none of the applicant's competitors uses that name to refer to products that are either identical or similar to the products referred to in the trade mark application.

45 In that regard, the Court of First Instance recalls that Article 7(1) of Regulation No 40/94 makes it very clear that it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign at issue not to be registrable as a Community trade mark (Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 29).

46 Therefore, given that the first plea in law was rejected, there is no need in the present case to consider this plea in law.

47 Furthermore, according to settled case-law, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 7(1)(c) of Regulation No 40/94 is, on that account, necessarily devoid of any distinctive character in relation to those goods or services within the meaning of Article 7(1)(b) of that regulation (see Joined Cases T-367/02 to T-369/02 *Wieland-Werke* v *OHIM (SnTEM, SnPUR, SnMIX)* [2005] ECR II-47, paragraph 46, and the case-law cited there).

48 In those circumstances, the second plea in law, alleging violation of Article 7(1)(b) of Regulation No 40/94, can in any event not be accepted.

The third plea, alleging infringement of Article 7(3) of Regulation No 40/94

Arguments of the parties

49 The applicant submits that, contrary to what the Board of Appeal decided, the mark applied for has acquired a distinctive character because of the use which has been made of it, as provided in Article 7(3) of Regulation No 40/94.

50 According to the applicant, the documents which the applicant submitted during the proceedings before OHIM demonstrate that use. The fact that the mark that appears on those documents is figurative, as opposed to the trade mark applied for, is not decisive, since in the trade, the name 'europig' is used orally, which has given it a distinctive character that is independent of its graphic representation.

51 OHIM contends that a mark can only be registered pursuant to Article 7(3) if certain conditions are met. The acquisition by a mark of a distinctive character as a consequence of the use of the mark requires that a significant proportion of the public can identify the goods originating from a particular undertaking because of that trade mark. Furthermore, that distinctive character ought to be established for the substantial part of the Community in which the mark has been shown to be devoid of a distinctive character for the purposes of Article 7(1)(b) to (d) of Regulation No 40/94.

52 However, the documents which the applicant has submitted do not prove that the mark applied for has acquired a distinctive character through use. First, those documents are either not dated or dated after the date on which the application for registration was made; second, they relate to product sales in geographic areas in which English is not the official language; and, third, they only refer to a figurative

sign that is different from the mark applied for or to a business name. In any event, those documents, which do not make it possible to determine the market share of the products sold under this mark, do not prove that the English-speaking public perceives the sign to be an indication of origin.

Findings of the Court

53 In accordance with Article 7(3) of Regulation No 40/94, the absolute grounds for refusal to register set out in subparagraphs (b), (c) and (d) of Article 7(1) of the regulation do not preclude registration of a trade mark if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.

54 It can be inferred from that provision that signs or marks can acquire a distinctive character through use despite their lack of inherent distinctiveness.

55 It follows from the case-law relating to the interpretation of Article 3(3) of Directive 89/104, whose normative content is, in essence, identical to that of Article 7(3) of Regulation No 40/94, that the acquisition of a distinctive character through use of a mark requires that at least a significant proportion of the relevant section of the public identifies the products or services concerned as originating from a particular undertaking because of the mark. However, the circumstances in which the condition regarding the acquisition of a distinctive character through use may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages (see, to that effect, *Windsurfing Chiemsee*, paragraph 52, and Case C-299/99 *Philips* [2002] ECR I-5475, paragraphs 61 and 62; see also, as regards Regulation No 40/94, Case T-399/02 *Eurocermex* v *OHIM (Shape of a beer bottle)* [2004] ECR II-1391, paragraph 42).

56 According to settled case-law, in order to assess whether a mark has acquired a distinctive character through use, the factors that must be taken into consideration include: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking. In this respect, appropriate evidence constitutes, in particular, statements from chambers of commerce and industry or other trade and professional associations (*Shape of a beer bottle*, paragraph 44; see also, to that effect and by analogy, *Windsurfing Chiemsee*, paragraph 51, and *Philips*, paragraph 60).

57 Taking into consideration those elements, it must be examined whether, in the present case, the Board of Appeal infringed Article 7(3) of Regulation No 40/94 when it considered that the mark applied for could not be registered in accordance with that provision.

58 However, all the documents which the applicant has submitted, which essentially consist of invoices and marketing materials, are either not dated or carry a date after the date on which the application for registration of the word mark EUROPIG was made, namely 4 May 2004. In addition, those documents, which relate to sales made in non-English-speaking areas, do not lead to the conclusion that at least a significant proportion of the relevant section of the public identifies the products or services concerned as originating from a particular undertaking because of the mark applied for.

59 Therefore, the Board of Appeal was fully entitled to find that the documents submitted by the applicant were inadequate for the purpose of proving that the mark applied for has acquired a distinctive character.

60 It follows from the foregoing that the applicant's plea alleging infringement of Article 7(3) of Regulation No 40/94 must also be dismissed.

61 Accordingly, the action must be dismissed in its entirety.

Costs

62 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred, as applied for by OHIM.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Legal Vadapalas Wahl

Delivered in open court in Luxembourg on 14 June 2007.

E. Coulon H. Legal

Registrar President