JUDGMENT OF THE GENERAL COURT (Second Chamber)

15 March 2011 *

In Case T-50/09,

Ifemy's Holding GmbH, established in Munich (Germany), represented by H.-G. Augustinowski, lawyer,

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

Dada & Co. Kids Srl, established in Prato (Italy),

* Language of the case: English.

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 27 November 2008 (Case R 911/2008-4), relating to opposition proceedings between Ifemy's Holding GmbH and Dada & Co. Kids Srl,

THE GENERAL COURT (Second Chamber),

composed of N. J. Forwood (Rapporteur), President, J. Schwarcz and A.Popescu, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 3 February 2009,

having regard to the response of OHIM lodged at the Registry on 18 May 2009,

having regard to the decision of 26 June 2009 refusing to authorise the lodging of a reply,

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

gives the following

Judgment

Background to the dispute

1 On 24 May 2006, Dada & Co Kids Srl ('the trade mark applicant') filed an application for registration of a Community trade mark at the Office for Harmonisation 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 (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p.1)).

2 The mark for which registration was sought is the figurative mark Dada & Co. kids.

3 The goods for which registration was sought are in Class 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Clothing, footwear, headgear'.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 2006/043 of 23 October 2006.

5 On 1 December 2006, the applicant, Ifemy's Holding GmbH, gave notice of opposition under Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009) to registration of the trade mark applied for in respect of all the goods referred to in paragraph 3 above.

6 The opposition was based on the German word mark DADA, registered on 10 April 2001 under number 30114449, designating, inter alia, the goods in Class 25 corresponding to the following description: 'Clothing, footwear, headgear'.

7 The ground relied on in support of the opposition was the likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009).

8 On 24 July 2007, the trade mark applicant requested that the applicant provide proof of genuine use of the earlier mark, in accordance with Article 43(2) and (3) of Regulation No 40/94 (now Article 42(2) and (3) of Regulation No 207/2009).

9 By letter of 30 August 2007, OHIM invited the applicant to provide that proof within two months, that is to say, by 31 October 2007 at the latest.

10 On 31 October 2007, the applicant sent a letter to OHIM by fax, supplying, inter alia, the list of the documents intended to provide proof that the earlier mark had been put to genuine use. The documents in question were not, however, attached to it.

11 On 9 November 2007, OHIM received the original of that letter by post in addition to 202 pages corresponding to the documents referred to in the letter.

12 By letter of 23 November 2007, the Opposition Division advised the applicant that the documents thereby communicated on 9 November 2007 would not be taken into account, since they were not filed within the time-limit set.

13 By letter of 20 December 2007, the applicant stated to OHIM that, if a transmission was incomplete, OHIM had to inform the sender accordingly and invite him to re-transmit his communication. The applicant therefore stated that it was awaiting such an invitation, contending that its communication by fax of 31 October 2007 had been 'obviously incomplete'.

14 By letter of 19 March 2008, the applicant insisted to OHIM that the proof of use of the earlier mark should be taken into account, relying, inter alia, on Rule 80(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1).

15 By decision of 16 April 2008, the Opposition Division rejected the opposition on the ground that the applicant had not provided proof within the time-limit specified that the earlier mark had been put to genuine use.

16 On 16 June 2008, the applicant filed a notice of appeal at OHIM pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009) against the Opposition Division's decision. It complained that in its decision the Opposition Division had incorrectly identified the Community trade mark applicant and it submitted, inter alia, that there had been infringement of Rule 80(2) of Regulation No 2868/95 and of the principle of equal treatment.

