JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
21 April 2004 *

In Case T-127/02,

Concept — Anlagen u. Geräte nach 'GMP' für Produktion u. Labor GmbH, established in Heidelberg (Germany), represented by G. Hodapp, lawyer,

applicant,

v

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

defendant,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 18 February 2002 (Case R 466/2000-2) on the application for registration of a figurative mark containing the word element 'ECA' as a Community trade mark,

* Language of the case: German.

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

composed of: H. Legal, President, V. Tiili and M. Vilaras, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2003,

gives the following

Judgment

Legal background

1 Article 7 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, provides:

'1. The following shall not be registered:

...

(h) trade marks which have not been authorised by the competent authorities and are to be refused pursuant to Article 6 *ter* of the Paris Convention;

...'.

2 Article 6 *ter* of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended, ('the Paris Convention') provides:

'(1) (a) The countries of the Union [composed of the countries to which the present Convention applies] agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorisation by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organisations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this

Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a nature as to suggest to the public that a connection exists between the organisation concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organisation.

...

(3) ...

(b) The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organisations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

...'

Background to the dispute

3 On 16 March 1999, the applicant filed with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) an application for registration of a Community trade mark under Regulation No 40/94.

4 The mark in respect of which registration was sought is the figurative sign shown below:



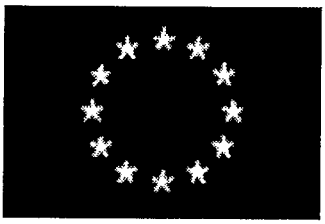
5 The goods and services in respect of which registration was sought fall within Classes 9, 41 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended, and, for each of those classes, correspond to the following description:

— Class 9: 'Computer hardware, computer software, record data carriers';

— Class 41: 'Arranging and conducting of colloquiums, seminars, symposiums, congresses and conferences; providing of tuition, instruction, training; consultancy on training and further training';

— Class 42: 'Creating, updating and maintenance of computer programmes; computer programme design; consultancy in the field of computers; rental of computer hardware and computer software; leasing access time to a computer database'.

6 By letter of 13 September 1999, the examiner informed the applicant that, under Article 7(1)(h) of Regulation No 40/94, its mark could not be registered because it contained an imitation of the symbol of the Council of Europe (shown below). The examiner took the view that the circle of stars characteristic of that well-known symbol was reproduced in the mark sought and that this created the impression that the mark sought designated a suborganisation of the Council of Europe or a special programme organised at its request or in which it cooperates. In the examiner's opinion, the abbreviation 'EC', which stands for European Community and which appears in the abbreviation 'ECA', reinforced that impression. She also stated that, on copies, the protected emblem often appears only in black and white.



7 By letter of 12 November 1999, the applicant submitted its observations on the examiner's objections.

8 By decision of 8 March 2000, the examiner refused the application for registration on the basis of Article 7(1)(h) of Regulation No 40/94.

9 On 5 May 2000, the applicant brought before OHIM an appeal under Article 59 of Regulation No 40/94 against the examiner's decision.

10 By decision of 18 February 2002 ('the contested decision'), the Second Board of Appeal dismissed the appeal. The Board found, essentially, that there was a high degree of similarity between the circle of stars in the sign in question and that in the emblem used by the Council of Europe and the European Community or the European Union ('the European emblem') and between the activities of those institutions and the goods and services covered by the application for registration and that the combination of the circle of stars and the series of letters 'E', 'C' and 'A' would give rise to an association of ideas on the part of the consumer.

Procedure and forms of order sought

11 By application lodged at the Registry of the Court of First Instance on 18 April 2002, the applicant brought the present action.

12 OHIM lodged its reply on 5 August 2002.

13 As a measure of organisation of procedure, OHIM was asked to produce a document and it complied with that request.

14 The parties' oral argument and their replies to the questions put by the Court were heard at the hearing on 26 November 2003.

