Form of order sought

— Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 14 February 2008 in case R 1527/2006-2;

— reject the application for Community trade mark No 3 663 234; and

— order the other party to the proceedings before the Board of Appeal to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The other party to the proceedings before the Board of Appeal

Community trade mark concerned: The figurative mark 'GREEN by missako' for goods and services in classes 3, 25, 35 — application No 3 663 234

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

Mark or sign cited: The Community figurative trade mark 'MI SA KO' for goods in classes 18 and 25; the national figurative trade mark 'MI SA KO' for services in class 35

Decision of the Opposition Division: Dismissal of the opposition

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation No 40/94 as a mere global likelihood of confusion among consumers is required in order to deny a Community trade mark application.

Action brought on 29 April 2008 — Arbeitsgemeinschaft Golden Toast v OHIM (Golden Toast)

(Case T-163/08)

(2008/C 171/79)

Language of the case: German

Parties

Applicant: Arbeitsgemeinschaft Golden Toast e.V. (Düsseldorf, Germany) (represented by: A. Späth and G. Hasselblatt, lawyers)

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

Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 31 January 2008 (Case R 761/2007-1);

— Order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

Community trade mark concerned: Word mark 'Golden Toast' for goods and services in Classes 5, 8, 9, 11, 14, 16, 21, 24, 25, 28-32, 39 and 41-44 (Application No 4 811 171).

Decision of the Examiner: Application refused in part, in respect of the goods in Classes 11 and 30.

Decision of the Board of Appeal: Dismissal of appeal.

Pleas in law: Breach of the obligation under the first sentence of Article 73 of Regulation (EC) No 40/94 ([1]) to state reasons, in that the appealed decision was based on lack of distinctive character within the meaning of Article 7(1)(b) of that regulation, although that was not examined. In addition, infringement of Article 7(1)(c) of Regulation No 40/94, in that the conditions for the finding of descriptiveness of the trade mark applied for were misconstrued.

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

Action brought on 9 May 2008 — Microsoft v Commission

(Case T-167/08)

(2008/C 171/80)

Language of the case: English

Parties

Applicant: Microsoft Corp. (represented by: J.-F. Bellis, lawyer, I. Forrester, QC

Defendant: Commission of the European Communities

Form of order sought

— annul the Decision of the European Commission C(2008) 764 final of 27 February 2008 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Commission Decision C(2005) 4420 final;

— in the alternative, annul or reduce the amount of the periodic penalty payment imposed;

— order the defendant to bear the costs.

Pleas in law and main arguments

By a decision of 10 November 2005 adopted pursuant to Article 24(1) of Regulation 1/2003 ([1]) the Commission imposed a periodic penalty payment on the applicant for failure to comply with the obligation to make the technical documentation embodying the Interoperability Information available to interested undertakings on reasonable and non-discriminatory terms pursuant to Article 5(a) of Commission Decision 2007/53/EC of 24 March 2004 ([2]). The contested decision fixed the definitive amount of the periodic penalty payment for the period between 21 June 2006 and 21 October 2007 inclusive at EUR 899 million. The applicant seeks the annulment of the contested decision on the following grounds:

1. The Commission erred by subjecting Microsoft to periodic penalty payments to force it to apply 'reasonable' price terms without first specifying what price terms would, in the Commission's view, be 'reasonable' so as to allow Microsoft to know what to do to avoid the imposition of such penalty payment.

2. The Commission committed a manifest error of assessment and violated Article 253 EC by concluding that published rates adopted by Microsoft were unreasonable and contrary to the 2004 decision without taking account of the facts that (i) these published rates were expressly intended to facilitate negotiations between Microsoft and prospective licensees and (ii) Microsoft had, in consultation with the Commission, created a mechanism whereby the trustee would review the rates proposed by Microsoft if any prospective licensee failed to reach agreement which was virtually identical to the mechanism created by the Commission itself in NDC Health/IMS Health: Interim Measures ('IMS Health') ([3]). The Commission also committed a manifest error of assessment by (i) failing to give due weight to the fact that these published rates were set by Microsoft at a figure lower than the rates that a third party expert determined to be reasonable (ii) failing to give due weight to the fact that no prospective licensee failed to reach agreement with Microsoft and (iii) failing to consider the fact that licensees of the 'no patent' licence also obtain rights to use Microsoft's patents.

3. The Commission committed a manifest error of assessment by requiring Microsoft to establish that its trade secrets were innovative under a heightened patentability test in order to justify the imposition of royalties for a licence to such trade secrets. The Commission also violated Article 253 EC by failing to take account of numerous arguments raised by Microsoft on the basis of reports prepared by patent experts which criticised the Commission's approach.

4. The Commission violated Article 233 EC by failing to take the necessary measures to comply with the judgment in Case T-201/04 ([4]) in so far as the Commission based its assessment reports prepared by the trustee on the basis of documents obtained through powers of investigation that the Court of First Instance held to be unlawful.

5. The Commission denied Microsoft's right to be heard by failing to give Microsoft an opportunity to make known its views after the end of the reference period for which Microsoft is fined, there by preventing Microsoft from commenting on all relevant aspects of the case.

6. The amount of the periodic penalty payment is excessive and disproportionate. Among other reasons, the Commission failed to take due account of the fact that the contested decision only concludes that the royalties allegedly established by Microsoft under one particular licence (the 'no patent' licence) were unreasonable, and therefore doesn't challenge (i) the royalties allegedly established by Microsoft for all of its intellectual property rights incorporated in the entirety of the Interoperability Information that Microsoft is required to disclose under Article 5 of the 2004 decision or (ii) the completeness and accuracy of the Interoperability Information.

([1]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) (OJ 2003 L 1, p. 1).
([2]) Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 — Microsoft) (notified under document number C(2004) 900) (OJ 2007 L 32, p. 23).
([3]) Commission Decision 2002/165/EC of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/38.044 — NDC Health/IMS Health: Interim measures) (notified under document number C(2001) 1695) (OJ 2002 L 59, p. 18).
([4]) Case T-201/04, *Microsoft* v. *Commission*, not yet published in the ECR.

Action brought on 13 May 2008 — Commission v I.D. FOS Research

(Case T-170/08)

(2008/C 171/81)

Language of the case: Dutch

Parties

Applicant: Commission of the European Communities (represented by: R. Lyal and W. Roels, Agents)

Defendant: I.D. FOS Research EEIG (Mol, Belgium)

Form of order sought

— order the defendant to pay to the Commission the sum of EUR 21 599,26 together with default interest in the sum of EUR 6 375,94;

— order the defendant to pay default interest of EUR 3,99 per day from 8 January 2007 until the date of full repayment of the debt;

— order the defendant to pay the costs.