

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 20 March 2003¹

1. This is an appeal against a judgment of the Court of First Instance² dismissing an action brought by Christina Kik against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office') in which she essentially sought to put in issue the rules governing the use of languages at the Office.

Relevant legislation

2. Article 290 EC (formerly Article 217 of the EC Treaty) provides:

'The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, be determined by the Council, acting unanimously.'³

3. Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community⁴ was based on what is now Article 290 EC. The citation in its preamble reads:

'Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously.'

4. Article 1 of Regulation No 1 currently provides:

'The official languages and the working languages of the institutions of the Union shall be Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.'

1 — Original language: English

2 — Case T-120/99 [2001] ECR II-2235.

3 — Article 290 has been amended by the Treaty of Nice so as to refer to the Statute rather than the Rules of Procedure of the Court of Justice.

4 — OJ, English Special Edition (I) (1952-1958), p. 59; as amended by the various accession treaties, most recently the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ 1994 C 241, p. 21 as adjusted by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union, OJ 1995 L 1, p. 1.

5. Article 2 of Regulation No 1 provides:

‘Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.’

6. Article 5 provides that the *Official Journal of the European Communities* (now the *Official Journal of the European Union*) is to be published in the 11 official languages.

7. The Office was established by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark⁵ (‘the Regulation’ or ‘Regulation 40/94’).

8. The 11th recital in the preamble to the Regulation reads:

‘... administrative measures are necessary at Community level for implementing in

relation to every trade mark the trade mark law created by this Regulation;... it is therefore essential, while retaining the Community’s existing institutional structure and balance of powers, to establish an Office for Harmonisation in the Internal Market (trade marks and designs) which is independent in relation to technical matters and has legal, administrative and financial autonomy;... to this end it is necessary and appropriate that it should be a body of the Community having legal personality and exercising the implementing powers which are conferred on it by this Regulation, and that it should operate within the framework of Community law without detracting from the competencies exercised by the Community institutions.’

9. The use of languages in proceedings before the Office is governed by Article 115 of the Regulation. That article provides as follows:

‘1. The application for a Community trade mark shall be filed in one of the official languages of the European Community.

2. The languages of the Office shall be English, French, German, Italian and Spanish.

3. The applicant must indicate a second language which shall be a language of the

⁵ — OJ 1994 L 11, p. 1.

Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings.

If the application was filed in a language which is not one of the languages of the Office, the Office shall arrange to have the application, as described in Article 26(1), translated into the language indicated by the applicant.

4. Where the applicant for a Community trade mark is the sole party to proceedings before the Office, the language of proceedings shall be the language used for filing the application for a Community trade mark. If the application was made in a language other than the languages of the Office, the Office may send written communications to the applicant in the second language indicated by the applicant in his application.

5. The notice of opposition and an application for revocation or invalidity shall be filed in one of the languages of the Office.

6. If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is the language of the application for a trade mark or the second language indicated when the application was filed, that language shall be the language of the proceedings.

If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is neither the language of the application for a trade mark nor the second language indicated when the application was filed, the opposing party or the party seeking revocation or invalidity shall be required to produce, at his own expense, a translation of his application either into the language of the application for a trade mark, provided that it is a language of the Office, or into the second language indicated when the application was filed. The translation shall be produced within the period prescribed in the implementing regulation. The language into which the application has been translated shall then become the language of the proceedings.

7. Parties to opposition, revocation, invalidity or appeal proceedings may agree that a different official language of the European Community is to be the language of the proceedings.'

10. Rule 1(1)(j) of Article 1 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation (EC) No 40/94⁶ repeats the requirement in Article 115(3) of Regulation No 40/94 that the application for registration must indicate a 'second language'.

6 — OJ 1995 L 303, p. 1.

Background to the dispute

11. On 15 May 1996 the applicant, a lawyer and trade mark agent in the Netherlands in a firm specialising in intellectual property work, submitted an application for a Community trade mark to the Office pursuant to the Regulation. The trade mark in respect of which registration was requested is the word KIK. In her application, which was in Dutch, the applicant indicated Dutch as a 'second language'.

12. By a decision of 20 March 1998 the Office dismissed the application on the ground that a formal condition, that is to say the requirement that the applicant indicate English, French, German, Italian or Spanish as a 'second language', was not satisfied. The applicant appealed against that decision on the ground *inter alia* that it was unlawful because it was based on unlawful legislation. The Board of Appeal of the Office dismissed the appeal by decision of 19 March 1999 ('the contested decision') on the ground that, since the applicant had indicated as a 'second language' the same language as that used for filing the application for registration, the application was vitiated by a formal irregularity distinct from the other irregularity committed by not indicating one of the five languages of the Office as a 'second language'. In the contested decision the Board

of Appeal also held that the Office, which includes its Boards of Appeal, can but apply the Regulation, even if its view is that the Regulation is not compatible with primary Community law

13. The applicant appealed to the Court of First Instance seeking annulment or revision of the contested decision on the ground that the Office had infringed the principle of non-discrimination in Article 12 EC principally in that it had not set aside Article 115 of the Regulation and Rule 1(1)(j) of Article 1 of Regulation No 2868/95 as discriminatory contrary to Article 12 EC and Article 1 of Regulation No 1 and in the alternative in that the contested decision required the second language to be one of the languages of the Office. The applicant was supported by Greece; the Office by the Council and Spain.