15 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

16 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The admissibility of certain arguments

17 First of all, as regards the arguments to which the applicant refers in paragraph 39 of its application and which it submitted during the proceedings before OHIM, Article 44(1) of the Rules of Procedure of the Court of First Instance provides that the application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to

prepare his defence and the Court to rule on the action, even without any other supporting information (Case T-111/99 *Samper* v *Parliament* [2000] ECR-SC I-A-135 and II-611, paragraph 27, and Case T-333/99 *X* v *ECB* [2001] ECR II-3021, paragraph 114).

18 Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provision, must appear in the application (*X* v *ECB*, cited in paragraph 17 above, paragraph 115, and order of the Court of First Instance of 21 May 1999 in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49).

19 In the present case, the applicant merely stated in its application (paragraph 39):

'In order to avoid unnecessary repetition and to supplement the arguments set out above, reference is made to all the arguments put forward in writing thus far in the proceedings before [OHIM]. It is expressly stated that all of those arguments are likewise part of this statement of grounds.'

20 The applicant has thus failed to identify either the specific points in its application which it wishes to supplement by that reference or the annexes in which those arguments might be set out.

21 Accordingly, the Court is not required to find in the annexes the arguments to which the applicant might be referring or to examine them, since those arguments are inadmissible.

The sole plea: infringement of Article 7(1)(h) of Regulation No 40/94

22 The applicant submits, essentially, that the contested decision is vitiated by an infringement of Article 7(1)(h) of Regulation No 40/94 in so far as registration of a mark which does not fall within the scope of the prohibition laid down in that provision was refused. The applicant's arguments fall into two parts. The first alleges infringement of Article 6 *ter* (1)(a) and (b) of the Paris Convention and the second alleges infringement of Article 6 *ter* (1)(c) of that convention.

The first part: infringement of Article 6 *ter* (1)(a) and (b) of the Paris Convention

— Arguments of the parties

23 The applicant argues that registration may be refused under Article 7(1)(h) of Regulation No 40/94, in conjunction with Article 6 *ter* of the Paris Convention, only if the mark in question is an imitation from a heraldic point of view.

24 The applicant states that the European emblem, which is protected under Article 6 *ter* of the Paris Convention, has a precise and detailed design. It refers to the following geometric description of the European emblem:

'The emblem is in the form of a blue rectangular flag of which the fly is one and a half times the length of the hoist. Twelve gold stars situated at equal intervals form an invisible circle whose centre is the point of intersection of the diagonals of the rectangle. The radius of the circle is equal to one third of the height of the hoist. Each of the stars has five points which are situated on the circumference of an invisible circle whose radius is equal to one eighteenth of the height of the hoist. All the stars are upright — that is to say, with the one point vertical and two points in a straight line at right angles to the mast. The circle is arranged so that the stars appear in the position of the hours on the face of a clock. Their number is invariable.'

25 The applicant also relies on the following description of the monochromatic reproduction of the European emblem: 'if only black is available, outline the rectangle in black and print the stars in black and white.'

26 The applicant submits that the mark sought is not identical to that emblem. Consequently, the Board of Appeal's refusal to register it can, at best, be justified only if that mark is an imitation from a heraldic point of view, which is not the case.

27 According to the applicant, the term 'heraldic' means 'relating to coats of arms'. The mark must therefore be an imitation of a coat of arms. It is an essential requirement of heraldry that coats of arms contain no word element but be composed exclusively of coloured and figurative elements ('Heraldik', *Brockhaus Enzyklopädie in 24 Bänden*, 19th edition, f.a. Brockhaus, Mannheim, 1989, Volume 9, p. 696).

