OPINION OF ADVOCATE GENERAL

BOT

delivered on 8 May 2008 [1]

1. This appeal concerns the rules that apply to the notification of a decision of a Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) [2] refusing an application to register a Community trade mark, as laid down in Commission Regulation (EC) No 2868/95. [3]

2. Rule 61(2) of Regulation No 2868/95 provides that notifications to be made by the Office may take a number of forms, and the detailed rules and conditions for each form of notification are specified in Rules 62 to 66 of that regulation.

3. In accordance with Rule 62(1) of that regulation, dealing with notification by post, a decision by a Board of Appeal refusing an application to register a Community trade mark must be notified to the applicant by registered letter with advice of delivery.

4. Rule 62 also contains, in paragraph 3, a presumption that a registered letter is deemed to be delivered to the addressee on the 10th day following that of its posting, unless the letter has failed to reach the addressee or has reached him at a later date.

5. In addition, according to Rule 68 of Regulation No 2868/95, if provisions relating to the notification of a document have not been observed, and that document has reached the addressee, the document is to be deemed to have been notified on the date of receipt.

6. The two main questions that arise in the present case are, first, whether delivery of a decision of the Office by express courier can be treated in the same way as notification by registered letter with advice of delivery, within the meaning of Rule 62(1) of Regulation No 2868/95, and, second, whether the presumption in Rule 62(3) also applies where

1 — Original language: French.

2 — 'The Office'.

3 — Regulation of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), as amended by Commission Regulations (EC) Nos 782/2004 of 26 April 2004 (OJ 2004 L 123, p. 88) and 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4) ('Regulation No 2868/95').

it is shown that the addressee of the express delivery received it within 10 days of its posting by the Office.

7. In the order in Case T-14/06 *K-Swiss* v *OHIM (Parallel stripes on a shoe)* of 14 December 2006,[4] the Court of First Instance of the European Communities held, first, that delivery of a decision of a Board of Appeal of the Office by express courier is not included in the means of notification listed in Rule 61(2) of Regulation No 2868/95 and, consequently, that it is improper. It also held that, pursuant to Rule 68 of Regulation No 2868/95, the period within which proceedings had to be brought began to run from the date of delivery by express courier, since the appellant expressly acknowledged that it had received the decision at issue in that way.

8. The Court of First Instance thus inferred that the period of two months and 10 days within which proceedings against such a decision had to be brought had expired, in the present case, on 9 January 2006 and that the action brought by the appellant on 16 January 2006 had to be dismissed as inadmissible.

9. In this Opinion, I will set out the reasons why I consider that, as the provisions of Regulation No 2868/95 relating to notification of the Office's documents are worded, delivery of a decision by express courier must be treated in the same way as notification by registered letter with advice of delivery. I will thus infer that the Court of First Instance erred in law in its interpretation of Rules 61(2), 62(1) and 68 of that regulation and that the appeal is well founded.

10. I will also set out the reasons why, in my opinion, the presumption provided for in Rule 62(3) of Regulation No 2868/95 applies even where there is evidence that the document was received by the addressee within 10 days of its posting. I will thus infer that the action brought before the Court of First Instance is admissible and that the order under appeal must be set aside.

11. In the alternative, I will argue that Rule 68 of Regulation No 2868/95, which concerns irregularities in notification, cannot have the effect of shortening the time-limit for bringing an action that would have applied if notification had been effected properly. I will thus infer that, even if it were accepted that delivery of the decision by express courier cannot be treated like notification by registered letter with advice of delivery and must, consequently, be considered to constitute improper notification, the order under appeal would, as regards the scope of Rule 68, still be vitiated by an error of law.

4 — 'The order under appeal'.

I — Legal framework

12. Article 63(5) of Council Regulation (EC) No 40/94 [5] provides that an action against a decision of a Board of Appeal of the Office must be brought before the Court of First Instance within two months of the date of notification of that decision. Under Article 102(2) of the Rules of Procedure of the Court of First Instance, the prescribed time-limits are to be extended on account of distance by a single period of 10 days.

13. Rule 61(1) of Regulation No 2868/95 provides: '[i]n proceedings before the Office, notifications to be made by the Office shall take the form of transmitting the original document, an uncertified copy thereof or a computer print-out in accordance with Rule 55, or, as concerns documents emanating from the parties themselves, duplicates or uncertified copies'.