17 By decision of 27 November 2008 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed that appeal. In particular, at paragraph 15 of its decision, the Board of Appeal found that it was immaterial that the Opposition Division's decision referred to the trade mark applicant as 'DADA & CO. MEN SRL' instead of 'DADA & CO. KIDS SRL'. That was merely an error of transcription and the decision had been validly notified to the representatives of the trade mark applicant and of the applicant, in accordance with Rule 77 of Regulation No 2868/95. The Board of Appeal also stated, at paragraph 21 of the contested decision, that in the present case OHIM had simply applied Rule 22 of Regulation No 2868/95 and, at paragraphs 23 to 25 of that decision, that OHIM's practice was not discriminatory since it was in compliance with the statutory provisions and there were other means of redress. Lastly, the Board of Appeal stated, at paragraph 26 of the contested decision, that the communication by fax had not been 'incomplete' within the meaning of Rule 80(2) of Regulation No 2868/95, since on 31 October 2007 the applicant had not intended or attempted to send the 202 pages corresponding to the proof of use of the earlier mark referred to in its letter.

Forms of order sought by the parties

18 The applicant claims that the Court should:

— annul the contested decision and the decision of the Opposition Division;

— order OHIM to pay the costs.

19 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

20 In support of its action against the contested decision, the applicant relies, in essence, on three pleas in law. The first plea alleges infringement of the 'formal requirements' of Article 77a(1) of Regulation No 40/94 (now Article 80(1) of Regulation No 207/2009), Rule 50(2) of Regulation No 2868/95 and of the principle of the rule of

law. The second plea alleges infringement of Rule 80(2) of Regulation No 2868/95. The third plea alleges infringement of the principles of equal treatment and fair competition, as laid down in Articles 2 EC and 3 EC, and of Article 43 of Regulation No 40/94.

The first plea in law, alleging infringement of the 'formal requirements' of Article 77a(1) of Regulation No 40/94, Rule 50(2) of Regulation No 2868/95 and of the principle of the rule of law

Arguments of the parties

21 The applicant complains that the Board of Appeal failed to annul the Opposition Division's decision, even though that decision incorrectly identified a third party as being the Community trade mark applicant, that is to say, Dada & Co. Men Srl, the proprietor of a different Community trade mark.

22 Since that decision was not annulled, there are now two decisions in favour of two different persons at the same time both making an order for costs against the applicant, that is to say, the Opposition Division's decision and the contested decision.

23 OHIM disputes the applicant's arguments.

Findings of the Court

24 Under Rule 50(2) of Regulation No 2868/95, in the version in force at the material time, the Board of Appeal's decision is to contain, inter alia, the names of the parties and of their representatives.

25 In the present case, the applicant is manifestly incorrect to allege infringement of that provision, since the Board of Appeal correctly identified the names of the parties and of their representatives.

26 Moreover, under Article 77a(1) of Regulation No 40/94, where OHIM has made an entry in the Register or taken a decision which contains an obvious procedural error attributable to OHIM, it is to ensure that the entry is cancelled or the decision is revoked.

27 Under Article 77a(3) of Regulation No 40/94 (now Article 80(3) of Regulation No 207/2009), Article 77 is to be without prejudice to the right of the parties to submit an appeal under Articles 57 and 63 (now Articles 58 and 65 of Regulation No 207/2009), or to the possibility, under the procedures and conditions laid down by Regulation No 2868/95, of correcting any linguistic errors or errors of transcription and obvious errors in OHIM's decisions.

28 Under Rule 53 of Regulation No 2868/95, where OHIM becomes aware, of its own motion or at the instance of a party to the proceedings, of a linguistic error, error of transcription or obvious mistake in a decision, it is to ensure that that error or mistake is corrected by the department or division responsible.

29 In the present case, it is apparent from OHIM's file that, in its decision, the Opposition Division incorrectly identified the Community trade mark applicant's business name as being 'DADA & CO. MEN SRL'. On the other hand, that decision correctly identified the trade mark applicant's address and legal representative, and the reference allocated to the case. Moreover, the document by which that decision was notified identifies the trade mark applicant correctly and that notification was made to the legal representative duly designated by the trade mark applicant. The appeal brought by the applicant against the Opposition Division's decision was also notified by OHIM to that legal representative.