The judgment of the Court of First Instance

14. The Court of First Instance first considered the Office's challenge to the admissibility of the plea that Article 115(3) of the Regulation – on which the contested decision was based – was unlawful. The Office submitted that, even if the Court were to find the restriction on the choice of languages in Article 115 to be unlawful, that could not lead to the contested decision being set aside since the Office did not dismiss the applicant's request for

registration on the ground that she had not indicated one of the languages of the Office as a 'second language' but on the ground that she had not chosen a 'second language' at all. Her plea of illegality was therefore inadmissible because there was no legal connection between the contested decision and the provision in respect of which the plea was raised.

15. The Court of First Instance rejected that argument, holding that it was the rule in Article 115(3) of the Regulation, whereby the applicant must accept that she does not automatically enjoy the right to participate in all proceedings before the Office in the language of filing, which constituted the direct basis for the decision of the Board of Appeal to which the plea of illegality raised by the applicant was directed. The Court concluded its ruling on admissibility by stating:

'32 It follows from the foregoing that, in so far as the plea of illegality raised by the applicant in support of her action for annulment or alteration of the contested decision relates to the obligation under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95, it is admissible. To that extent, the subject-matter of the plea of illegality encompasses the obligation laid down by those provisions, as clarified – in regard to its

scope and legal effects – by certain other paragraphs of Article 115 of Regulation No 40/94.

33 However, in so far as the plea of illegality raised by the applicant relates to the remainder of Article 115 of Regulation No 40/94, it is inadmissible. The provisions in the remainder of Article 115 did not constitute any basis for the contested decision, since that decision related only to an application for registration and the obligation on an applicant to indicate a second language which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings that might be filed against him.'

16. With regard to the substance, the Court of First Instance analysed the action as based on a single plea, namely infringement of the principle of non-discrimination in Article 12 EC.

17. It stated first that, contrary to the submissions of the applicant, the examiner and the Board of Appeal did not have jurisdiction to decide not to apply the rule laid down by Article 115(3) of the Regulation and Rule 1(1)(j) of Article 1 of Regulation No 2868/95.

18. With regard to the alleged conflict between Article 115 of Regulation No 40/94 on the one hand and Article 12 EC, read in conjunction with Article 1 of Regulation No 1, on the other, the Court of First Instance stated as follows:

‘... Regulation No 1 is merely an act of secondary law, whose legal base is Article 217 of the Treaty. To claim, as the applicant does, that Regulation No 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law. Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law.’⁷

19. The Court of First Instance then continued:

‘60 As regards the obligation on an applicant for registration of a Community

trade mark under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95 to “indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings”, it is clear that, contrary to the claims of the applicant and the Greek Government, this does not involve an infringement of the principle of non-discrimination.

61 First, it is apparent from the actual wording of Article 115(3) of Regulation No 40/94 that, by indicating a second language, the applicant accepts use of that language as a language of proceedings only in relation to opposition, revocation or invalidity proceedings. It follows, as indeed is confirmed by the first sentence of Article 115(4) of Regulation No 40/94, that so long as the applicant is the sole party to proceedings before the Office, the language used for filing the application for registration remains the language of proceedings. Consequently, in such proceedings, Regulation No 40/94 cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted.

⁷ — Paragraph 58 of the judgment.

- 62 Next, in so far as Article 115(3) of Regulation No 40/94 requires the applicant to indicate a second language for the purposes of the possible use of that language as the language of proceedings for opposition, revocation or invalidity proceedings, the fact remains that that rule was adopted for the legitimate purpose of reaching a solution on languages in cases where opposition, revocation or invalidity proceedings ensue between parties who do not have the same language preference and cannot agree between themselves on the language of proceedings. In that regard, it is to be noted that, under Article 115(7) of Regulation No 40/94, parties to opposition, revocation or invalidity proceedings are entitled to agree that any one of the official languages of the European Community is to be the language of the proceedings, an option which might particularly suit parties with the same language preference.
- 63 In pursuing the objective of determining the language of the proceedings where parties who do not share the same language preference fail to agree, the Council must be considered to have made an appropriate and proportionate choice, even if the official languages of the Community were treated differently. First of all, Article 115(3) of Regulation No 40/94 accords the applicant for registration of a trade mark an opportunity to fix, from among the most widely known languages in the European Community, the language that is to be used for opposition, revocation or invalidity proceedings in the event that the first language chosen by the applicant is not that requested by another party to the proceedings. Secondly, by limiting that choice to the languages which are the most widely known in the European Community, and thus avoiding the possibility of the language of proceedings being particularly remote in relation to the linguistic knowledge of the other party to the proceedings, the Council remained within the limits of what is necessary for achieving the aim in view (Cases 222/84 *Johnston* [1986] ECR 1651, paragraph 38, and C-285/98 *Kreil* [2000] ECR I-69, paragraph 23).
- 64 Finally, the applicant and the Greek Government are not entitled to rely on the paragraph added by the Amsterdam Treaty to Article 8d of the Treaty (now, after amendment, Article 21 EC) according to which "every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 [EC] in one of the languages mentioned in Article 314 [EC] and have an answer in the same language". Article 21 EC refers to the Parliament and the Ombudsman and Article 7 EC mentions the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors and also the Economic and Social Committee and the Committee of the Regions. In so far as the paragraph in question is applicable *ratione*

temporis to this case, the Office is in any event not one of the institutions or bodies referred to in Article 7 EC or Article 21 EC.’