14. Rule 61(2) provides:

'Notifications shall be made:

(a) by post in accordance with Rule 62;

(b) by hand delivery in accordance with Rule 63;

(c) by deposit in a post box at the Office in accordance with Rule 64;

(d) by telecopier and other technical means in accordance with Rule 65;

(e) by public notification in accordance with Rule 66.'

15. Rule 61(3) of Regulation No 2868/95 provides that, where the addressee has indicated his telecopier number or contact details for communicating with him through

5 — Regulation of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

other technical means, the Office is to have the choice between any of these means of notification and notification by post.

16. Rule 62 of that regulation, concerning notification by post, states:

'1. Decisions subject to a time-limit for appeal, summonses and other documents as determined by the President of the Office shall be notified by registered letter with advice of delivery. All other notifications shall be by ordinary mail.

…

3. Where notification is effected by registered letter, whether or not with advice of delivery, this shall be deemed to be delivered to the addressee on the 10th day following that of its posting, unless the letter has failed to reach the addressee or has reached him at a later date. In the event of any dispute, it shall be for the Office to establish that the letter has reached its destination or to establish the date on which it was delivered to the addressee, as the case may be.

4. Notification by registered letter, with or without advice of delivery, shall be deemed to have been effected even if the addressee refuses to accept the letter.

5. Notification by ordinary mail shall be deemed to have been effected on the 10th day following that of its posting.'

17. Rule 68 of that regulation deals with irregularities in notification. It provides:

'Where a document has reached the addressee, if the Office is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by the Office as the date of receipt.'

18. I should also mention Rule 70 of Regulation No 2868/95, concerning the calculation of time-limits, paragraph 2 of which provides:

'Calculation shall start on the day following the day on which the relevant event occurred, the event being either a procedural step or the expiry of another period. Where that procedural step is a notification, the event considered shall be the receipt of the document notified, unless otherwise provided.'

II — The facts and the procedure before the Court of First Instance

19. On 24 July 2002, the appellant filed an application with the Office to register as a Community trade mark a figurative sign consisting of five parallel stripes placed on the side of the representation of a shoe, to designate goods in Class 25 within the meaning of the Nice Agreement, [6] corresponding to shoes for men, women and children.

20. That application was refused by decision of 19 October 2004 on the ground that the sign at issue was devoid of any distinctive character in respect of the goods concerned. The appeal which the appellant brought against that decision was dismissed by a decision of the First Board of Appeal of the Office of 26 September 2005. [7]

21. By application lodged at the Registry of the Court of First Instance on 16 January 2006, the appellant sought the annulment of the contested decision and an order for costs against the Office.

22. By a separate document lodged at the Registry of the Court of First Instance on 3 April 2006, the Office raised an objection of inadmissibility against that action, in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance. The Office also sought an order for costs against the appellant.

23. The Office submitted that the contested decision had been delivered to the appellant on 28 October 2005 by express courier dispatched by DHL ('the DHL courier'). It inferred that the action, lodged at the Registry of the Court of First Instance on 16 January 2006, had been brought after the expiry of the two-month period following notification of the contested decision, extended on account of distance by a single period of 10 days.

6 — Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

7 — 'The contested decision'.

24. In its observations on the objection of inadmissibility, lodged on 31 May 2006, the appellant claimed that the Court of First Instance should declare its action admissible.

25. The appellant acknowledged that it had received the contested decision by DHL courier on 28 October 2005. However, it submitted that the date of delivery was not to be regarded as the date of legal notification of that decision. The appellant submitted, in that respect, that delivery of the contested decision by DHL courier was not covered by any of the means of notification provided for in Rule 61(2) of Regulation No 2868/95, not even the notification by post referred to in point (a). The appellant inferred from that that delivery cannot be regarded as constituting notification within the meaning of Rule 61 and Article 63(5) of Regulation No 40/94, which provides that an action is to be brought before the Court of First Instance within two months of the date of notification of the decision of the Board of Appeal.

26. In the alternative, the appellant submitted that, by analogy, the provisions relating to notification by post should be applied. It stated that, in that case, notification was deemed irrefutably to have been effected on the 10th day following that of posting, that is, in the present case, on 5 November 2005. Under those circumstances, the period for bringing an action did not expire until 16 January 2006, and its action was therefore admissible.