30 It follows that, contrary to OHIM's contention, the error alleged in fact affects the Opposition Division's decision itself, rather than its notification, with the result that the case-law which states that the irregularities in the procedure for notifying a decision are extraneous to the decision, and cannot therefore invalidate it, is of no relevance (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 39; Joined Cases T-78/96 and T-170/96 *W* v *Commission* [1998] ECR-SC I-A-239 and II-745, paragraph 183; and Case T-323/00 *SAT.1* v *OHIM (SAT. 2)* [2002] ECR II-2839, paragraph 12).

31 Nevertheless, the error in identification made by the Opposition Division did not have any procedural consequences and cannot be categorised as a procedural error within the meaning of Article 77a(1) of Regulation No 40/94. Consequently, that provision is not applicable to the circumstances of the case.

32 Rather it follows from the above considerations, in particular those in paragraph 29 above, that the error in identification made by the Opposition Division is to be categorised as an error of transcription or an obvious error for the purposes of Article 77a(3) of Regulation No 40/94 and Rule 53 of Regulation No 2868/95. Consequently, an error of that kind could, under those provisions, be corrected by the

competent OHIM department or division acting of its own motion or at the request of an interested party, and OHIM does not have to revoke the decision marred by it or declare it invalid.

33 It is clear from Article 62(1) of Regulation No 40/94 (now Article 64(1) of Regulation No 207/2009) that, when it decides on the substance of an appeal, the Board of Appeal may, inter alia, exercise any power within the competence of the department which was responsible for the decision appealed.

34 In exercising the powers within the Opposition Division's competence, the Board of Appeal did not therefore err or infringe the provisions relied on in the context of the present plea by declaring that the Opposition Division had made an error of transcription or an obvious error and ensuring that this was corrected, pursuant to Article 77a(3) of Regulation No 40/94 and Rule 53 of Regulation No 2868/95. The declaration that there had been that mistake or error and the correction thereof, at paragraphs 9 and 15 of the contested decision, did not, moreover, require the annulment or revocation of the Opposition Division's decision.

35 As regards the applicant's argument summarised at paragraph 22 above, OHIM is right to rebut this by pointing out that the applicant suffers no loss from the fact that there are two decisions making an order for costs against it. The contested decision replaced the Opposition Division's decision in respect of the order for costs, as is apparent from point 3 of the operative part of the contested decision, and in accordance with the provision referred to at paragraph 32 of the grounds of that decision. Therefore, the company Dada & Co. Men Srl, referred to in error in the Opposition Division's decision, cannot assert any claim against the applicant.

36 As to the remainder, the applicant has not advanced any other objection or argument in relation to the alleged infringement of the 'formal requirements' and of the principle of the rule of law. Therefore, such infringement is not established.

37 It follows from all the foregoing that the first plea must be rejected as unfounded.

The second plea in law, alleging infringement of Rule 80(2) of Regulation No 2868/95

Arguments of the parties

38 The applicant submits that a communication by fax starting with the words 'We'd like to present the following evidence' but not including any such evidence is clearly incomplete for the purpose of Rule 80(2) of Regulation No 2868/95. It takes the view, therefore, that OHIM was required to inform it accordingly and to invite it to retransmit its communication, in accordance with that same provision.

39 The Board of Appeal's assertion that the applicant never intended to send a complete communication by fax is pure speculation as to its intentions. The applicant simply stated, in support of its appeal, that since over 200 pages were to be faxed, it was impossible to transmit them without malfunction.

40 The Board of Appeal's assertion based on the heading of the fax of 31 October 2007 is also speculative and unfounded.

41 OHIM disputes the applicant's arguments.

Findings of the Court

42 Rule 80(2) of Regulation No 2868/95 provides:

'Where a communication received by telecopier is incomplete or illegible, or where [OHIM] has reasonable doubts as to the accuracy of the transmission, [OHIM] shall inform the sender accordingly and shall invite him, within a period to be specified by [OHIM], to retransmit the original by telecopy or to submit the original in accordance with Rule 79(a). Where this request is complied with within the period specified, the date of the receipt of the retransmission or of the original shall be deemed to be the date of the receipt of the original communication … Where the request is not complied with within the period specified, the communication shall be deemed not to have been received.'