Office, supported by Spain, the Council and the Commission,⁸ submits that the appeal should be dismissed.

20. The Court of First Instance accordingly dismissed the action.

23. The appeal was lodged on 21 September 2001. On 25 January 2002 the appellant’s counsel informed the Court of Justice that the appellant had died and that her estate wished to continue the appeal. In this Opinion, I use the terms ‘applicant’ and ‘appellant’ to refer to both the late Mrs Kik and her estate as appropriate.

The appeal

21. In her appeal, the appellant asks the Court to annul the judgment of the Court of First Instance, to annul the contested decision and to order the Office to pay the costs of both proceedings. There are two grounds of appeal: first, that the Court of First Instance erred in law in its interpretation of Article 115 of Regulation No 40/94 since it failed to take into account the second sentence of Article 115(4) and second, that the Court of First Instance erred in law in dismissing her plea that the language regime set up by Article 115 of the Regulation was unlawful.

24. The Office sent a letter to the Court raising the question whether the appellant’s estate had standing to continue the appeal, given in particular that the proceedings had been brought by the appellant in her professional capacity as a trade mark agent.

22. Greece supports the appellant, in particular with regard to her argument that there is a principle that all the official languages of the Community are equal. The

25. At the hearing, at which the appellant, the Office, Spain, the Council and the Commission were represented, counsel for the appellant contended that the estate did have standing. The Office did not pursue the point and I accordingly do not propose to deal with it.

⁸ — The Commission intervened in the appeal only.

The first ground of appeal

26. The appellant's first ground of appeal is that the Court of First Instance incorrectly interpreted Article 115 of the Regulation by not taking account of the second sentence of Article 115(4). That sentence states that, if the application was made in a language other than the languages of the Office, the Office may send written communications to the applicant in the second language indicated by the applicant in his application. The appellant submits that, as she stated in her application to the Court of First Instance and as the representative of the Office expressly acknowledged at the hearing before the Court of First Instance, the Office always⁹ uses its power to correspond with applicants in the second language if the application is not made in one of the languages of the Office. Thereafter the whole procedure, including the automatic examination of the absolute and relative grounds for refusal and any differences which arise between the applicant and the Office, takes place in the second language. All the applicant receives in his first language is evidence of the entry in the register of Community trade marks, which by virtue of Article 116(2) of the Regulation is made in all the official languages of the European Community.

27. The appellant submits that the Court of First Instance is accordingly wrong when it states in paragraph 61 of its judgment that, by indicating a second language, the appli-

cant accepts the use of that language as a language of proceedings only with regard to opposition, revocation or invalidity proceedings. While that principle indeed underlies Article 115(3), the Court of First Instance fails to take account of the fact that the second sentence of Article 115(4) empowers the Office to derogate from that principle where the application is not made in one of the working languages of the Office. The conclusion of the Court of First Instance that for so long as the applicant is the sole party to proceedings before the Office the Regulation cannot in itself entail differentiated treatment as regards language is consequently incorrect. The effect of the Regulation is that all applications are dealt with in one of the working languages of the Office.

28. Moreover the Court of First Instance ignores the implications of the second sentence of Article 115(4) in paragraphs 62 and 63 of the judgment. The fact that in the case of applications not made in one of the working languages of the Office the indication of a second language entails the use of that language in the processing of the application cannot contribute to resolving the question of languages in *inter partes* proceedings and cannot therefore be considered to be an appropriate and proportionate choice.

29. The Office in effect submits that the first ground of appeal is inadmissible in so far as it relies on Article 115(4). The Office

⁹ — It may be noted however that in the present case it appears that the Office departed from that practice and communicated with the applicant throughout in Dutch.

points out that the Court of First Instance dismissed as inadmissible the applicant's argument that the whole of Article 115 was unlawful to the extent that it concerned the provisions of that article other than Article 115(3), which underlay the contested decision, and considers that the Court should not upset that ruling, particularly given that the appellant adduces no specific argument against it in the appeal. The Council and Spain also submit that the first ground of appeal is inadmissible: as the Court of First Instance noted at paragraphs 32 and 33 of its judgment, Article 115(3) was at the root of the contested decision; the applicant could not therefore raise the illegality of the other provisions of Article 115. Since the appellant does not contest those paragraphs of the judgment, she cannot now question the legality of those other provisions of Article 115.