28 The applicant argues that the mark sought cannot be an imitation from a heraldic point of view since it contains the word element 'ECA' and, in heraldry, word

elements never appear in the centre of coats of arms. The applicant relies on the doctrine that there is an imitation from a heraldic point of view only where, despite modification of the State emblem or any other sign, the mark retains the character of a coat of arms and is perceived in trade as a State emblem or as the name of an international intergovernmental organisation. The heraldic impression of an emblem used as a trade mark (heraldic style) is lost if, for example, the blazon or the seal is removed. The design of a State emblem, as such, may be freely used but the representation of that design must not be an imitation of the State emblem (K.H. Fezer, *Beck'scher Kommentar zum Markenrecht*, Munich, 2001). In the applicant's view, the heraldic impression of the emblem is lost if the rectangular flag symbolised by the rectangular background is removed.

29 The applicant also relies on a draft article which was drawn up by the congress of experts of the League of Nations at the time of insertion of the expression 'imitation of a State emblem' into the Paris Convention and which is worded as follows:

'Only those reproductions which, from a heraldic point of view, can be distinguished from the original only by virtue of ancillary features shall be deemed to be imitations of a State emblem or armorial bearings for the purposes of the first paragraph [of Article 6 *ter* of the Paris Convention]'.

30 According to the applicant, it was the legislature's intention that, in accordance with the principles of the Final Protocol to the Paris Convention, a mark should be found to be an imitation only if, from a heraldic point of view, that is to say, in the context of coats of arms, the difference between it and the emblem is negligible. That is not the case here.

31 Moreover, the circle of stars in the mark sought is not identical to that of the European emblem. In the applicant's view, the dimensions of the stars, the radii of the circles of stars and the ratio of the radius of each star to that of the circle of stars are clearly different.

32 The applicant further submits that, from a heraldic point of view, it is essential that flags are always rectangular. The mark sought has a square background which is not reminiscent of the usual rectangular background of a flag. In addition, flags do not contain word elements.

33 According to the applicant, the mark sought can be distinguished from the European emblem, from a heraldic point of view, not only by virtue of ancillary features but also by virtue of a fundamental element compared with those which generally characterise flags or national symbols. It is the word element of the mark sought which is precisely that element which, as a key word that can be easily remembered, normally distinguishes a mark more clearly than any graphics, such as any circle of stars.

34 The mark sought therefore has strong individual characteristics which clearly differ from those of the European emblem. According to the applicant, the mark sought does not represent the European emblem in itself, does not contain the European emblem in itself and is not an imitation from a heraldic point of view. The mark sought is, on the contrary, a sign which has been formed in an entirely different manner and which OHIM associates with the European emblem simply because it also contains a circle of stars. Neither the Council of Europe nor the European Communities have a right to protection of the reproduction of a circle of stars. Only the representation of the flag exactly described on the website of the European Union, namely a rectangle with a circle of stars placed in the centre according to precise measurements and containing no word element, is protected.

35 OHIM relies on the German doctrine that there may be an imitation from a heraldic point of view only if, despite modification of the State emblem or any other sign of that kind, the mark retains the character of armorial bearings and is perceived by the public as a State emblem or the emblem of an international intergovernmental organisation (K.H. Fezer, *Beck'scher Kommentar zum Markenrecht*, Munich, 1999).

36 Accordingly, OHIM takes the view that 'from a heraldic point of view' means that it need only be examined whether there is any similarity between the heraldic elements and that it is unnecessary to assess the similarity of the signs in geometric or graphic terms. According to OHIM, while two signs may be different visually, they may nevertheless be identical from a heraldic point of view. For example, in the eyes of the viewer, the heraldic device of Aesculapius's staff may take various perfectly distinguishable forms. Conversely, signs may be visually similar, even though there is no similarity between them from a heraldic point of view, as is the case, for example, with the depiction of griffins and eagles.

37 As regards the assessment of the mark sought, OHIM takes the view that the Board of Appeal was right to confirm the refusal to register because it was likely that the mark would be perceived as the sign of an organisation of the European Union or the Council of Europe.