III — The order under appeal

27. In the order under appeal, the Court of First Instance stated the following grounds:

'22 The Court notes that, as the applicant submits, the delivery of the contested decision by an express courier service, such as DHL, is not included in the means of notification provided for in Rule 61(2) of Regulation No 2868/95. Moreover, it must be held that neither [the Office] nor the applicant, which indeed expressly submits that delivery by DHL does not constitute notification by post, claims that the DHL delivery to the applicant on 28 October 2005 was sent in the form of a registered letter or, moreover, that DHL is able to send such letters in Germany or, finally, that the contested decision was notified to the applicant by one of the other means provided for in Rule 61(2) of Regulation No 2868/95 and in Rules 62 to 66 of that regulation. In that respect, it is important, moreover, to point out that the covering letter attached to the DHL delivery to the applicant does not in any way indicate that it is a registered letter, but states that that delivery is "[n]otified by DHL only".

23 It follows from the foregoing that the contested decision was not notified to the applicant in accordance with the requirements of Rules 61 and 62 of Regulation No 2868/95.

24 Contrary to the applicant's assertions, however, that fact is not capable of leading to the conclusion that the present action was brought within the prescribed period.

25 It must be borne in mind that, in accordance with Rule 68 of Regulation No 2868/95, entitled "Irregularities in notification", "[w]here a document has reached the addressee, if the Office is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by the Office as the date of receipt".

26 That provision, taken as a whole, must be construed as affording to [the Office] the possibility of establishing the date on which a document reached its addressee, if it is not possible to prove due notification or the provisions relating to its notification have not been observed; [the Office] must be entitled therefore to attach to that proof the legal effects of due notification (Joined Cases T-380/02 and T-128/03 *Success-Marketing* v *OHIM — Chipita (PAN & CO)* [2005] ECR II-1233, paragraph 64).

27 In the present case, it is common ground that the applicant received the DHL [courier] on 28 October 2005, as is attested, moreover, by the monitoring document [track report] held by the Registry of the Boards of Appeal.

28 Pursuant to Rule 68 of Regulation No 2868/95, the contested decision is therefore deemed to have been notified to the applicant on 28 October 2005, with the result that the presumption laid down in Rule 62(3) of Regulation No 2868/95 does not apply in the present case. This is also in compliance with Rule 70(2) of Regulation No 2868/95, which provides "[w]here that procedural step is a notification, the event considered [to set time running] shall be the receipt of the document notified, unless otherwise provided". Similarly, according to settled case-law concerning the fifth paragraph of Article 230 EC, in the event that the contested measure has been notified to its addressee, the period within which proceedings must be brought begins to run on the day of receipt by that addressee (see, to that effect, Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 19, confirmed on appeal in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619).

29 Under those circumstances, and given that, in accordance with Article 63(5) of Regulation No 40/94, an action must be brought before the Court within two months of the date of notification of the decision of the Board of Appeal, extended on account of distance by a single period of 10 days, pursuant to Article 102(2) of the Rules of Procedure, the period within which proceedings against the contested decision had to be brought expired on 9 January 2006.

30 The present action, which was brought on 16 January 2006, is therefore out of time and must be dismissed as inadmissible.'

IV — The appeal

A — *The procedure before the Court of Justice*

28. By application lodged at the Registry on 11 March 2007, the appellant brought an appeal against the order under appeal.

29. The Office lodged its response on 31 May 2007.

30. The Court considered it necessary to convene an oral hearing to request the parties to clarify their position on the meaning of Rule 62 of Regulation No 2868/95, and in particular paragraph 3 of that rule, and on whether Rule 68 of Regulation No 2868/95, concerning irregularities in notification, can lead to a less advantageous outcome for the appellant than application of the notification rules under Rule 62.

B — *Forms of order sought and arguments of the parties*

31. The appellant claims that the Court should set aside the order under appeal and order the Office to pay the costs.

32. The Office contends that the appeal should be dismissed as unfounded and that the appellant should be ordered to pay the costs.

33. In support of its appeal, the appellant puts forward a single plea alleging infringement of Rules 61, 62 and 68 of Regulation No 2686/95.

34. The appellant submits that the usual means of notifying decisions of the Boards of Appeal is to send them by DHL courier and that the Office has treated this dispatch like notification by post. Treating it like notification by post is justified by the functional and institutional proximity between DHL and the German post, DHL being a wholly-owned subsidiary of Deutsche Post AG, and the fact that when a document is delivered by DHL, the addressee signs a receipt bearing the date of the day of delivery.