30. I do not accept those arguments. It seems to me that the appellant is not raising the argument which she raised before the Court of First Instance and which that court dismissed as in part inadmissible. In the appeal she is rather focusing on the analysis of the Court of First Instance in paragraph 61 of its judgment, in which it is considering the substance and not the admissibility of the application. In that paragraph, the Court of First Instance concludes from the wording of Article 115(3) that 'so long as the applicant is the sole party to proceedings before the Office, the language used for filing the application for registration remains the language of proceedings'. On that basis, it concludes that 'in such proceedings, Regulation No 40/94 cannot be taken, in itself,

as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted'. In the appellant's view, those two statements are as a matter of law incorrect by reason of the second sentence of Article 115(4). In my view the appellant's first ground of appeal is admissible.

31. On the substance of the first ground of appeal, the Office, supported by the Council and the Commission, submits that in any event the Court of First Instance did not overlook the second sentence of Article 115(4): although that sentence was not explicitly mentioned in paragraphs 60 to 63 of the judgment, the legal analysis there set out applies to the whole of Article 115; moreover a careful reading of the judgment shows clearly that the Court of First Instance took into account the scope and effect of Article 115 as a whole.

32. The Office adds that applicants who file their application in a language other than one of its working languages remain entitled to use the language of the application in their written and oral communications with the Office for as long as they are the sole party to the proceedings. The second sentence of Article 115(4) gives the Office an option in the exercise of which it must take account of all relevant circum-

stances and in particular any request by the applicant that the Office use only the language of the application in the proceedings for as long as the applicant is the sole party. That is precisely what happened in the present case: the appellant notified the Office that she wished to receive all communications in Dutch and the Office immediately complied. The option conferred on the Office by the second sentence of Article 115(4) cannot therefore undermine the conclusion reached by the Court of First Instance in paragraph 61 of its judgment.

33. The Office considers however that the option conferred by that provision is not restricted, as the Court of First Instance states, to documents other than procedural documents of a decisional character but rather encompasses all written communications.

34. The Council submits that the Office in applying the second sentence of Article 115(4) should respect the principle underlying proceedings to which the applicant is the sole party, namely that the language of proceedings is the language of the application. Thus procedural documents of a decisional character must be in the language of the application. The appellant's interpretation of the second sentence of Article 115(4) would negate the above-mentioned principle. The Council adds that the manner in which the Office applies that provision cannot affect its validity.

35. Spain concurs with the view that for as long as a trade mark applicant is the only party to the proceedings Article 115 guarantees the use of the language of the application as the language of proceedings and hence the language in which documents of a decisional character must be drafted. That does not however prevent the Office from using the second language indicated for other communications. The appellant has not pleaded or sought to prove that documents of a decisional character were sent to her in a language other than the language of proceedings or that the Office refused to use the language of proceedings when she asked it to do so.

36. In my view, the fact that the appellant was apparently not directly prejudiced by the second sentence of Article 115(4), since the Office communicated with her in Dutch throughout, does not undermine her argument, which is to the effect that the conclusion of the Court of First Instance that the Regulation did not differentiate between languages in proceedings to which the applicant was the sole party was incorrect as a matter of law. It is worth repeating that the appellant is not in her first ground of appeal directly challenging the lawfulness of the second sentence of Article 115(4);¹⁰ she is rather criticising the failure of the Court of First Instance to

¹⁰ — She does however seek directly to challenge the lawfulness of the second sentence of Article 115(4) in her submission in the alternative in the context of her second ground of appeal; as I explain in paragraph 74 below I consider that that plea is inadmissible.

take account of that provision in arriving at its conclusion as to the lawfulness of Article 115(3). It must be borne in mind that it is the requirement in Article 115(3) that the applicant for a Community trade mark indicate a second language from the working languages of the Office which has affected the appellant, in that her application to register a Community trade mark was rejected by reason of her failure to comply with that requirement.

The second ground of appeal

38. In her second ground of appeal the appellant submits that the Court of First Instance erred in law in dismissing her plea that the language regime set up by Article 115 of the Regulation was unlawful.

The principal argument

37. It is implicit in paragraph 61 of the judgment, and in particular the conclusion of that paragraph, that the Court of First Instance considered that the Office was entitled to draft documents other than procedural documents of a decisional character in a language other than the language of proceedings. That entitlement can flow only from the second sentence of Article 115(4). The Court of First Instance must therefore have interpreted that provision as entitling the Office to use the second language indicated by the applicant when sending written communications other than procedural documents of a decisional character. To that extent, the statement of the Court of First Instance that the Regulation 'cannot be taken, in itself, as in any sense implying differentiated treatment as regards language' is incorrect. As will become apparent, however, I do not consider that it follows from the fact that the Regulation so differentiates between languages that it is in any sense unlawful.

39. The appellant's principal submission is that that regime is contrary to Article 12 EC because it favours certain official languages and hence certain citizens of the Union. In particular she argues that (i) the language regime discriminates on the basis of language contrary to the fundamental principle of equality of languages enshrined in particular in Article 12 EC; (ii) such discrimination cannot be justified on grounds of practical convenience and (iii) even if the regime could be so justified, it is not proportionate. In addition, Greece submits that insufficient reasons are given in the Regulation for the choice of the regime.