38 OHIM refers to the following heraldic description of the European emblem: 'on a field azure a circle of 12 mullets or, their points not touching'. It submits that, from a heraldic point of view, the figurative mark sought, which consists of a circle composed of 12 stars which do not touch, differs from the heraldic description of the European emblem only in that the circle of stars is depicted in white on a black background and the mark contains a word element. The fact that the circle of stars in the mark sought is depicted on a square background is irrelevant given that the heraldic description referred to does not specify the shape

but rather the colour of the background (azure). From a heraldic point of view, the same is true of the spacing between the stars. According to OHIM, the important point is that both signs contain five-pointed stars. OHIM therefore concludes that there is such a high degree of similarity between the two signs that it may be found that the graphic representation of the mark sought is an imitation from a heraldic point of view.

— Findings of the Court

39 The aim of Article 6 *ter* (1)(a) of the Paris Convention is to preclude the registration and use of trade marks which are identical to State emblems or which are to a certain degree similar to them. Such registration or use would adversely affect the right of the State to control the use of the symbols of its sovereignty and might, moreover, mislead the public as to the origin of the goods for which such marks are used. By virtue of Article 6 *ter* (1)(b) of the Paris Convention, that protection also covers the armorial bearings, flags, other emblems, abbreviations and names of international intergovernmental organisations.

40 State emblems and emblems of international intergovernmental organisations are protected not only against the registration and use of marks which are identical to them or which incorporate them but also against the inclusion in such marks of any imitation of those emblems from a heraldic point of view.

41 Accordingly, in the present case, the fact that the mark also contains a word element does not, in itself, preclude application of that article, contrary to what the applicant claims. The important question is whether, in the present case, the mark sought contains an element which may be regarded as the European emblem

or an imitation thereof from a heraldic point of view. That element need not necessarily be identical to the emblem in question. The fact that the emblem in question is stylised or that only part of the emblem is used does not mean that there is no imitation from a heraldic point of view.

42 The applicant relies on the geometric description and the monochrome reproduction process in order to claim that the mark sought is not identical to the European emblem.

43 However, the applicant fails to take account of the following heraldic description given by the Council of Europe:

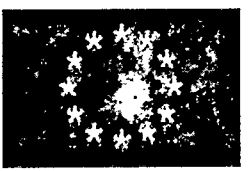
'On a field azure a circle of 12 mullets or, their points not touching'

44 When making a comparison 'from a heraldic point of view', regard must be had to the heraldic description and not to the geometric description, which is by nature much more detailed. From a heraldic point of view, the mark sought differs from the heraldic description of the European emblem only in that the circle of stars in that mark is depicted in white on a black background.

45 Given that the application for registration does not mention the colours of the mark sought, that mark could be depicted in any combination of colours and thus equally on an azure background with yellow or golden stars. The part of the heraldic description concerning colours is therefore irrelevant in the present case.

46 Moreover, it should be noted that the European emblem is often reproduced in black and white so that the azure background and golden stars do not appear in colour.

47 It is therefore the following signs which must be compared:





48 The applicant submits that the circle of stars in the mark sought is not identical to that in the European emblem since the dimensions of the stars, the radii of the circles of stars and the ratio of the radius of each star to that of the circle of stars are clearly different.

49 However, the Board of Appeal rightly found, in paragraph 20 of the contested decision, that the 'protected circle of stars and the figurative mark sought both consist of 12 stars' and that, moreover, 'the stars are of the same type since they are of the same shape and size and have five points one of which points upwards'. It is irrelevant that the circle of stars in the mark sought is not identical to that in the European emblem since the relevant public may have the impression that it is an imitation, from a heraldic point of view, of that circle. The fact that the stars are not exactly the same size is therefore not decisive. The applicant's argument must therefore be rejected.

50 As regards the applicant's argument that the fact that the mark sought has a square background distinguishes it from the European emblem, which has the rectangular background of a flag, it must be held, as OHIM rightly did, that that alleged difference is irrelevant given that the heraldic description does not specify the shape of the background to the European emblem. Moreover, it is the circle of stars rather than the background which is predominant. In addition, while the circle of stars was originally the flag of the Council of Europe, it is now regarded not only as a flag but also as the symbol, or emblem, of the European Union. The applicant's argument therefore cannot succeed.