35. Finding that delivery by DHL courier is an improper means of notification would imply that the Office has deliberately adopted a practice bringing about irregularities in notification within the meaning of Rule 68 of Regulation No 2868/95. That would be contrary to the Office's duty to act lawfully, inasmuch as it has no right to deprive the addressee of one of its decisions of legal certainty in calculating the time-limit for bringing an action and of the benefit of the presumption set out in Rule 62(3) of that regulation.

36. Therefore, the appellant submits that notification of the contested decision by DHL courier must be considered to have been effected by post, within the meaning of Rule 61(2)(a) of Regulation No 2868/95, in a form comparable to a registered letter with advice of delivery and, where relevant, to notification by ordinary mail.

37. Consequently, the day of posting of the contested decision is the date shown on the covering letter of the Registry of the Boards of Appeal, that is, 26 October 2005. Pursuant to the presumption laid down in Rule 62(3) of Regulation No 2868/95, notification is deemed to have been effected on the 10th day following that of posting, which is 5 November 2005, so that the action brought by lodging the application at the Registry on 16 January 2006 is admissible.

38. Like the appellant, the Office contends, first, that notification of a decision of a Board of Appeal by express courier can be treated like notification by post and that the Court of First Instance erred in law in finding that the provisions of Rule 68 of Regulation No 2868/95 were to be applied in the present case.

39. In that respect, the Office states that, according to the case-law, a decision is duly notified once it has been communicated to the person to whom it is addressed and that person is in a position to take cognisance of it. [8]

8 — The Office cites Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749.

40. The Office also contends that using an express courier service is comparable to sending a letter by post, taking into account the similarities in the manner in which the two services operate. The Office refers on this point to Article 2 of Directive 97/67/EC of the European Parliament and of the Council, [9] according to which, for the purposes of that directive, 'postal services' are defined as services involving the clearance, sorting, transport and delivery of postal items.

41. The Office confirms that the vast majority of the decisions of its Boards of Appeal are notified by express courier.

42. Second, and contrary to the appellant, the Office contends that the presumption laid down in Rule 62(3) of Regulation No 2868/95 does not apply where there is evidence that the decision was delivered to the addressee.

43. According to the Office, application of that presumption in such a situation would lead to a difference in treatment between an addressee living in Alicante, who would receive the notified document the day after its posting, and an addressee with an address for delivery in Cyprus, who would receive it only five or six days later.

9 — Directive of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14).

44. Given that the addressee received the decision at issue and was in a position to take cognisance of it before the 10th day following that of its posting, it would not be reasonable to postpone to this 10th day the starting point of the period within which proceedings must be brought.

C — *Appraisal*

45. Like the appellant and the Office, I consider that the Court of First Instance erred in law in holding that notification by express courier was improper. Moreover, I will set out below the consequences to be drawn from that error of law.

1. Notification of a decision of the Office by express courier constitutes due notification for the purposes of Regulation No 2868/95

46. I will show, first, that delivery of a decision of the Office by express courier falls within the scope of 'notification by post' within the meaning of Rules 61(2)(a) and 62 of Regulation No 2868/95. I will then set out the reasons why such delivery must be treated like notification by registered letter with advice of delivery, within the meaning of Rule 62 of Regulation No 2868/95.

(a) Delivery of a decision of the Office by express courier constitutes notification by post

47. It is true, as the Court of First Instance found in the order under appeal, that delivery by express courier is not expressly mentioned among the means of notification listed in Rule 61(2) of Regulation No 2868/95 or Rule 62 of that regulation, concerning notification by post. None the less, in my opinion, it must be regarded as notification by post for the following reasons.

48. It seems to me that the concept of 'notification by post' referred to in the abovementioned rules cannot be interpreted in a manner that is restrictive or formalistic.

49. I note that, in Rule 61(2) of Regulation No 2868/95, the Commission of the European Communities listed all the means of transmission that are either possible or conceivable, such as post, hand delivery on the premises of the Office, deposit in a post box at the Office, fax and all other technical means of transmission and, finally, public notification.

50. In my opinion, that list shows that the Commission wanted to give the Office the opportunity to use the broadest possible range of means of transmission. This analysis is borne out by the wording of Rule 61(2)(d) of that regulation, which provides for the possibility of notification by telecopier and 'other technical means'. This part of the sentence clearly proves that the Commission did not want to limit the means of transmission to any particular technical means, but that it wanted the Office to be able to make use of all existing tools as well as those that would become available after the adoption of Regulation No 2868/95.