Infringement of the fundamental principle of equality of languages

40. According to the Court of First Instance, the appellant had claimed that

there was a conflict between Article 115 of the Regulation on the one hand and Article 12 EC, read in conjunction with Article 1 of Regulation No 1, on the other, in that Article 115 infringed an alleged principle of Community law of non-discrimination between the official languages of the European Communities.¹¹

41. The Court of First Instance noted first that Regulation No 1 was merely an act of secondary law and that the Member States did not lay down rules governing languages in the Treaty, since Article 290 EC simply conferred on the Council acting unanimously the competence to determine the rules governing the languages of the institutions. The rules governing languages laid down by Regulation No 1 could not therefore be deemed to amount to a principle of Community law and the applicant could not rely on Article 12 EC in conjunction with Regulation No 1 as a basis for demonstrating that Article 115 was illegal.¹²

42. That conclusion certainly seems correct as far as it goes. It is possible however that it does not fully answer the point raised. Although the appellant's pleadings before the Court of First Instance are laconic, it may be that she invoked Regulation No 1 merely as an additional argument supporting her principal assertion that the language regime was discriminatory contrary

to Article 12. The assumption appears to be — and this is confirmed by the somewhat fuller argument on appeal — that Article 12 itself embodies a fundamental principle that all the official languages have equal standing. Greece supports the appellant on this point.

43. However, I am not convinced by the arguments adduced before this Court in support of that proposition.

44. First, the appellant and Greece simply state that equality of languages is a fundamental principle of Community law, the appellant adding that the principle is manifested above all in Article 314 EC. Equality of languages is not however a fundamental principle; as will be seen, the appellant adduces no argument which succeeds in demonstrating that it is. Nor does Article 314 assist. That article merely provides that all the texts of the Treaty are equally authentic; no principle that all official languages of the Community must in all circumstances be treated equally may be inferred from that statement. That is all the more obvious given the inclusion of Irish in the language versions of the Treaty stated to be authentic. Irish however is not for most purposes an official language of the Community. In particular it is not included in 'the official languages and the

11 — Paragraph 57 of the judgment.

12 — Paragraphs 58 and 59 of the judgment.

working languages of the institutions of the Union' listed in Article 1 of Regulation No 1.¹³

45. Second, the appellant submits that the Court has confirmed that all the language versions must, in principle, be recognised as having the same weight regardless of the size of the population of the Member States using the language in question.¹⁴ Greece makes a similar point.¹⁵ That proposition however was made in the context of the need for a uniform interpretation of Community legislation and concerns the exercise which the Court sometimes undertakes of comparing different language versions in cases where there are discrepancies between some of those versions. It does not — nor can it — itself provide support for the view that in all circumstances all the official languages are to have equal status for all purposes.

46. The appellant then states that the fundamental principle that the official languages are equal is developed and confirmed in Regulation No 1. That Regulation, which is based on what is now Article 290 EC,¹⁶ lays down rules governing the languages of the institutions of the Community.¹⁷ Nowhere however does it state that all the Community languages

must be used for all purposes as working languages of all institutions of the Union, nor can any such proposition be inferred from it. In any event the Office is not an institution. The Office is mentioned in neither Article 7(1) EC, which lists the institutions, nor Part Five of the Treaty, entitled 'Institutions of the Community'. Moreover the preamble to Regulation No 40/94¹⁸ confirms that the Office is not an institution and was not intended to be treated as one.

47. Next, the appellant and Greece invoke Article 21 EC. That article states that every citizen of the Union may write to 'any of the institutions or bodies referred to in this Article or in Article 7' in any of the official languages and have an answer in the same language. Article 21 refers to the European Parliament and the Ombudsman. Article 7 refers to the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors (which are collectively described as 'institutions'), the Economic and Social Committee and the Committee of the Regions. The Office is thus not among the institutions and bodies to which Article 21 applies and the conclusion of the Court of First Instance to that effect in paragraph 64 of its judgment is clearly correct. In any event, the present case concerns not the rights of citizens of the Union acting as such but the professio-

13 — Set out in paragraph 4 above.

14 — Case C-296/95 *EMU Tobacco* [1998] ECR I-1605, paragraph 36 of the judgment.

15 — Greece refers to Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345.

16 — Set out in paragraph 2 above.

17 — See the citation in the preamble, set out in paragraph 3 above.

18 — See the 11th recital, set out in paragraph 8 above.

nal activities of a trade mark agent submitting an application to register a trade mark.