51 Accordingly, it must be held that the mark sought is an imitation from a heraldic point of view of the European emblem. The first part of the plea is therefore unfounded.

The second part: infringement of Article 6 *ter* (1)(c) of the Paris Convention

— Arguments of the parties

52 The applicant submits that OHIM failed to exercise the discretion conferred on it by the second sentence of Article 6 *ter* (1)(c) of the Paris Convention. Even if the mark sought is an imitation from a heraldic point of view of the European emblem, that provision does not require that registration of that mark be refused. According to the applicant, it is of fundamental importance in this case that the mark sought relates to goods and services which clearly differ from the primary functions of both the Council of Europe and the European Union. There is no similarity of goods or services between those primary public-law functions and the services associated with them, such as financial assistance.

53 According to the applicant, the word element 'ECA', which appears in the foreground of the mark sought, has no meaning in trade. That word element is not a common or usual abbreviation and is at the very most understood by a variety of meanings. The combination of the letters 'E', 'C' and 'A' is thus the abbreviation of 'Economic Cooperation Administration', the name of the former authority implementing the Marshall Plan, which has no connection with the European Union. The applicant cites other possible meanings, such as 'Early Compatibility Analysis', 'Earth Coverage Antenna', 'Economic Commission for Africa', 'Electrical Contractors Association', 'Export Credit Agency' and 'European Crystallographic Association' and refers to websites and extracts attached as annexes to its application. Given that the abbreviation 'ECA' is used throughout Europe for widely varying company purposes, trade will not be exposed to any risk of confusion with State organisations, still less with the European Community or the European Commission.

54 Moreover, in an annex to its application, the applicant sets out registered trade marks consisting of a circle of 12 stars and word elements and claims that those marks cannot be confused with the European emblem. It also lists, in an annex to its application, German trade marks consisting of a circle of stars which, as a result of their additional word or figurative elements, refer to the European Union to a greater extent than the mark sought. The applicant points out that the Markengesetz (German law on trade marks) contains provisions identical to those of Regulation No 40/94.

55 The applicant argues that the registration of those national and international trade marks shows, first, that the use of a circle of stars in a figurative mark with a coloured background and an additional word element is not regarded as being contrary to Article 6 *ter* (1)(b) of the Paris Convention and, second, that even where a similarity can be found, all the European patent and trade mark offices exercise their discretion under Article 6 *ter* (1)(c) of the Paris Convention and take the view that marks of a design such as that of the mark sought are not of such a nature as to suggest to the public that a connection exists between the organisation concerned and the armorial bearings, flags, other emblems, abbreviations and names. The applicant claims that, according to all those offices, the use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organisation.

56 The applicant concludes that the mark sought is not of such a nature as to suggest to the public that a connection exists between the organisation concerned and the emblems, abbreviations or names. Nor is it of such a nature as to mislead the public as to the existence of a connection between the applicant and that organisation.

57 OHIM points out that Article 6 *ter* (1)(c) of the Paris Convention is in no way concerned with the existence of a likelihood of confusion within the meaning of trade mark law. As a result of the special need to protect the specific category of signs to which the emblems of States and international organisations belong, application of the rule is not subject to the condition that the goods and services be similar or identical. It need only be determined whether the public could be misled as to the existence of a connection between the proprietor of the mark and the proprietor of the State or international emblem. In OHIM's view, that is not the case where, in the light of the goods and services claimed and the sector of the international organisation's activity, the possibility that the consumer might believe there to be a connection between those goods and services and the organisation can be ruled out. The obvious disparity between the sector of activity of the proprietor of the mark and that of the international organisation may also be used to support the argument that there is no risk that the public might associate the proprietor of the mark with the international organisation.

