

- Reject definitely and in its entirety the opposition to registration of the mark applied in respect of all the classes where it was successful,
- Order the Office and the intervener to pay the costs, including those incurred in opposition proceedings and before the Board of Appeal.

*Pleas in law and main arguments:*

Applicant for the Community trade mark:	The Applicant.
Trade mark concerned:	Figurative trade mark 'Ferró' - Application No 1 1 010 099 for goods and services in classes 29, 30 and 42.
Proprietor of the opposing trade mark or sign:	Ferrero oHG mbH.
Opposing trade mark or sign:	Word trade mark 'FERRERO' (German trade mark registration No 956 671) for goods in classes 5, 29, 30, 32 and 33.
Decision of the Opposition Division:	Partial upholding of the opposition for the following goods in class 30: 'Coffee, tea, sugar, artificial coffee, flour and preparation made from cereals, bread, biscuits, pastry and confectionery, ices, syrup, yeast, baking powder, all kinds of bread preparations, honey, treacle'.
Decision of the Board of Appeal:	Rejection of the appeal.
Pleas in law:	Infringement of Article 8(1)(b) of Council Regulation 44/94.

**Action brought on 2 February 2004 by the Autonomous Region of the Azores against the Council of the European Union**

(Case T-37/04)

(2004/C 94/131)

(Language of the case: English)

An action against the Council of the European Union was brought before the Court of First Instance of the European Communities on 2 February 2004 by the Autonomous Region of the Azores, (Portugal), represented by M. Renouf, S. Crosby and C. Bryant, Solicitors.

The applicant claims that the Court should:

- Annul Articles 3 and 11 and the Annex to Council Regulation 1954/2003 in so far as: a) They provide for the fishing effort under the Regulation to be determined by reference only to the target species and the ICES/CECAF area but not also by reference to the type of fishing gear used, whether fixed or towed; b) They exclude from the operation of Articles 3 and 11 demersal species covered by Regulation 2347/2002.
- Annul Article 15 of Council Regulation 1954/2003 in so far as the repeal of Council Regulations 685/95 and 2027/95: a) Removes the power of the Community to determine fishing effort by reference not only to target species and ICES/CECAF area but also by reference to the type of fishing gear used (Articles 3(1), 6 and Annex 1 of Regulation 685/95 and Article 2 and Annex of Regulation 2027/95) and removes the determination of same which had been effected by Regulation 2027/95; b) Removes the power to determine a maximum annual fishing effort by area in respect of demersal species covered by Regulation 2347/2002 and removes the determination of same which had been effected by Regulation 2027/95; c) Removes the exclusion of access of Spanish vessels to island waters under the sovereignty or jurisdiction of Portugal in ICES Area X and CECAF for fishing of tuna or tuna-like species (Annex III, para. 3 of Regulation 685/95); d) Is capable of taking effect on 1 August 2004, whether or not a Regulation under Articles 11(2) or (3) of Regulation 1954/2003 has entered into force.
- Annul Article 5(1) of Council Regulation 1954/2003 in so far as it does not maintain the exclusion of access of Spanish vessels to island waters under the sovereignty or jurisdiction of Portugal in ICES Area X and CECAF for fishing of tuna or tuna-like species.
- Annul Article 13(b) of Council Regulation 1954/2003 insofar as it exempts Articles 19a(3), 19b, 19c, 18d and 19e(3) of Regulation (EEC) No. 2847/93 from application in the waters under the sovereignty or jurisdiction of Portugal around the Azores.
- Order the Council to pay the costs incurred by the Applicant in the present proceedings.

*Pleas in law and main arguments:*

The Applicant claims the partial annulment of Council Regulation 1954/2003<sup>(1)</sup> which replaces the fishing regime governing the Azorean fisheries. The applicant invokes a number of alleged procedural violations in the adoption of the regulation, which would justify its annulment as requested by the applicant. These procedural violations comprise failure to properly consult the European Parliament; failure to take into account evidence of an economic, technical, scientific and environmental nature; and failure to provide an adequate statement of reasons for the act adopted.

The Applicant further invokes a number of alleged substantive law violations by the contested regulation, namely:

- breach of the principle of relative stability and related provisions of the Common Fisheries Policy, in particular Article 33 EC and Regulation 2371/2002 <sup>(1)</sup> Official Journal L 358, 31/12/2002 P. 0059 - 0080
- breach of Article 299 paragraph 2 EC
- breach of Articles 6 and 174 EC, and of the environmental law principles that is to say, the precautionary principle, the principle of preventive action, the principle of rectification of damage at source and the principle that the polluter should pay.
- breach of the fundamental objectives of the Treaty, of Article 158 EC and of the principle of proportionality
- breach of mandatory public international law requirements and thus of Article 300(7) EC
- breach of Regulation 1275/94 <sup>(2)</sup> Official Journal L 140, 03/06/1994 P. 0001-0002 adopted to facilitate the integration of Spain and Portugal into the general scheme of the Common Fisheries Policy.

<sup>(1)</sup> Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95 Official Journal L 289, 07/11/2003 P. 0001 - 0007

<sup>(1)</sup> Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy

<sup>(2)</sup> Council Regulation (EC) No 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal

**Action brought on 4 February 2004 by Sunplus Technology Co. Ltd., against the office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**

**(Case T-38/04)**

(2004/C 94/132)

*(Language of the case: to be determined pursuant to article 131(2) of the Rules of Procedure language in which the case was submitted: English)*

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before the Court of First Instance of the European Communities on 4 February 2004 by Sunplus Technology Co. Ltd., Hsin-Chu,

Taiwan, represented by Dr H. Eichmann, Mr G. Barth, Dr U. Blumenröder, Ms C. Niklas-Falter, Dr M. Kinkeldey, Dr K. Brandt, Ms A. Franke, Ms U. Stephani, Dr B. Allekotte, Dr E.Pfrang, Ms K. Lochner, Ms B. Ertlé, Ms Christine Neuhierl and Ms Sabine Prückner, lawyers.

Sun Microsystems, Inc., was also a party to the proceedings before the Board of Appeal.

The applicant claims that the Court should:

- annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in Case R 642/2000-4 of 7 October 2003;
- order the costs of the proceedings to be borne by the defendant.

*Pleas in law and main arguments:*

Applicant for the Community trade mark:

Sunplus Technology Co. Ltd.

The Community trade mark sought:

The figurative mark 'SUNPLUS' for certain goods in class 9 (Chips; semi-conductors; micro-processing chips; program cards;...) (trade mark application No 214346)

Proprietor of mark or sign cited in the opposition proceedings:

Sun Microsystems Inc.

Mark or sign cited in opposition:

The national verbal and figurative marks 'SUN' for goods in class 9 (computers; magnetic and electronic data carriers;...)

Decision of the Opposition Division:

Rejection of the trade mark application

Decision of the Board of Appeal <sup>(1)</sup>:

Dismissal of the appeal brought by the applicant

Pleas in law:

Infringement of Article 8(1) (b) of Council Regulation (EC) No 40/94 <sup>(2)</sup> in that there is no likelihood of confusion.

<sup>(1)</sup> Decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in Case R 642/2000-4 of 7 October 2003

<sup>(2)</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 11, p. 1)