51. I infer from this that the concept of 'notification by post' referred to in Rules 61(2)(a) and 62 of Regulation No 2868/95 must not be construed restrictively, as referring exclusively to services provided by national operators which, before the opening of the postal sector to market forces, enjoyed monopolies in that sector of activity. [10]

10 — The Community legislature decided to open the postal sector gradually to market forces. For that purpose, it adopted Directive 97/67, in which it provided for the measures necessary to guarantee, on the one hand, the freedom to provide services in the postal sector and, on the other, the maintenance of a universal postal service encompassing a minimum range of services at an affordable price for the benefit of all users, irrespective of their geographical location in the European Community. Implementation of the internal market for postal services continued with Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ 2002 L 176, p. 21), Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1), and, still more recently, Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3).

52. In my opinion, by mentioning the post as one of the means of notification that the Office may use, the Commission wanted to refer to that means of transmission as such; in other words, communication of the document concerned in a letter bearing an address which is collected by a service provider, transported and delivered to the addressee.

53. As submitted by the parties, an express courier company offers a service that is comparable in every respect to that provided by a public or private operator which, in accordance with Directive 97/67, today provides either all or part of the universal postal service in a Member State. The company collects the letter containing the Office's decision to be notified, transports it to the addressee and delivers it to him.

54. Finally, communication of a decision of the Office by express courier can certainly fulfil the objective of the rules of Regulation No 2868/95 concerning notification.

55. According to the case-law, the purpose of notification of a measure is to put the addressee in a position to take cognisance of it and, if necessary, to exercise its right to bring an action. [11] Notification of a decision by an express courier company can certainly meet that objective, given that it consists in the delivery of a written version of that decision to the addressee by an employee of that company. I also take as evidence the fact that the Court also sometimes uses this method of transmission to notify, in the context of an accelerated procedure, the reference for a preliminary ruling to the persons referred to in Article 23 of the Statute and the written observations of those persons.

56. That is why, in my opinion, such delivery must be considered to constitute notification by post, within the meaning of Rules 61(2) and 62 of Regulation No 2868/95.

(b) Delivery of a decision of the Office by express courier can be treated like notification by registered letter with advice of delivery

57. The aim of notification by registered letter with advice of delivery is not only to communicate the measure in question to the addressee so that he can take cognisance of it. The aim is also to make it possible to determine with certainty the date of that communication, so as to set time running as regards the period within which proceedings against that measure must be brought. Finally, in the event of any dispute, it enables

11 — See, to that effect, *Cockerill-Sambre* v *Commission*, paragraph 10, and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, paragraph 22.

the sender to have proof that the letter was delivered to its addressee, in the form of the advice of delivery signed by the addressee or the person authorised by him, whose identity would normally have been checked by the employee making the delivery.

58. Delivery of a decision by express courier makes it possible to know without any doubt the exact date on which delivery was made to the addressee. As the parties have submitted, when a letter is delivered by an express courier company a receipt is signed by the addressee or the person authorised by him to take receipt of such a document. The date of that delivery is subsequently recorded on the track report held by the Registry of the Board of Appeal that adopted the decision in question.

59. In addition, I do not believe that an express courier company provides less of a guarantee, as concerns the accuracy of that date, than the operator responsible for providing all or part of the universal public service in a Member State, which, in accordance with Article 3(4) of Directive 97/67, includes services for registered items.

60. That universal service can also be entrusted to private operators, as is indicated by the definition of 'universal service provider' in Article 2(13) of Directive 97/67. In addition, as is apparent from the 18th recital in the preamble to the directive, the essential difference between express mail and universal postal services in actual fact lies in the value added provided by express courier services to customers, which can be measured as a result of the extra price that customers are prepared to pay for those services.

61. In other words, it is mainly for cost reasons that the Community legislature decided that services for registered items had to come under the universal service.

62. The only difference that seems to me to exist, in the context of the present case, between delivery by express courier and notification by registered letter with advice of delivery relates to the fact that the express courier company does not systematically transmit to the sender the receipt signed by the addressee of the document. Therefore, the Office does not in advance have that means of proving that delivery took place, which it can use against the addressee in the event of any dispute.