58 According to OHIM, it must therefore be determined whether the addition of a word element and the depiction combining the colours black and white are sufficient to exclude application of Article 6 *ter* of the Paris Convention on the ground that the use or registration is manifestly not of such a nature as to mislead the public as to the existence of a connection between the user and the organisation.

59 OHIM submits that the point to be determined is not whether the abbreviation 'ECA' may have several meanings but rather whether the mark is of such a nature as to mislead the public as to the existence of a connection between the user and the organisation.

60 Moreover, OHIM disputes the applicant's argument that, in the practice of the national trade mark offices, the use of a circle of stars on a coloured background, together with a word element, is not regarded as an infringement of Article 6 *ter* (1)(b) of the Paris Convention.

61 OHIM points out that it has likewise refused to register a number of marks on account of their similarity to the European emblem. The examples attached by OHIM as an annex to its reply show that each of those decisions was based on the existence of a likelihood of association.

62 In OHIM's view, it follows that infringement of the prohibition of discrimination cannot be the subject of an action (see Case T-106/00 *Streamserve* v *OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 66). Given that the decisions of OHIM are adopted in the exercise of circumscribed powers, earlier decisions cannot be used as a point of reference. While the earlier decisions were lawful and the cases in question are indeed similar, the contested decision may be annulled only on the ground of a misapplication of the law and not for infringement of the prohibition of discrimination.

— Findings of the Court

63 Under the second sentence of Article 6 *ter* (1)(c), it is permissible, in the case of the emblem of an international organisation, to allow registration of a mark if it is not of such a nature as to suggest to the public that a connection exists between the organisation concerned and armorial bearings, flags, emblems, abbreviations and names or if such registration is probably not of such a nature as to mislead the public as to an existence of a connection between the user and the organisation.

64 The applicant is wrong to claim that OHIM failed to exercise the discretion conferred on it by that provision. In paragraph 24 of the contested decision, the Board of Appeal found as follows:

'In order to establish whether, when confronted with the figurative mark in the context of the goods and services in question, the relevant public will associate the figurative mark with the intergovernmental organisations concerned or is likely to be misled as to the existence of a connection between the applicant and those intergovernmental organisations, the overall impression created by the mark must be assessed. In order to answer the question in the affirmative, the relevant public must, when confronted with the mark as a whole, that is to say, with both its graphic and word elements, associate that mark with the protected sign or the organisations using it. In making that assessment, account is likewise to be taken of the list of goods and services in the application for registration'.

65 It is clear from the paragraph cited and from paragraphs 25 to 29 of the contested decision that, although the Board of Appeal did not expressly refer to Article 6 *ter* (1)(c) of the Paris Convention, it considered whether the mark sought was of such a nature as to suggest to the public a connection between that mark and the Council of Europe or the European Community or whether it was of such a nature as to mislead the public as to the existence of a connection between the applicant and the Council of Europe or the European Community. It concluded that registration and use of the mark are capable of giving rise to the impression on the part of the relevant public that there is a connection between the mark sought and the Council of Europe or the European Community.

66 The Board of Appeal took the view that, having regard to the goods and services in respect of which the applicant sought registration, the relevant public included the general public as well as the specialist public. For example, instruction may be aimed at a clearly defined specialist public or at the general public, depending on how it is given and on the subject-matter dealt with.

67 Moreover, the Board of Appeal found that, contrary to what the applicant claims, there is an overlap between the goods and services offered by the applicant and the activities of the Council of Europe and the European Union. The Board of Appeal referred, inter alia, to the *Official Journal of the European Communities*, which is available on CD-ROM, that is to say, on a record data carrier, to seminars, training programmes and conferences offered by the Council of Europe and the European Community in a variety of areas and to a large number of databases made available to the public by those institutions, in particular EUR-Lex.

68 Given the wide variety of services and goods which may be offered by the Council of Europe and the European Union or the European Community, it cannot be ruled out on the basis of the kind of goods and services in respect of which registration was sought that the relevant public might believe that there is a connection between the applicant and those institutions. Accordingly, the Board of Appeal was right to find that registration of the mark sought was likely to give the public the impression that there is a connection between the mark sought and the institutions in question.

