

**Appeal brought on 24 December 2008 by Messer Group GmbH against the judgment of the Court of First Instance (First Chamber) delivered on 15 October 2008 in Case T-305/06 Air Products and Chemicals Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**

(Case C-579/08 P)

(2009/C 55/27)

*Language of the case: English*

### Parties

*Appellant:* Messer Group GmbH (represented by: W. Graf v. Schwerin and J. Schmidt, Attorneys at law)

*Other parties to the proceedings:* Air Products and Chemicals Inc., Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

### Form of order sought

The appellant claims that the Court should:

— Set aside the judgment of the Court of First Instance of 15 October 2008 in joined cases T-305/06, T-306/06 and T-307/06 and dismiss the action

— Order the applicant to pay the costs, including those of the appellant and intervener,

alternatively,

— Set aside the judgment of the Court of First Instance of 15 October 2008 in joined cases T-305/06, T-306/06 and T-307/06;

— Refer the case back to the Court of First Instance;

— Reserve the costs.

### Pleas in law and main arguments

The applicant submits that the Court of First Instance failed to apply correctly the criteria laid down for the proper implementation of Article 8(1)(b) of Regulation (EC) No 40/94 <sup>(1)</sup>.

Furthermore the applicant submits that the contested decision of the Court of First Instance is based on a substantive inaccuracy in its findings with respect to the determination of the relevant public.

<sup>(1)</sup> Council Regulation (EC) No 40/94 of 20 December 2003 on the Community trade mark (OJ L 11, p. 1).

**Reference for a preliminary ruling from VAT and Duties Tribunal, London (United Kingdom) made on 29 December 2008 — EMI Group Ltd v The Commissioners for Her Majesty's Revenue & Customs**

(Case C-581/08)

(2009/C 55/28)

*Language of the case: English*

### Referring court

VAT and Duties Tribunal, London

### Parties to the main proceedings

*Applicant:* EMI Group Ltd

*Defendant:* The Commissioners for Her Majesty's Revenue & Customs

### Questions referred

- (a) How is the last sentence of Article 5.6 of the Sixth Directive <sup>(1)</sup> to be interpreted in the context of the circumstances of the present case?
- (b) In particular, what are the essential characteristics of a 'sample' within the meaning of the last sentence of Article 5.6 of the Sixth Directive?
- (c) Is a Member State permitted to limit the interpretation of 'sample' in the last sentence of Article 5.6 of the Sixth Directive to-
  - (i) an industrial sample in a form not ordinarily available for sale to the public given to an actual or potential customer of the business (until 1993),
  - (ii) only one, or only the first of a number of samples given by the same person to the same recipient where those samples are identical or do not differ in any material respect from each other (from 1993)?
- (d) Is a Member State permitted to limit the interpretation of 'gifts of small value' in the last sentence of Article 5.6 of the Sixth Directive in such a way as to exclude-
  - (i) a gift of goods forming part of a series or succession of gifts made to the same person from time to time (to October 2003),
  - (ii) any business gifts made to the same person in any 12-month period where the total cost exceeds £50 (October 2003 onwards)?