43 It must be recalled that the purpose of that provision is to allow persons sending communications to OHIM by fax to retransmit their documents or to provide the originals to OHIM after the expiry of the opposition period where one of the situations mentioned by the rules arises, so that they are able to remedy deficiencies resulting from such situations (judgment of 15 May 2007 in Joined Cases T-239/05, T-240/05,

T-245/05 to T-247/05, T-255/05 and T-274/05 to T-280/05 *Black & Decker v OHIM — Atlas Copco (Three-dimensional representation of a yellow and black electrical power tool et al.)*, not published in the ECR, paragraph 60).

44 As OHIM rightly points out, the provision therefore governs situations in which an objective factor relating to particular or abnormal technical circumstances, outside the control of the party in question, prevents the latter from communicating documents by fax in a satisfactory manner.

45 On the other hand, Rule 80(2) of Regulation No 2868/95 does not govern situations in which the incomplete or illegible nature of the communication by fax is intended by the sender, who deliberately chooses not to make a complete and legible transmission although technically able to do so.

46 It also follows, as borne out by the use of the word 'resubmit', that Rule 80(2) of Regulation No 2868/95 presupposes that the documents whose communication by fax was incomplete or illegible are identical to the documents communicated at a later stage as originals or by fax at OHIM's request, and therefore precludes any correction, amendment or addition of new information on that occasion. Any other interpretation would enable the parties to a procedure before OHIM to circumvent the time-limits set for them, which is clearly not the objective pursued by Rule 80(2) of Regulation No 2868/95.

47 The question whether, in the present case, the communication received by fax on 31 October 2007 ought to have been regarded as incomplete, within the meaning of Rule 80(2) of Regulation No 2868/95, must be determined in accordance with those principles.

48 In that connection, the Court must reject at the outset the applicant's argument that a communication by fax starting with the words 'We'd like to present the following evidence', but not including any such evidence, is clearly incomplete for the purpose of Rule 80(2) of Regulation No 2868/95. In accordance with the principles set out in paragraphs 44 and 45 above, a communication of that kind may be regarded as incomplete only if the sender actually intended and indeed attempted to communicate by fax the evidence at issue. If, on the other hand, the sender intended to communicate by fax only a letter listing all the evidence which it proposed to rely on, and subsequently sent that evidence in annex to the original of that letter dispatched by post, then, in accordance with the principle set out in paragraph 46 above, he may not rely on Rule 80(2) of Regulation No 2868/95.

49 In the present case, it is clear from OHIM's file that the letter communicated by fax on the final day of the period set by the Opposition Division, namely on 31 October 2007, comprised five pages, that it was presented as a complete and coherent document duly signed by its author, and that it contained no reference to any annex or document attached. It is also apparent from the file that, after receipt by OHIM, each of the five pages of that letter transmitted to it by fax included the words 'Seite: [number from 001 to 005] von 005'.

50 In addition, the applicant did not formally dispute, before the Opposition Division or subsequently before the Board of Appeal, that it had sent only that one letter by fax on 31 October 2007, nor that the proof of genuine use, sent by post at the same time as the original of the letter, was received by OHIM on 9 November 2007, that is to say, nine days after the time-limit set. The applicant simply stated that since over 200 pages were to be faxed, it was impossible to transmit them without malfunction, without even arguing that it had also attempted to send proof of genuine use by fax,

and without providing the slightest explanation as to the precise circumstances of the fax transmission on 31 October 2007. The applicant also failed to produce the transmission report for the fax of 31 October 2007, or any other report or record capable of proving, if it were the case, that on 31 October 2007 an attempt had indeed been made to communicate the evidence by fax, but had failed.