69 As regards the word element 'ECA', it should be pointed out that the presence of the abbreviation 'ECA' in the centre of the sign of the mark sought reinforces the impression that there is a connection between the applicant and the European Union or the European Community. As OHIM found, the abbreviation 'EC' refers directly to the European Community, at least in the English-speaking part of the European Union. That abbreviation is known to stand for the European Community, even outside the United Kingdom. Further, the abbreviation 'ECA' may also refer to the European Court of Auditors. The addition of the word element 'ECA' inside the circle of stars does not remove the impression that there is a connection between the applicant and the European Union or the European Community, and in fact quite the opposite is true. That impression is created by the circle of stars so that it cannot be removed by adding a word element beginning with EC, which could stand for any agency, body or programme of the European Union or of the European Community. The applicant's line of argument concerning the word element 'ECA' is therefore unfounded.

70 With respect to the earlier national registrations on which the applicant relies, it is clear from the case-law that the Community trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it; it is self-sufficient 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 Community legislation alone. Consequently, neither OHIM nor, as the case may be, the Community Courts are bound by decisions adopted in any Member State, or indeed a third country, finding a sign to be registrable as a national trade mark (Case T-88/00 *Mag Instrument* v *OHIM (Torch shapes)* [2002] ECR II-467, paragraph 41). Registrations already made in the Member States are therefore a factor which may only be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (Case T-122/99 *Procter & Gamble* v *OHIM (Soap bar shape)* [2000] ECR II-265, paragraph 61; Case T-24/00 *Sunrider* v *OHIM (VITALITE)* [2001] ECR II-449, paragraph 33; Case T-337/99 *Henkel* v *OHIM (Red and black round tablet)* [2001] ECR II-2597, paragraph 58; and Case T-194/01 *Unilever* v *OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 68). Those considerations apply *a fortiori* to the registration of marks other than that sought in the present case.

71 As regards the practice of OHIM itself, it is apparent from the case-law that decisions concerning registration of a sign as a Community 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. Accordingly, the question whether a sign may be registered as a Community trade mark must be assessed solely on the basis of that regulation, as interpreted by the Community Courts, and not on the basis of previous practice in the decisions of the Boards of Appeal (*STREAMSERVE*, cited in paragraph 62 above, paragraph 66; Joined Cases T-79/01 and T-86/01 *Bosch* v *OHIM (Kit Pro and Kit Super Pro)* [2002] ECR II-4881, paragraph 32; and Joined Cases T-324/01 and T-110/02 *Axions and Belce* v *OHIM(Brown cigar shape and gold ingot shape)* [2003] ECR II-1897, paragraph 51).

72 In any event, whilst it is accepted that factual or legal grounds contained in an earlier decision might constitute arguments to support a plea alleging infringement of a provision of Regulation No 40/94 (*STREAMSERVE*, cited in paragraph 62 above, paragraph 69, and *Kit Pro and Kit Super Pro*, cited in paragraph 71 above, paragraph 33), in this case, the applicant has clearly not claimed that the national decisions or the earlier decisions of the Boards of Appeal relied on by it contain grounds which might call into question the reply given above to the plea alleging infringement of Article 7(1)(h) of Regulation No 40/94 (*Brown cigar shape and gold ingot shape*, cited in paragraph 71 above, paragraph 52).

73 The applicant's arguments based solely on the instances of registration in Germany and the other countries and at Community level are therefore irrelevant.

74 The second part of the plea is therefore unfounded.

75 Consequently, the action must be dismissed in its entirety.

Costs

76 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must 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 by OHIM as applied for in the latter's pleadings.

On those grounds

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay the costs.**

Legal Tiili Vilaras

Delivered in open court in Luxembourg on 21 April 2004.

H. Jung

Registrar

H. Legal

President