



Reports of Cases

ORDER OF THE GENERAL COURT (Second Chamber)

22 January 2015 *

(Community trade mark — Time-limit for instituting proceedings — Point from which time starts to run — Notification of the decision of the Board of Appeal by fax — Receipt of the fax — Lateness — No force majeure or unforeseeable circumstances — Manifest inadmissibility)

In Case T-488/13,

GEA Group AG, established in Düsseldorf (Germany), represented by J. Schneiders, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented initially by A. Pohlmann, and subsequently by S. Hanne, acting as Agents,

defendant,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 21 March 2013 (Case R 935/2012-4), concerning an application for registration of the word sign ‘engineering for a better world’ as a Community trade mark,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 2 September 2013,

having regard to the response lodged at the Court Registry on 16 December 2013,

having regard to the reply lodged at the Court Registry on 11 March 2014,

having regard to the rejoinder lodged at the Court Registry on 28 April 2014,

having regard to the applicant’s letter lodged at the Court Registry on 11 September 2013,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to give a ruling without an oral procedure, pursuant to Article 135a of the Rules of Procedure of the General Court,

* Language of the case: German.

makes the following

Order

Background to the dispute

- 1 On 6 September 2011, the applicant, GEA Group AG, filed an application with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), for registration of the word mark 'engineering for a better world' in respect of goods and services in Classes 6, 7, 9, 11, 35, 37, 39, 41 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks of 15 June 1957, as revised and amended.
- 2 By decision of 20 March 2012, the examiner refused registration of the trade mark applied for on the basis of Article 7(1)(b) and (2) of Regulation No 207/2009.
- 3 On 15 May 2012, the applicant filed an appeal with OHIM, pursuant to Articles 58 to 64 of Regulation No 207/2009.
- 4 By decision of 21 March 2013 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal.
- 5 The contested decision was notified to the applicant by fax on 25 March 2013.
- 6 The applicant was unaware of that fax and lodged an additional written statement with OHIM, relating to the appeal proceedings before the Board of Appeal, on 13 June 2013.
- 7 On 11 July 2013, the OHIM Registry informed the applicant that the Fourth Board of Appeal had decided on the appeal and that it had notified the applicant of the contested decision by fax on 25 March 2013. In addition, the OHIM Registry sent the applicant a further copy of the contested decision accompanied by a copy of the transmission report from its fax machine, dated 25 March 2013, stating the word 'ok'.

Forms of order sought

- 8 The applicant claims, in essence, that the Court should:
 - declare the action admissible;
 - annul the contested decision;
 - order OHIM to pay the costs.
- 9 OHIM contends that the Court should:
 - dismiss the action as inadmissible and, in the alternative, as unfounded;
 - order the applicant to pay the costs.

Law

- 10 Under Article 111 of the Rules of Procedure of the General Court, where the action is manifestly inadmissible, the General Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.
- 11 In the present case, the Tribunal considers that there is sufficient information in the documents before it and has decided, pursuant to Article 111 of the Rules of Procedure, to give a decision on the action without taking further steps in the proceedings.
- 12 OHIM contends that the applicant failed to comply with the time-limit for bringing an action before the General Court, since the application was lodged almost three months after the expiry of that time-limit.
- 13 Article 65(5) of Regulation No 207/2009 prescribes that an action is to be brought before the General Court within two months of the date of notification of the decision of the Board of Appeal.
- 14 Rule 61(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), as amended, provides that notifications to be made by OHIM may be effected by fax. Notification by fax may be employed for any OHIM decision (judgment of 19 April 2005 in *Success-Marketing v OHIM — Chipita (PAN & CO)*, T-380/02 and T-128/03, ECR, EU:T:2005:133, paragraph 58). Accordingly, this includes decisions of the boards of appeal.
- 15 Rule 65(1) of Regulation No 2868/95, headed ‘Notification by [fax] and other technical means’, states that ‘[n]otification shall be deemed to have been taken place on the date on which the communication was received by the [fax machine] of the recipient’. Rule 70(2) of Regulation No 2868/95, entitled ‘Calculation of time-limits’, provides that ‘[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’.
- 16 Since no derogating provision applies in the present case, the date of receipt of the fax constitutes the starting point of the period prescribed for instituting proceedings against OHIM decisions notified by fax.
- 17 In the present case OHIM maintains that it notified the contested decision by fax on 25 March 2013. The applicant acknowledged, in its letter of 30 August 2013, that the OHIM Registry had sent it a copy of the transmission report from its fax machine, relating to the notification of the contested decision, stating the word ‘ok’. The applicant also acknowledged that the information technology system of its representative had recorded and stored the fax of 25 March 2013. Nevertheless, according to the applicant, its representative was not informed of the arrival of the fax at issue, and *a fortiori* its content, before 11 July 2013, due to a technical malfunction.
- 18 However, it cannot be inferred from that that the fax notifying the contested decision was not received by the representative of the applicant on 25 March 2013 and that, consequently, the time-limit for instituting proceedings did not start to run from that date.
- 19 The case-law draws a distinction between, first, the transmission of a document to the addressee, which is required for due notification, and, secondly, effective knowledge of that document, which is not required for the notification to be regarded as a due notification. According to that case-law, the validity of a notification to the addressee is in no way conditional on its having been actually brought to the notice of the person competent to deal with it under the internal rules of the entity addressed. Due notification of a decision has been effected once it has been communicated to the addressee and the addressee is in a position to take cognisance of it (judgment of 15 December 1994 in *Bayer v*

