

*Defendant:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

*Other party to the proceedings before the Board of Appeal of OHIM:* Tofutown.com GmbH (Wiesbaum/Vulkaneifel, Germany)

#### Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 7 January 2010 (Case R 63/2009-4);

— Order OHIM to pay the costs.

#### Pleas in law and main arguments

*Applicant for a Community trade mark:* Tofutown.com GmbH

*Community trade mark concerned:* the word mark 'TOFUKING' for goods in Classes 29, 30 and 32 (Application No 5 027 016)

*Proprietor of the mark or sign cited in the opposition proceedings:* the applicant

*Mark or sign cited in opposition:* the German word mark 'King' (trade mark No 30 404 434), the Community word mark 'Curry King' (trade mark No 2 885 077) and the German word mark 'Curry King' (trade mark No 39 902 969), all three of which were registered for goods in Classes 29 and 30

*Decision of the Opposition Division:* rejection of the opposition

*Decision of the Board of Appeal:* dismissal of the appeal

*Pleas in law:* Breach of Article 8(1)(b) of Regulation (EC) No 40/94 <sup>(1)</sup> as there is a likelihood of confusion between the marks at issue

<sup>(1)</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

**Action brought on 3 March 2010 — Nordzucker v Commission**

(Case T-100/10)

(2010/C 113/100)

*Language of the case:* German

#### Parties

*Applicant:* Nordzucker AG (Brunswick, Germany) (represented by: M. Niestedt, lawyer)

*Defendant:* European Commission

#### Form of order sought

— Annul Commission Regulation (EC) No 1193/2009; <sup>(1)</sup>

— Order the defendant to pay the costs.

#### Pleas in law and main arguments

The applicant puts forward the following pleas in law in support of its action:

— Lack of competence of the Commission to adopt a regulation relating to production levies for sugar marketing years 2002/2003 to 2005/2006 since the legal basis for the regulation was one that is no longer in force;

— Infringement of essential procedural requirements in so far as a different procedure for the adoption of the contested regulation should have been selected, and the participation rights of the Council and of the European Parliament have thus been disregarded;

— Failure to have regard to the judgment of the Court of Justice in Joined Cases C-5/06 and C-23/06 to C-36/06 *Zuckerfabrik Jülich and Others* [2008] ECR I-3231 in so far as, in the contested regulation, the Commission arbitrarily also changed the 'total amount of refunds' parameter in the calculation of production levies, even though this parameter was not the object of the Court's examination;

— Infringement of the prohibition of retroactivity by the subsequent amendment — only introduced by Regulation No 1193/2009 — of the total amount of refunds for sugar marketing years that had already been completed.

(<sup>1</sup>) Commission Regulation (EC) No 1193/2009 of 3 November 2009 correcting Regulations (EC) No 1762/2003, (EC) No 1775/2004, (EC) No 1686/2005, (EC) No 164/2007 and fixing the production levies in the sugar sector for marketing years 2002/2003, 2003/2004, 2004/2005, 2005/2006 (OJ 2009 L 321, p. 1).

### Action brought on 3 March 2010 — Poland v Commission

(Case T-101/10)

(2010/C 113/101)

Language of the case: Polish

#### Parties

*Applicant:* Republic of Poland (represented by: M. Szpunar, Agent)

*Defendant:* European Commission

#### Form of order sought

— declare invalid Article 3 of Commission Regulation (EC) No 1193/2009 of 3 November 2009 correcting Regulations (EC) No 1762/2003, (EC) No 1775/2004, (EC) No 1686/2005, (EC) No 164/2007 and fixing the production levies in the sugar sector for marketing years 2002/2003, 2003/2004, 2004/2005, 2005/2006, (<sup>1</sup>) to the extent to which that article recasts Article 2 of Commission Regulation (EC) No 1686/2005 of 14 October 2005 setting the production levies and the coefficient for the additional levy in the sugar sector for the 2004/05 marketing year; (<sup>2</sup>)

— order the Commission to pay the costs of the proceedings.

#### Pleas in law and main arguments

The applicant submits that the contested provision introduced a difference in coefficients for the additional production levy in the sugar sector for the marketing year 2004/2005 in that that coefficient was established in the amount of 0.25466 for the new Member States, whereas it was established in the amount of 0.14911 for the States of the Community of Fifteen.

The applicant raises the following heads of complaint in respect of the contested provision:

First, the applicant alleges that there was a lack of competence on the part of the Commission and a breach of Article 16 of Council Regulation (EC) No 1260/2001, (<sup>3</sup>) which authorised the Commission solely to establish one single coefficient in a uniform amount for the whole of the Union. The applicant submits that the various language versions of the provisions of Regulation (EC) No 1260/2001 are to that extent perfectly in line with one another and unambiguous. The applicant further submits that the principles of the common organisation of the markets in the sugar sector cannot constitute justification for departing from the literal construction of the provisions of Regulation (EC) No 1260/2001 and, indeed, rather exclude any such departure. In the applicant's view, a uniform coefficient constituted an essential instrument for the purpose of giving effect to the principles of the common organisation of the markets in the sugar sector.

Second, the applicant alleges that there has been a breach of the principle that new Member States must give immediate and full effect to the *acquis communautaire*. In the applicant's view, the contested provision is *de facto* a transitional measure which lacks any basis in the 2003 Act of Accession or in the measures adopted pursuant thereto. The applicant cites in this regard Article 2 of the Act of Accession, which forms the basis for the full adoption by the Republic of Poland of all rights and obligations resulting from membership, and thus also, according to the applicant, of the right to benefit from excess payments and duties covering losses on the sugar market which have arisen in previous marketing years.

Third, the applicant alleges that there has been an infringement of the principle of non-discrimination. According to the applicant, the sole criterion for the difference in coefficients is the date on which Member States acceded to the European Union. It contends that the accession of new Member States cannot, by itself, constitute an objective criterion capable of justifying the distinction introduced inasmuch as the consequences of accession were exhaustively regulated in the Act of Accession and in the measures adopted pursuant thereto.

Fourth, the applicant alleges infringement of the principle of solidarity. It submits that the principle of solidarity among producers is a fundamental principle of the common organisation of the markets in the sugar sector and implies that the costs of financing that market are to be borne jointly by all producers, and financial neutrality is achieved, not on the basis of individual Member States, but rather on the basis of the entire Union, in accordance with objective criteria. A distinction in coefficients with regard to individual Member States is, according to the applicant, indicative of an arbitrary and disproportionate distribution of the costs of financing the sugar market which demonstrates a lack of solidarity.