63. None the less, in my opinion, that difference is not decisive in the context of the rules on notification provided for in Regulation No 2868/95.

64. As Rule 61 and the subsequent rules of that regulation are drafted, it is doubtful that a decision of the Office subject to a time-limit for bringing an action must be notified by post alone, by means of a registered letter with advice of delivery. In other words, those rules can be construed as meaning that, if the Office chooses to notify such a decision by post, it must do so by registered letter with advice of delivery. However, it is conceivable that the Office may also use one of the other means of notification referred to in Rule 61(2) of that regulation.

65. It is true that Rule 66(1) of Regulation No 2868/95 could be interpreted as meaning the opposite. That rule provides that '[i]f the address of the addressee cannot be established or if after at least one attempt, notification in accordance with Rule 62 has proved impossible, notification shall be effected by public notice'. That provision could thus be construed as meaning that a decision subject to a time-limit for bringing an action must be notified by post, and therefore by registered letter with advice of delivery and, if that is impossible, by public notice.

66. However, such an interpretation of the notification system laid down in Regulation No 2868/95 is inconsistent with Rule 61(3) of that regulation, which, let us recall, provides that where the addressee has indicated his telecopier number or contact details for communicating with him through other technical means, the Office is to have the choice between any of these means of notification and notification by post.

67. The Court of First Instance for its part adopted a clear position on that point in *PAN & CO*, by holding that the Office is not under an obligation to notify decisions that are subject to a time-limit for appeal solely by post, because such an interpretation of Rule 62(1) of Regulation No 2868/95 would render devoid of effect the other modes of notification laid down in Rule 61(2) of that regulation. [12] The Court inferred that such decisions can legitimately be notified by means of fax. [13]

68. As the provisions of Regulation No 2868/95 concerning notification are drafted, I consider that that interpretation must be accepted. Therefore, the Office can notify a decision subject to a time-limit for bringing an action by post, in accordance with Rule 62 of that regulation, or by hand delivery, in accordance with Rule 63 of that regulation, or by deposit in a post box at the Office or, finally, by telecopier and other technical means. If it is impossible to use one of those means of notification, the Office must effect notification by public notice.

12 — Paragraphs 58 to 60.
13 — Paragraph 61.

69. Therefore, for the purposes of the question examined in the present case, account should be taken of the fact that, where the Office effects notification by telecopier and receipt of the fax is disputed, the Office also does not have a document that it can rely on against the addressee with an evidential value equivalent to that of an advice of delivery. That is why it would be inconsistent with the system of notification provided for in Regulation No 2868/95 to consider that communication by express courier cannot be treated like notification by registered letter with advice of delivery, when such a communication, in contrast to a mere fax, gives rise, as a rule, to the signing of a receipt which can, if necessary, be sent to the Office.

70. It is in view of those elements that I consider that the order under appeal, according to which notification by express courier is not included in the means of notification provided for in Rule 61(2) of Regulation No 2868/95 and is improper for the purposes of Rule 68 of that regulation, is vitiated by an error of law as regards the interpretation of those rules as well as Rule 62(1) of that regulation.

2. The consequences of that error of law for the order under appeal

71. The Office contends that the error of law in the order under appeal should not lead to its being set aside. According to the Office, the action brought by the appellant is inadmissible because the presumption laid down in Rule 62(3) of Regulation No 2868/95 does not apply where it is proven that the document was delivered to the addressee within 10 days of its being sent by express courier.

72. Since the contested decision was delivered to the appellant on 28 October 2005, the action lodged at the Registry of the Court of First Instance on 16 January 2006 was, according to the Office, out of time, having been brought after the expiry of the two-month time-limit following that delivery, extended on account of distance by a single period of 10 days.

73. I do not agree with that analysis. Like the appellant, I am of the opinion that the presumption laid down in Rule 62(3) of Regulation No 2868/95 applies even where proof is adduced that delivery took place within 10 days of posting. My position is based on the following considerations.

74. In accordance with consistent case-law, the time-limits for bringing an action meet the requirement of legal certainty and the need to avoid any discrimination or arbitrary

treatment in the administration of justice. [14] Therefore, it is important that those time-limits are set out clearly and precisely, so that the addressee of a decision can know exactly as of when and for how long he may, if necessary, challenge it.

75. Rule 62(3) of Regulation No 2868/95, let us recall, is worded as follows:

'Where notification is effected by registered letter, whether or not with advice of delivery, this shall be deemed to be delivered to the addressee on the 10th day following that of its posting, unless the letter has failed to reach the addressee or has reached him at a later date …'.