48. Finally, the appellant states that the importance of the principle that languages are equal is stressed in the case-law of the Court, which has frequently confirmed that Article 12 EC requires perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member State in question¹⁹ and that the protection of the linguistic rights and privileges of individuals is of particular importance.²⁰

49. The only cases cited which concern the right to use a particular language however are *Mutsch* and *Bickel and Franz*, neither of which helps the appellant. In neither case was it alleged or held that the restriction on the applicant's right to use his mother tongue infringed a fundamental principle that all Community languages are equal. *Mutsch* concerned the lawfulness of Belgian rules on the use of languages in the national courts. Those rules provided that, where an accused person of Belgian nationality resided in a German-speaking municipality, the proceedings before the criminal court in question were to take place in German. Mr Mutsch, a Lux-

embourg national, sought to rely on that provision; the Ministère Public argued that, since he was not of Belgian nationality, he could not do so. The Court ruled essentially that denying Mr Mutsch the benefit of the provision on the ground of his nationality amounted to discrimination. In *Bickel and Franz*, similarly, the issue was whether it was lawful for Italy to refuse to extend to Mr Bickel, an Austrian, and Mr Franz, a German, a right to opt for the use of German in criminal proceedings which was available to residents of the Province of Bolzano in Italy. The Court concluded that rules making the right to have proceedings conducted in the language of the person concerned conditional on that person being resident in the area favoured nationals of the host State by comparison with nationals of other Member States and therefore ran counter to the principle of non-discrimination. Accordingly the cases cited by the appellant do not establish a principle that languages are equal.

50. For the reasons given above, the appellant has not in my view succeeded in demonstrating that Article 12 enshrines a fundamental principle of Community law that all official languages must in all circumstances be treated equally for all purposes. The ruling of the Court of First Instance set out in paragraph 41 above must accordingly stand, and moreover could properly have been expressed in more general terms.

19 — Case 186/87 *Cowan* [1989] ECR 195, paragraph 10 of the judgment; Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661, paragraph 16 and Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 14.

20 — Case 137/84 *Mutsch* [1985] ECR 2681, paragraph 11 of the judgment.

Differentiated treatment of languages

Justification and proportionality

51. Having reached the conclusion that the applicant could not rely on Article 12 in conjunction with Regulation No 1 as a basis for demonstrating that Article 115 of the Regulation is illegal, the Court of First Instance turned to the more general question whether the obligation on an applicant for registration of a Community trade mark under Article 115(3) of the Regulation to 'indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings' infringed the principle of non-discrimination.

52. The Court of First Instance implicitly accepted, in paragraph 62 of its judgment, that in so far as Article 115(3) concerned *inter partes* proceedings it differentiated between the official languages of the Community since it limited the languages which could be used in such proceedings (in most circumstances) to one of the languages of the Office. The Court of First Instance concluded however²¹ that the requirement in Article 115(3) was both justified and proportionate. Since the appellant appears to challenge that conclusion, I will consider her arguments on those issues.

53. The Court of First Instance states that the requirement in Article 115(3) that the applicant indicate a second language which may be used as the language of proceedings for opposition, revocation or invalidity proceedings was adopted for the legitimate purpose of reaching a solution on languages in cases where opposition, revocation or invalidity proceedings ensue between parties who do not have the same language preference and cannot agree between themselves on the language of proceedings.²² It concludes that in 'pursuing the objective of determining the language of the proceedings where parties who do not share the same language preference fail to agree, the Council must be considered to have made an appropriate and proportionate choice [and] remained within the limits of what is necessary for achieving the aim in view'.²³

54. By implication the Court of First Instance accepted the arguments advanced before it by the Council, which it summarised as follows in the judgment:

'... the purpose of [the rules governing languages instituted by the Regulation] is to enable undertakings to obtain, following a single, practical and accessible procedure,

21 — In paragraphs 62 and 63.

22 — Paragraph 62 of the judgment.

23 — Paragraph 63 of the judgment.

registration of a Community trade mark. As regards the practical nature of the procedure, the Council observes that, given the structure of the Office and the [need for] translators, proceedings before a Board of Appeal of the Office cannot, for instance, be conducted in different languages. The choice which the Council made in adopting Regulation No 40/94 was based on a balancing of the interests of undertakings on the one hand and the possible drawbacks such as those raised by the applicant on the other.... Finally, the Council explains that its decision was also based on budgetary considerations. It points out in that connection that, without the chosen rules governing languages, it would be necessary to provide for an additional budget of several tens of millions of euros per year for the Office.²⁴

55. The appellant submits that the Court has for many years invariably dismissed arguments adduced by Member States seeking to justify infringement of the fundamental principle of equal treatment on grounds of practical convenience. The Council cannot therefore plead the adverse financial consequences which would ensue if all the official languages were to be recognised as working languages of the Office. All the institutions and other bodies of the Union have a long settled practice of communicating with citizens in all the official languages. Thus each year DG Competition deals with numerous mergers

which may be notified in any language; similarly with notifications of proposed State aid. The Community Plant Variety Office²⁵ also operates in all the official languages.

56. The Office, Spain, the Council and the Commission all consider that the different treatment of languages in *inter partes* proceedings resulting from Article 115 is objectively justified and that the Court of First Instance correctly so concluded. Spain and the Council add that the appellant has not adduced arguments capable of refuting that conclusion. The Office quoted figures at the hearing designed to underline the unacceptable consequences of making all official languages working languages. The Council adds that when it adopted the Regulation, it had to balance the interests of undertakings, whether applicants or third parties, against alleged hypothetical and indirect consequences for the competitive position of certain trade mark agents.

