

continued validity (i.e. renewal) of its registration IR 238 203. This obligation resulted from Article 41(2) 3<sup>rd</sup> sentence Regulation No. 207/2009 read in conjunction with Rules 16(1), (3) and 20(2) Implementing Regulation 1995, and the notification issued by OHIM on 18 January 2002, reiterating the invitation for Budvar to submit 'any further facts, evidence and arguments in support of his opposition'. The obligation was to submit such evidence by the deadline set in this notification, i.e. by 26 February 2002. Nevertheless, it was not submitted until 21 January 2004.

As a consequence, the finding of the Court of First Instance that Article 76(2) Regulation No. 207/2009 did not apply with respect to the submission of the renewal certificate, as there was no 'due time' for this submission, was also erroneous, and resulted in a violation of this provision. In fact there was a 'due time' and the Board of Appeal would have had to at least exercise its discretion under Article 76(2) as to whether it was going to take the evidence into account. The Court of First Instance has read the Board of Appeal decision as saying that the renewal certificate was filed in good time. As a result, the violation of Article 76(2) lay in the non-use of discretion by the Board of Appeal, and its confirmation by the Court of First Instance.

The Court of First Instance also failed to recognise that the evidence of use submitted by Budvar in support of its opposition was insufficient and referred, moreover, to trade marks other than the one on which the contested decision and the underlying Board of Appeal decision were based, thereby violating Article 42(2), (3) Regulation No. 207/2009.

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(<sup>1</sup>) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark OJ L 78, p. 1

(<sup>2</sup>) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark OJ L 303, p. 1

(<sup>3</sup>) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark OJ L 11, p. 1

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**Reference for a preliminary ruling from the  
Markkinaoikeus (Finland) lodged on 15 June 2009 —  
Mehiläinen Oy, Suomen Terveystalo Oyj v Oulun kaupunki**

(Case C-215/09)

(2009/C 193/19)

*Language of the case: Finnish*

**Referring court**

Markkinaoikeus

**Parties to the main proceedings**

*Applicants:* Mehiläinen Oy, Suomen Terveystalo Oyj

*Defendant:* Oulun kaupunki

**Questions referred**

1. Is an arrangement by which a municipal contracting authority concludes with a private undertaking in the form of a company which is separate from it a contract establishing a new undertaking in the form of a share company, on an equal share basis both in terms of ownership and of power of control, from which the municipal contracting authority commits itself, when setting up the company, to purchasing occupational health and wellbeing services for its own staff, on an overall assessment, an arrangement which must be put out to tender, on the ground that the general contract is a contract for the procurement of services within the meaning of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts and public service contracts (<sup>1</sup>), or is the arrangement to be regarded as the establishment of a joint venture and the transfer of the business activity of a municipal enterprise to which that directive and the consequent obligation to put out to tender are not applicable?
2. Should any significance in this case also be attached
  - (a) to the fact that the City of Oulu, as a municipal contracting authority, has undertaken to acquire in return for consideration the services referred to above over a four-year transitional period, after which the municipal contracting authority intends, according to its decision, once again to put out to tender the occupational health care services it requires;
  - (b) to the fact that, prior to the arrangement in question, most of the turnover of the municipal enterprise that was part of the City of Oulu organisation came from occupational health care services other than those produced for the City's own employees;
  - (c) to the fact that the founding of the new company has been organised with the intention of transferring as a capital contribution the activity of the municipal enterprise, which comprises the production of occupational health care services both for the City's employees and for private customers?

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(<sup>1</sup>) OJ 2004 L 134, p. 114