76. That provision thus provides expressly that the only two situations in which the presumption at issue is to be set aside are failure of the letter to reach the addressee or receipt of that letter more than 10 days after it was sent by post. [15] Given the wording of that provision, that presumption therefore applies even where the addressee has received the letter within 10 days following that of its posting. [16]

77. In contrast to the position adopted by the Court of First Instance in the order under appeal, I do not believe that Rule 70 of Regulation No 2868/95 is inconsistent with that analysis. That rule, according to which, where the procedural step is a notification, the event considered to set time running is to be the receipt of the document notified, expressly states that it applies 'unless otherwise provided'. It is precisely Rule 62(3) of Regulation No 2868/95 which 'provides otherwise'. [17]

78. It is true that application of the presumption provided for in that last provision where the letter is received within 10 days of posting may seem illogical in the light of the purpose of the method of notification by registered letter with advice of delivery which is, generally, to determine with certainty the date on which cognisance of the decision

14 — See, in particular, Case C-154/99 P *Politi* v *European Training Foundation* [2000] ECR I-5019, paragraph 15.

15 — The wording is also identical in the German and English versions of Regulation No 2868/95.

16 — Rule 62(3) of Regulation No 2868/95 differs in that respect from Article 79 of the Rules of Procedure of the Court of Justice and Article 100 of the Rules of Procedure of the Court of First Instance, according to which service is to be deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the registered letter at the post office of the place where the Court has its seat, *unless it is shown by the acknowledgement of receipt that the letter was received on a different date* or the addressee informs the Registrar, within three weeks of being advised by telefax or other technical means of communication, that the document to be served has not reached him (emphasis added).

17 — This analysis does not render Rule 70 of Regulation No 2868/95 redundant. That rule thus remains relevant in order to determine the beginning of the period within which proceedings must be brought in the event of notification effected by hand delivery on the premises of the Office, pursuant to Rule 63 of that regulation, according to which notification may be effected on the premises of the Office by hand delivery of the document to the addressee, who is on delivery to acknowledge its receipt.

in dispute was taken and, consequently, the point from which time begins to run. Viewed like that, the presumption of receipt on the 10th day following that of posting should apply only where the date of that receipt cannot be determined accurately, either because the addressee has refused to collect the registered letter sent to him, or because the postal service has not returned the advice of delivery to the sender.

79. In addition, as the Office points out, application of the presumption where the letter is received within 10 days of its posting leads to a difference in the treatment of addressees living close to the Office, who may receive the letter the day after its posting, and those in more distant Member States, for whom the time required to transport the letter may be longer. As a result of that presumption, the former therefore have more time to decide whether or not to bring an action and to prepare such an action.

80. However, that lack of logic and that interference with equality between addressees cannot, in my opinion, justify upholding an interpretation of Rule 62(3) of Regulation No 2868/95 that would run counter to the clear and precise wording of that provision. I consider that, as regards time-limits for bringing actions, priority should be given to legal certainty and the right of the addressees of a decision to be able to determine accurately the period available to them.

81. In addition, I note that the Office's letter accompanying the copy of the contested decision delivered to the appellant by express courier on 28 October 2005 did not contain any information on the period within which that decision could be challenged, or when time began to run. [18]

82. If the Office wants the presumption laid down in Rule 62(3) of Regulation No 2868/95 no longer to apply where it is proven that delivery has taken place within 10 days of posting, it is for the Office to ask the Commission to change the content of that provision accordingly. As we have seen, Regulation No 2868/95 has already been amended on two occasions, in 2004 and 2005.

83. That is why I take the view that the notification of the contested decision must be fixed on the 10th day following its posting by express courier, namely 5 November 2005. It follows that the period of two months and 10 days within which the appellant could bring an action against that decision expired on 15 January 2006. Since that day was a Sunday, the period was extended until Monday 16 January 2006, in accordance with Article 101(2) of the Rules of Procedure of the Court of First Instance. Consequently, the action against the contested decision, which was brought on that day, must be declared admissible.

18 — In that letter, the Office merely drew the addressee's attention to the content of Article 63 of Regulation No 40/94, which states that an action against a decision of a Board of Appeal must be brought before the Court of First Instance.