57. It is clear from the legislative history of the Regulation that the rule in Article 115(3) was indeed adopted, as the Court of First Instance states, for the legitimate purpose of reaching a solution on languages in *inter partes* proceedings.

25 — Set up by Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ 1994 L 227, p. 1.

58. In the original proposal for the Regulation²⁶ (issued in 1980), Article 103, headed '[Language]', read: 'The language of the Office for procedural purposes is...'. It was thus intended to restrict the Office to the use of one language for procedural purposes. It is clear from the Explanatory Memorandum accompanying the proposal that the Commission had given careful thought to the appropriate linguistic regime.

59. In particular the Commission noted first that the 'establishment of a Trade Mark Office raises a completely new problem for the Community as regards the linguistic arrangements to be adopted, since the Office will be the first Community body to be making administrative decisions in accordance with a formal, precisely defined, multi-stage procedure'. Next, the Commission referred to 'the problem of the sheer number of applications for Community trade marks reaching the Office, estimated at 10 000 a year'. It may be noted that the annual average is now over 40 000.

60. The Commission stressed that it was essential for the success of the Community trade mark to find a procedure that was cheaper than the existing seven national registration procedures. If the ordinary linguistic arrangements of the Community had been adopted, that would have involved translation and interpreting costs

of around BEF 100 million; each trade mark application would then have involved at least BEF 10 000²⁷ in translation costs in a Community of six languages. The fees which users would have had to be charged would therefore have been so high that the Community trade mark would have lost its attraction and would not have been used. In addition, the Commission stressed that with seven (from 1981) and later eight and nine languages, the Office would have been unable to handle thousands of procedures within the requisite time-limits.

61. Now of course there are 11 official languages, and there may shortly be 20. The concerns expressed by the Commission are therefore even weightier.

62. The Regulation as ultimately adopted did not in fact provide for a single language: a more sophisticated regime was chosen. The Explanatory Memorandum none the less shows that the concern to ensure that the Community trade mark system would work was paramount. That concern also informed the Council, as appears from its observations before the Court of First Instance summarised above.²⁸

26 — Proposal for a Council Regulation on Community trade marks submitted by the Commission to the Council on 25 November 1980, OJ 1980 C 351, p. 5.

27 — 1980 figures.

28 — See paragraph 54.

63. The comparison which the appellant draws with Member States seeking to defend themselves on financial grounds against charges of infringement of fundamental Treaty freedoms is not in my view apposite. In adopting the legal framework for establishing the Office, including its language regime, the Council was correctly driven by the imperative of setting in place a system which would work. Common sense suggests that imposing on the Office a requirement to operate for all purposes in all official languages would have seriously undermined that objective, all the more so as there would clearly be an ever-increasing number of official languages in the future.²⁹ It is evident that business organisations — in general representing the vast majority of those whom the Community trade mark was intended to benefit — took the same view.³⁰ Had the Council imposed on the Office mandatory use of all Community languages for all purposes, that to my mind would have been both unjustified and disproportionate.

64. The comparisons which the appellant draws with the Commission's merger and State aid work and the Community Plant Variety Office are similarly in my view unhelpful, if only because there are such

wide divergences between the workloads involved: whereas the Office stated at the hearing that from the beginning of 1996 to the end of October 2002 it dealt with 288 946 applications (an annual average of over 40 000) and that in the same period 55 889 opposition proceedings were registered (an annual average of some 8 000), in 2001 the Commission took only 340 merger decisions and (in DG Competition) 451 State aid decisions.³¹ As for the Community Plant Variety Office, in 2001 it granted 1 518 Community Plant Variety rights,³² and the Council states in its written observations that in six years there have been only 12 opposition proceedings.

65. That last figure illustrates another weakness in seeking support for the argument that the language regime of the Office is unlawful in comparison with other Community bodies. When it was set up, the Office was unique among such bodies in having to deal with a significant number of disputes between individuals who would not necessarily share a common language. Subsequently the jurisdiction of the Court of First Instance was extended to include such disputes in the form of appeals against decisions of the Office. It is instructive to note that the normal language regime of the Court of Justice and the Court of First Instance is not applicable to such appeals.

29 — It is instructive to bear in mind that each time a new official language is added, the number of possible pairs of languages — which dictates the structure of translation and interpretation provision — increases exponentially. Thus while there were 12 possible combinations for the original four Community languages, there are 110 for the current 11 languages and there would be 380 for a possible future 20 languages.

30 — See for example E. Armitage, 'The Community Trade Mark — an assessment after the hearing of interested organisations', *European Intellectual Property Review* 1979, p. 133 and W. Mak, 'The advantages and disadvantages of the Community Trade Mark as seen by industry and the consumer', *European Intellectual Property Review* 1979, p. 312.

31 — Figures from Commission website.

32 — Figures from CPVO Annual Report 2001.

