

*Pleas in law:* Infringement of Article 7(1) and (3), 52(1)(a), 56(1)(a), 75(1) and 83 of Regulation No 207/2009

**Action brought on 27 July 2011 — Welte-Wenu v OHIM — Commission (Representation of a circle of 12 stars on a blue background)**

(Case T-413/11)

(2011/C 298/36)

*Language in which the application was lodged:* German

**Parties**

*Applicant:* Welte-Wenu GmbH (Neu-Ulm, Germany) (represented by: T Kahl, lawyer)

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

*Other party to the proceedings before the Board of Appeal:* European Commission

**Form of order sought**

The applicant claims that the General Court should:

- annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market of 12.5.2011 — Case R 1590/2010;
- reject the appeal of the European Union against the decision of the Cancellation Division on the application for a declaration of invalidity of the Community trade mark EDS EUROPEAN DRIVESHAFT SERVICES (and thereby that application itself);
- order the European Union to pay the costs of the cancellation and appeal proceedings and the defendant to pay the costs of these proceedings.

**Pleas in law and main arguments**

*Registered Community trade mark in respect of which a declaration of invalidity has been sought:* Figurative mark containing a circle of 12 stars on a blue background for goods in Classes 7 and 12 — Community trade mark No 2 180 800

*Proprietor of the Community trade mark:* The applicant.

*Applicant for the declaration of invalidity of the Community trade mark:* European Commission.

*Grounds for the application for a declaration of invalidity:* The registration of the Community trade mark was contrary to Article 7 of Regulation No 207/2009.

*Decision of the Cancellation Division:* Rejection of the application for a declaration of invalidity of the Community trade mark at issue.

*Decision of the Board of Appeal:* Upholding of the appeal and cancellation of the Community trade mark at issue.

*Pleas in law:* Infringement of Article 7(1)(g)(h) and (i) and Articles 55 and 76 of Regulation No 207/2009, Article

6ter(1)(c) of the Paris Convention and Rule 37(b)(iv) of Regulation No 2868/95, since the registration of the Community trade mark was not contrary to the provisions of Article 7 of Regulation No 207/2009.

**Action brought on 29 July 2011 — Nutrichem Diät + Pharma v OHIM — Gervais Danone (Active)**

(Case T-414/11)

(2011/C 298/37)

*Language in which the application was lodged:* German

**Parties**

*Applicant:* Nutrichem Diät + Pharma GmbH (Roth, Germany) (represented by: D. Jochim and R. Egerer, lawyers)

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

*Other party to the proceedings before the Board of Appeal:* Compagnie Gervais Danone (Levallois Perret, France)

**Form of order sought**

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) of 4 May 2011 in Case R 683/2010-1;
- Order the defendant to pay the costs.

**Pleas in law and main arguments**

*Applicant for a Community trade mark:* the applicant.

*Community trade mark concerned:* the figurative mark containing the word element 'Active' for goods in Classes 5, 29 and 32 — application No 3 423 316.

*Proprietor of the mark or sign cited in the opposition proceedings:* Compagnie Gervais Danone.

*Mark or sign cited in opposition:* the national word mark 'ACTIVIA' for goods in Classes 5, 29, 30 and 32.

*Decision of the Opposition Division:* the opposition was upheld.

*Decision of the Board of Appeal:* the appeal was dismissed.

*Pleas in law:* Infringement (i) of Article 76 of Regulation No 207/2009 in conjunction with Rule 50(1) and Rule 19(1) and (3) of Regulation No 2868/95 as the Board of Appeal incorrectly assumed that the earlier mark has average distinctive character; (ii) of Article 8(1)(b) of Regulation No 207/2009 as there is no likelihood of confusion between the marks at issue; and (iii) of Article 76 of Regulation No 207/2009 as the parallel decisions of the German Patent and Trade Mark Office and of other national authorities, cited by the applicant, were not taken into account when the defendant took its decision.