84. I therefore propose that the Court set aside the order under appeal, refer the case back to the Court of First Instance for judgment on the action against the contested decision and reserve costs. [19]

3. Observations in the alternative

85. In the alternative, even assuming that delivery of a decision of the Office by express courier must be considered to be inconsistent with Regulation No 2868/95, it is my view that Rule 68 of that regulation did not allow the Court of First Instance to declare the action inadmissible for having been brought out of time.

86. Since the interpretation of that rule, which gave rise to the approach adopted in the order under appeal, directly concerns the duration of the period within which the appellant could bring an action and, according to the case-law, the provisions laying down the time-limits for bringing actions are mandatory in nature, [20] the Court must check of its own motion whether those time-limits have been complied with. [21]

87. As I stated earlier, it is apparent from Rule 62(3) of Regulation No 2868/95 that, where notification of a decision of a Board of Appeal of the Office refusing an application for registration of a Community trade mark is effected by registered letter with advice of delivery, notification is to be deemed to have been made on the 10th day following posting or on the day of delivery, if it takes place after the 10-day period.

88. It follows that, if the contested decision had been notified to the appellant on 28 October 2005 by registered letter with advice of delivery, the action brought by the appellant on 16 January 2006 would have been admissible.

89. It is true that, as is apparent from the abovementioned observations and the judgment in *PAN & CO*, the Office could have used one of the other means of notification set out in Rule 61(2) of Regulation No 2868/95 and, in those circumstances, the presumption in dispute would not have applied. However, if the Office had used one of those other means of notification, the

19 — See, as regards costs, Case C-193/01 P *Pitsiorlas* v *Council and ECB* [2003] ECR I-4837.

20 — Joined Cases 122/79 and 123/79 *Schiavo* v *Council* [1981] ECR 473, paragraph 22.

21 — Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, paragraph 3, and *Politi* v *European Training Foundation*, paragraph 15.

appellant would have been able to determine accurately the starting point of the applicable time-limit for bringing an action.[22] This would not be the case if the Court were to find that delivery by express courier is improper and is not covered by any of the means of notification set out in Rule 61(2) of Regulation No 2868/95.

90. In that situation, the appellant would have had to be convinced that there had been an irregularity and that Rule 68 of Regulation No 2868/95 applied. I do not believe that K-Swiss can be required to know that the notification practice regularly used by the Office was improper.

91. Therefore, I consider that an infringement, by the Office, of the applicable rules on notification cannot have the effect of denying the appellant the benefit of the most favourable time-limit for bringing an action which it should have benefited from if those rules had been complied with.

22 — According to Rule 64 of Regulation No 2868/95, notification by deposit in a post box at the Office is to be deemed to have taken place on the fifth day following that deposit. In accordance with Rule 65 of the regulation, notification by telecopier is to be deemed to have taken place on the date on which the communication was received by the telecopying device of the recipient.

92. In accordance with the case-law cited above, the time-limits for bringing actions are not subject to the discretion of the parties or the court and they are binding as mandatory provisions of public policy. Therefore, the Office cannot, by an improper practice, disregard the time-limits for bringing actions which stem from the provisions of Regulation No 2868/95 concerning the notification of its decisions.

93. To the extent that Rule 68 of Regulation No 2868/95 ought to lead to the appellant's action being declared inadmissible, that rule is in my view unlawful and must be set aside. This means that, if the Court were to find that delivery of the contested decision by express courier was inconsistent with the requirements of Regulation No 2868/95, that delivery would have to be regarded as having no effect. In that case, the Office would have to notify the contested decision using one of the means of notification provided for in Rule 61(2) of that regulation.

94. It seems to me that that approach is dictated in the present case all the more by the fact that the appellant had indicated its telecopier number to the Office, so that the Office was in a position to use one of the means of notification expressly provided for in Rule 61(2) of Regulation No 2868/95.

V — Conclusion

95. In the light of the foregoing considerations, I propose that the Court should rule as follows:

— set aside the order of the Court of First Instance of the European Communities in Case T-14/06 *K-Swiss* v *OHIM (Parallel stripes on a shoe)* of 14 December 2006;

— dismiss as unfounded the objection of inadmissibility raised by the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) before the Court of First Instance of the European Communities;

— refer the case back to the Court of First Instance of the European Communities for judgment on the form of order sought by K-Swiss Inc., seeking annulment of the decision of the First Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 26 September 2005;

— reserve costs.