Precisely because the parties will be individuals who will not necessarily share a common language, it was thought necessary to lay down specific rules determining the use of languages.³³

66. Finally in the context of proportionality the appellant argues that the Council could have achieved the same end with less discriminatory effect by designating one official language, such as English, for all proceedings before the Office. That argument appears perverse: it is hard to see how favouring one language could be regarded as less discriminatory than favouring five. However, I do not consider that it is necessary to take a view on the argument since in putting it forward the appellant is raising a wholly new plea which was not raised before the Court of First Instance. Since in an appeal the Court is competent only to review the legal assessment made by the Court of First Instance of the pleas argued before it, an appellant cannot introduce a fresh submission going to the substance of the case.

Infringement of the requirement to give reasons

67. Greece submits in its response that before the Court of First Instance it had

33 — See Article 131 of the Rules of Procedure of the Court of First Instance. (That article, like the other provisions of the Rules of Procedure of the Court of Justice and the Court of First Instance governing language arrangements, continues to apply by virtue of Article 64 of the Statute of the Court of Justice until the rules governing the language arrangements applicable at the courts have been adopted in the Statute.)

pleaded that no reasons had been given in the Regulation for the limitation on languages there laid down but that the Court of First Instance neither dealt with that plea nor raised the question of its own motion. Although in paragraphs 62 and 63 of the judgment the Court of First Instance appears to have considered whether there were valid reasons for the language regime instituted by the Regulation, Greece submits that the Court of First Instance did not properly assess the reasons given in the Regulation but in fact added a reason where none was given. It is clear from the case-law however that the Court of First Instance cannot in any circumstances substitute its own reasoning for that of the author of the contested act.³⁴

68. Greece's intervention before the Court of First Instance contains two sentences on the issue of reasoning, to the effect that the Regulation supplies no reasons for its significant departure from a rule, namely that all languages are equal, that to date had known no exception. Thus Greece's view that reasons for the language regime should have been given in the Regulation was clearly based on its view that there was a principle of primary Community law that all languages are equal. That was also the understanding of the Court of First

34 — Case C-164/98 P *DIR International Film v Commission* [2000] ECR I-447, paragraph 38 of the judgment.

Instance, which summarised Greece's submission as follows:

'That departure from primary Community law is all the more serious because no grounds are given for it in the Regulation.'³⁵

69. Admittedly, the Court of First Instance does not revert to that issue in its judgment. Since however that court found (correctly, in my view) that there was no such departure from primary Community law, there was no need for it to examine the plea further.

70. In any event it is settled law that reasons do not have to be given for every provision in a legislative measure. In particular the Court has stated that in the case of a measure of general application such as a regulation, the statement of reasons does not have to specify the often very numerous and complex matters of law or of fact constituting the subject-matter of the instrument as long as those matters fall within the framework of the whole of which they form part. The preamble may be confined to indicating the general situation which led to adoption of the legislation and the general objectives which it is intended to achieve. If the measure clearly

discloses the essential objective pursued, it would be excessive to require a specific statement of reasons for each of the technical choices made by the legislature.³⁶

71. In the present case, the language regime established by the Regulation is the subject of one article out of 143; the principles set out in the preceding paragraph are in my view manifestly applicable. The general and essential objectives of the Regulation are clearly spelt out in the 18 recitals in the preamble. It would be disproportionate to require explicit reasons to be given separately for each of the articles laying down specific details of the Community trade mark system which the Regulation aims to establish.

72. Finally, I do not consider that there is any evidence that the Court of First Instance sought to substitute its own reasons for those of the legislature. As Greece itself submits, the Court of First Instance did not expressly deal with its plea concerning the absence of reasons in the Regulation. In paragraphs 62 and 63 of its judgment, referred to by Greece, the Court of First Instance was dealing with the separate question whether the differential treatment of languages in *inter partes* proceedings was justified and proportionate.

35 — Paragraph 45 of the judgment.

36 — See Case 5/67 *Beus* [1968] ECR 83, at p. 95; Case 244/81 *Klöckner-Werke v Commission* [1983] ECR 1451, paragraph 33 of the judgment; Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29.

The argument in the alternative

73. In the alternative, the appellant submits in the context of her second ground of appeal that, even if the whole of Article 115 is not unlawful, the second sentence of Article 115(4) is unlawful since it is incompatible not only with the prohibition on discrimination but also with the principle underlying Article 115(1) and the first sentence of Article 115(4), namely that the language in which the application is filed is the language of proceedings.

74. I concur with the Office, Spain, the Council and the Commission that that submission is manifestly inadmissible since the contested decision was not based on the second sentence of Article 115(4). Nor moreover has the appellant been in any way prejudiced by that provision since it appears that the Office in fact communicated with her in Dutch from the outset. Finally, the submission that the second sentence of Article 115(4) is in itself unlawful appears to be a wholly new plea which was not raised before the Court of First Instance. The appellant's argument in the alternative is accordingly inadmissible.

Conclusion

75. I am therefore of the opinion that the Court should:

(1) dismiss the appeal;

(2) order the appellant to bear the costs of the appeal.