51 On the basis of such sufficiently precise and consistent evidence, and in the absence of any plausible explanation to the contrary provided by the applicant, the Board of Appeal properly concluded not only that the five-page letter alone had been sent by fax and that the 202 other pages had been sent at a later stage, on an unspecified date, by post only, but also that the applicant had never intended to communicate those 202 pages by fax.

52 Faced with that same evidence, the applicant cannot simply contend, before the General Court, that that conclusion of the Board of Appeal is pure speculation as to its intentions. It is incumbent upon it, in order to convince the Court, to provide an explanation or justification such as to undermine the likelihood of the fact alleged (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 79).

53 In those circumstances, it must be concluded that the applicant has failed to prove that on 31 October 2007 it attempted to send by fax the proof that the earlier mark had been put to genuine use.

54 It follows that the communication received by OHIM by fax on 31 October 2007 cannot be classified as incomplete within the meaning of Rule 80(2) of Regulation No 2868/95, so that that provision is not in any event applicable to the circumstances of the present case.

55 The second plea in law must therefore be rejected.

The third plea in law, alleging infringement of the principles of equal treatment and fair competition, as laid down in Articles 2 EC and 3 EC, and of Article 43 of Regulation No 40/94

Arguments of the parties

56 The applicant submits that OHIM's practice discriminates, in breach of the Treaty, against persons established in the 'further parts of Europe', who have considerably less time than those established in Spain to send their letters to OHIM within the time-limits — usually two months — which it sets them. To be sure that a letter is received in time, or if not will give entitlement to *restitutio in integrum*, any person not resident close to where OHIM is located has to send the letter about two weeks before the time-limit expires, whereas persons resident in Spain can use the full time-limit. In addition, that practice is likely to encourage interested parties to move closer to OHIM's location or to employ law firms close to it, which hinders the free flow of business.

57 OHIM's argument that everyone is free to send their communications by fax is mistaken. First, some documents, in particular those in colour, cannot be sent by fax. Second, as in the present case, some communications are too large to be able to be sent by fax without malfunction.

58 The applicant states that there are a number of alternatives to OHIM's practice that are based on objective and non-discriminatory criteria. For example, OHIM could allow communications by email, as the General Court does, or indeed take into account the date on which a fax is sent and accept proof of genuine use sent within the time-limit set, but received after its has expired.

59 In response to the Board of Appeal's argument that it had other means of redress which it did not use, the applicant submits, first, that, in accordance with OHIM's practice, a request for a period to be extended under Rule 71(1) of Regulation No 2868/95 might not necessarily have been granted. Second, the continuation of proceedings through the payment of a fee, pursuant to Article 78a of Regulation No 40/94 (now Article 82 of Regulation No 207/2009) was impossible, since that article is not applicable to the time-limit laid down in Article 43 of that regulation. Third, *restitutio in integrum* under Article 78 of Regulation No 40/94 (now Article 81 of Regulation No 207/2009) is granted only in a very limited number of cases and cannot therefore serve as a valid alternative. Furthermore, there is no reason why an applicant should waive his rights and pay any extra fees because of a 'discriminatory practice' by OHIM.

60 Lastly, the applicant submits that Rule 22(2) of Regulation No 2868/95 provides that an opponent must furnish its proof of use before the time-limit expires, not that that evidence must have reached OHIM before that date. The applicant states that that

rule must be interpreted in the light of the general principles of law, in particular the principle of equal treatment, and that it must be consistent with those principles.

61 OHIM disputes the applicant's arguments.

Findings of the Court

62 Rule 22(2) of Regulation No 2868/95 provides:

'Where the opposing party has to furnish proof of use or show that there are proper reasons for non-use, [OHIM] shall invite him to provide the proof required within such period as it shall specify. If the opposing party does not provide such proof before the time limit expires, [OHIM] shall reject the opposition.'

