

**Form of order sought**

The applicant claims that the Court should:

- declare the present action admissible and find that the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 21 September 2011 in Case R 1612/2010-2 is inconsistent with Council Regulation No 40/94 on the Community trade mark (now Regulation No 297/2009), in so far as that decision annulled the decision of the Opposition Division of OHIM of 20 July 2010 in opposition proceedings No B 1344995, and rejected the application to register as a Community trade mark international mark No 938.133 for part of the goods in Classes 29 and 30 in respect of which registration was sought;
- order the defendant, and where appropriate the intervener, to pay all the costs of the proceedings, including those incurred in the opposition and appeal proceedings before OHIM.

**Pleas in law and main arguments**

*Applicant for a Community trade mark:* the applicant

*Community trade mark concerned:* figurative mark with the word element 'Maestro de Oliva' for goods in Classes 29 and 30

*Proprietor of the mark or sign cited in the opposition proceedings:* Carapelli Firenze SPA

*Mark or sign cited in opposition:* national word mark 'MAESTRO' for goods in Classes 29 and 30

*Decision of the Opposition Division:* opposition rejected

*Decision of the Board of Appeal:* appeal upheld and application rejected in relation to part of the goods in respect of which registration was sought

*Pleas in law:* Infringement of Article 15(1)(a) and related articles of Regulation No 207/2009, since the use made by the defendant of the opposing mark constitutes a deliberate change in the original concept of the mark represented by the opposing mark and, therefore, substantially alters the distinctive character of the mark 'MAESTRO', and infringement of Article 8(1)(b) of Regulation No 207/2009, since there is no likelihood of confusion between the conflicting marks.

**Action brought on 9 January 2012 — Andechser Molkerei Scheitz v Commission**

(Case T-13/12)

(2012/C 89/43)

*Language of the case:* German

**Parties**

*Applicant:* Andechser Molkerei Scheitz GmbH (Andechs, Germany) (represented by: H. Schmidt, lawyer)

*Defendant:* European Commission

**Form of order sought**

- Annul Commission Regulation (EU) No 1131/2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council with regard to steviol glycosides, in so far as it authorises steviol glycosides extracted from the leaves of the *Stevia rebaudiana* Bertoni plant for use only as food additives and not as plant-based food ingredients of agricultural origin or as natural flavouring preparations;
- In essence, declare that the European Union is obliged to compensate the applicant for the damage arising from the fact that Commission Regulation (EU) No 1131/2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council authorises steviol glycosides extracted from the leaves of the *Stevia rebaudiana* Bertoni plant for use only as food additives and not as plant-based food ingredients of agricultural origin or as natural flavouring preparations, and other undertakings therefore use steviol glycosides in the production of their conventional milk-based products, thereby forcing the applicant out of the market, while the applicant, as an organic dairy and producer of organic products, is prevented by the provisions of Regulation (EC) No 834/2007 and Regulation No 889/2008 from using steviol glycosides as food additives, even where these are obtained by extraction from organically cultivated stevia leaves using the procedure approved under European Union law in respect of organic products.

**Pleas in law and main arguments**

The applicant challenges Commission Regulation (EU) No 1131/2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council with regard to steviol glycosides,<sup>(1)</sup> in so far as it authorises steviol glycosides extracted from the leaves of the *Stevia rebaudiana* Bertoni plant for use only as food additives and not as plant-based food ingredients of agricultural origin or as natural flavouring preparations.

In support of the action, the applicant relies, in essence, on four pleas in law.

1. First plea in law, alleging infringement of the *non ultra vires* rule

— The applicant submits, first, that the Commission has — wrongly — treated steviol glycosides extracted from the leaves of the *Stevia rebaudiana* Bertoni plant as a food additive, and thus exceeded the powers conferred on it in adopting the regulation at issue. Steviol glycosides are a sophisticated choice owing to their taste. Accordingly they are not used as food additives for a technological purpose in accordance with Article 3(2) of Regulation (EC) No 1333/2008,<sup>(2)</sup> but exclusively for the purpose of imparting flavour and/or taste within the meaning of recital 5 in the preamble to that regulation. Steviol glycosides should therefore be categorised as plant-based food ingredients or natural flavouring preparations. Consequently the Commission acted *ultra vires*.

2. Second plea in law, alleging infringement of the fundamental right to equal treatment

— Secondly, the applicant alleges infringement of its fundamental right to equal treatment in the sense that arbitrary decisions are prohibited; as an organic dairy, it is prevented from producing and marketing organic yoghurt with organic steviol glycosides, whereas its competitors, who produce yoghurts in conventional agriculture, are permitted to use steviol glycosides. The use of organic steviol glycosides as a food additive is prohibited under Article 19(2)(b) of Regulation (EC) No 834/2007,<sup>(3)</sup> according to which only food additives which have been authorised for organic products may be used in production. No such authorisation was forthcoming either in Article 27(1)(a) of Regulation (EC) No 889/2008<sup>(4)</sup> or as a result of inclusion in the positive list in Section A of Annex VIII to that regulation. By approving steviol glycosides as food additives only, the Commission therefore unlawfully interfered in the market to the benefit of producers of conventional products, thereby impeding competition.

3. Third plea in law, alleging infringement of the fundamental right to the protection of property and of the freedom to exercise an economic activity

— Thirdly, the applicant alleges infringement of its fundamental right to the protection of property and of its freedom to exercise an economic activity.

4. Fourth plea in law, alleging a failure to state reasons

— The reasons given for Regulation No 1131/2011 are, moreover, insufficient, as no explanation is given in the recitals in the preamble as to why steviol glycosides, which serve only to impart flavour, to sweeten and to add a slightly tart taste, are treated as food additives.

<sup>(1)</sup> Commission Regulation (EU) No 1131/2011 of 11 November 2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council with regard to steviol glycosides (OJ 2011 L 295, p. 205).

<sup>(2)</sup> Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives (OJ 2008 L 354, p. 16).

<sup>(3)</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1).

<sup>(4)</sup> Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ 2008 L 250, p. 1).

## Action brought on 16 January 2012 — Hagenmeyer and Hahn v Commission

(Case T-17/12)

(2012/C 89/44)

*Language of the case: German*

### Parties

*Applicants:* Moritz Hagenmeyer (Hamburg, Germany) and Andreas Hahn (Hanover, Germany) (represented by: T. Teufer, lawyer)

*Defendant:* European Commission

### Form of order sought

The applicants claim that the Court should:

— annul the part of Commission Regulation (EU) No 1170/2011 of 16 November 2011 refusing to authorise certain health claims made on foods and referring to the reduction of disease risk (OJ 2011 L 299, p. 1) concerning the applicant's claim 'Regular consumption of significant amounts of water can reduce the risk of development of dehydration and of concomitant decrease of performance';

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

### Pleas in law and main arguments

Pursuant to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods,<sup>(1)</sup> health claims made on foods are prohibited in so far as they are not authorised by the Commission in accordance with that regulation and have not been added to the list of permissible claims.

This action has been brought against Commission Regulation (EU) No 1170/2011 of 16 November 2011 refusing to authorise certain health claims made on foods and referring to the reduction of disease risk,<sup>(2)</sup> in so far as that regulation rejected the applicants' application to have added to the list of permissible claims its claim regarding the reduction of a disease risk, namely 'regular consumption of significant amounts of water can reduce the risk of development of dehydration and of concomitant decrease of performance'.

In support of their action, the applicants rely on nine pleas in law.

1. First plea in law: The dispensability of the naming of a 'risk factor'