63 It follows from the wording of that provision that the time-limit which it lays down is a strict time-limit which means that OHIM cannot take account of evidence that is submitted late (see Case T-388/00 *Institut für Lernsysteme* v *OHIM - Educational Services (ELS)* [2002] ECR II-4301, paragraph 28).

64 Such a time-limit, like the periods for lodging complaints and bringing actions, is a matter of public policy and cannot be left to the discretion of the parties or the Court, which must ascertain, of its own motion if need be, whether it has been complied with. That time-limit meets the requirement of legal certainty and the need to

avoid any discrimination or arbitrary treatment in the administration of justice (see, by analogy, Case 79/70 *Müllers* v *ESC* [1971] ECR 689, paragraph 18; Case 276/85 *Cladakis* v *Commission* [1987] ECR 495, paragraph 11; and Case C-154/99 P *Politi* v *European Training Foundation* [2000] ECR I-5019, paragraph 15).

65 For the purposes of ascertaining compliance with that time-limit, the Court considers, like OHIM, that Rule 22(2) of Regulation No 2868/95 must be interpreted as meaning that proof is 'furnished' not when it is sent to OHIM but when it reaches it.

66 First, that interpretation is borne out, in terms of their literal meaning, by the use of the two verbs 'to furnish' and 'to provide' proof to OHIM in the wording of Rule 22(2) of Regulation No 2868/95. Both of those verbs convey the idea of moving or transferring the proof to the place at which OHIM is located, the emphasis thus being placed on the result of the action rather than on its origin.

67 Second, although neither Regulation No 40/94 nor Regulation No 2868/95 contains a provision equivalent to Article 43(3) of the Rules of Procedure of the General Court — which provides that in the reckoning of time-limits for taking steps in proceedings only the date of lodgment at the Registry is to be taken into account — the interpretation above is consistent with the overall scheme of both those regulations, in which numerous specific provisions lay down that, in the reckoning of time-limits for taking steps in proceedings, the date of a document is the date on which it is received and not that on which it is sent. This is the case, for example, with Rule 70(2) of Regulation No 2868/95, which provides that where a procedural step is notified, the 'receipt' of the document notified is the relevant event. The same is also true of Rule 72 of Regulation No 2868/95, which provides that if a time-limit expires on a day on which OHIM is not open for 'receipt' of documents, the time-limit is to be extended until the first day thereafter on which OHIM is open for 'receipt' of documents, and of Rule 80(2) of Regulation No 2868/95, which provides that the date of the 'receipt' of the

retransmission or of the original of a document is to be deemed to be the date of the 'receipt' of the original communication where the latter proved deficient.

68 Third, OHIM correctly points out that, in the context of Community staff cases, a similar solution has been identified in settled case-law in which Article 90(2) of the Staff Regulations of Officials of the European Communities has been interpreted as meaning that a complaint is 'lodged' not when it sent to the institution but when it 'reaches' it (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraphs 8 and 13; Case T-54/90 *Lacroix* v *Commission* [1991] ECR II-749, paragraphs 28 and 29; and order in Case F-3/05 *Schmit* v *Commission* [2006] ECR-SC I-A-1-9 and II-A-1-33, paragraph 28).

69 Fourth, that interpretation is the most apt to meet the requirement of legal certainty. It ensures a clear determination and meticulous observance of the starting and end points of the period referred to in Rule 22(2) of Regulation No 2868/95.

70 Fifth, contrary to the applicant's claims, that interpretation also meets the requirement to avoid any discrimination or arbitrary treatment in the administration of justice, in that it makes possible the same methods of calculating time-limits for all the parties, irrespective of their residence or nationality.

71 It is settled case-law that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different

situations must not be treated in the same way unless such treatment is objectively justified (Case C-71/07 P *Campoli* v *Commission* [2008] ECR I-5887, paragraph 50).

72 In the present case, it is indeed true, as OHIM acknowledges, that parties who are established or resident a long way from Alicante (Spain) may be disadvantaged compared to other parties, established or resident close to that city, when they communicate with OHIM by post.

73 However, the mere fact that the time it takes to deliver a letter by post varies according to the country of dispatch does not allow the conclusion to be drawn that the taking into account of the date of receipt of the proof provided under Rule 22(2) of Regulation No 2868/95 discriminates between the persons concerned according to the country in which they are located when that proof is sent (see, to that effect, by analogy, Case T-293/07 P *Lofaro* v *Commission* [2008], ECR-SC I-B-1-85 and II-B-1-531, paragraph 49).

74 First, in accordance with point 1.2 of the guidelines relating to proceedings before OHIM, adopted in November 2005, the time-limits prescribed by OHIM are generally of two months' duration. As regards providing proof of genuine use of an earlier mark, that time-limit is usually quite sufficient to enable a trade-mark opponent exercising all the diligence required of a normally prudent person, wherever he is within the territory of the European Union, to collect his evidence and to communicate it, all the more so because the party concerned must expect to be requested to communicate such evidence by the other party, as provided for in Article 43(2) and (3) of Regulation No 40/94.

75 Second, the fact that the time it takes to deliver a letter by post to Alicante varies according to the country of dispatch is to a certain extent offset by the opportunity

for any person concerned, when appropriate under the circumstances, of requesting an extension of the period, in accordance with Rule 71(1) of Regulation No 2868/95. In addition, Rule 72(4) of that regulation provides that, if an exceptional occurrence such as a natural disaster or strike interrupts or dislocates proper communication from the parties to the proceedings to OHIM or vice versa, the President of OHIM may determine that for parties to the proceedings having their residence or registered office in the State concerned or who have appointed a representative with a place of business in the State concerned, all time-limits that otherwise would expire on or after the date of commencement of such occurrence, as determined by him, are to extend until a date to be determined by him.

76 Third, the discrimination alleged is in any event negated by the opportunity afforded to everyone of communicating with OHIM by fax, pursuant to Rule 80 of Regulation No 2868/95. Since that method of delivery is immediate, the taking into account of the date on which the proof is received does not disadvantage the parties according to the country in which they are located when that proof is communicated (see, to that effect, by analogy, *Lofaro* v *Commission*, paragraph 50).

77 In that connection, the applicant cannot simply claim that large communications cannot be sent by fax without malfunction. Not only is that assertion not substantiated in any way, but it is in fact disproved by the data relied on by OHIM, in particular those relating to the judgment in Case T-191/07 *Anheuser-Busch* v *OHIM - Budějovický Budvar (BUDWEISER)* [2009] ECR II-691.

78 In addition, the possibility of malfunction in the course of a communication by fax, with the result that receipt by fax is incomplete or illegible, is specifically envisaged by

Rule 80(2) of Regulation No 2868/95, which in that case allows the party suffering that malfunction to obtain a new time-limit. Indeed, in its judgment in *Three-dimensional representation of a yellow and black electrical power tool et al.*, the Court held that the scope of that provision extended to the communication of colour documents by fax.

79 It follows that the applicant is not justified in maintaining that the Board of Appeal infringed the principle of equal treatment in holding that the date on which the applicant's communication was received was the relevant date for compliance with the time-limit prescribed, in accordance with Article 22(2) of Regulation No 2868/95.

80 Since the alleged infringement of the principle of fair competition is based on the premiss that there has been infringement of the principle of equal treatment, it is not proved either.

81 As to the remainder, the applicant has not advanced any other objection or argument in relation to the alleged infringement of Article 43 of Regulation No 40/94. Therefore, that infringement is not proved.

82 It follows from all the foregoing that the third plea in law must be rejected and, accordingly, the action dismissed in its entirety, and there is no need to rule on the admissibility of the form of order sought, in the application, seeking annulment of the Opposition Division's decision.

Costs

83 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.

84 Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Ifemy's Holding GmbH to pay the costs.

Forwood Schwarcz Popescu

Delivered in open court in Luxembourg on 15 March 2011.

[Signatures]