Commission, C-195/91 P, ECR, EU:C:1994:412, paragraph 20; see also judgment of 15 September 1998, *European Night Services and Others v Commission*, T-374/94, T-375/94, T-384/94 and T-388/94, ECR, EU:T:1998:198, paragraph 76 and the case-law cited). Thus, in order to assess the validity of a notification, only its external aspect is taken into consideration, that is to say, due transmission to the addressee, rather than its internal aspect, which concerns the internal functioning of the entity addressed (see, to that effect, judgment in *European Night Services and Others v Commission*, EU:T:1998:198, paragraph 79).

- 20 It follows that in order to determine the date of receipt of a notification, account should be taken only of the external aspect of the notification, that is to say, whether it was received in a formal and proper manner by the entity addressed, irrespective of whether that entity effectively received and took cognisance of the notification. That conclusion is not called into question by the requirement established in the abovementioned case-law under which due notification requires the addressee to be in a position to take cognisance of it. That requirement places an obligation on the notifier to create the conditions necessary for the addressee to effectively take cognisance of the notification, that is to say, an obligation to use best endeavours (which corresponds with the external aspect of the notification) rather than an obligation on the notifier to interfere in the internal functioning of the entity addressed in order to ensure it has actually taken cognisance of the notification, that is to say, an obligation to achieve a specific result (which corresponds with the internal aspect of the notification) (see, to that effect, judgment of 26 November 1985 in *Cockerill-Sambre v Commission*, 42/85, ECR, EU:C:1985:471, paragraph 11).
- 21 The General Court has thus held that the production, by OHIM, of fax transmission reports which included items conferring probative value on them was sufficient to prove that the fax in question had been received by the addressee (see, to that effect, judgment in *PAN & CO*, cited in paragraph 14 above, EU:T:2005:133, paragraphs 67, 68, 80, 81 and 85). Fax machines are designed so that any transmission or reception problem is reported by an error message which informs the sender of the exact reason for the non-receipt, as communicated to that fax machine by the addressee's fax machine. Where there is no communication of such a problem, a message indicating effective transmission is generated. Thus, where there has been no error message and there is a transmission report stating the word 'ok', it can be considered that the fax sent has been received by the addressee. In the present case, the applicant itself has referred to the word 'ok' appearing in the transmission report it received from OHIM and has recognised that that demonstrates the notification of the contested decision was effected in proper and regular form. The applicant has also acknowledged that the fax notifying the contested decision was recorded on the information technology system of its representative on 25 March 2013.
- 22 Furthermore, if only actual knowledge of the fax at issue were sufficient to prove that it had been received by the representative of the applicant, even where a decision had been duly notified to the addressee, it would be impossible for OHIM to adduce evidence of effective notification of the decision and of the date on which it had been received by the addressee. The starting point of the period prescribed for instituting proceedings against a decision of an OHIM board of appeal would depend on fortuitous circumstances, unrelated to the diligence with which OHIM notified the decision, whereas the specific purpose of establishing time-limits for instituting proceedings is to establish legal certainty (see the case-law cited in paragraph 26 below).
- 23 It follows from the foregoing that the two-month time-limit for bringing an action against the contested decision, extended on account of distance by 10 days pursuant to Article 102(2) of the Rules of Procedure, began to run on 26 March 2013, the day following the day on which the fax at issue was received. That time-limit thus ended on 4 June 2013.
- 24 Therefore, the present action, lodged on 2 September 2013, is out of time.

- 25 Nevertheless, it is necessary to examine whether, as submitted by the applicant, the malfunction of its fax machine constitutes unforeseeable circumstances or force majeure which would enable the Court to grant leave to bring an action out of time on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union, which is applicable to proceedings before the General Court by virtue of Article 53 of that statute.
- 26 It should be noted that, pursuant to established case-law, time-limits for appeals are a matter of public policy and are not subject to the discretion of the parties or the court (see judgments of 11 November 2010 in *Transportes Evaristo Molina v Commission*, C-36/09 P, EU:C:2010:670, paragraph 33 and the case-law cited and of 15 March 1995 in *COBRECAF and Others v Commission*, T-514/93, ECR, EU:T:1995:49, paragraph 40). The strict application of procedural rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. In accordance with the second paragraph of Article 45 of the Statute of the Court, no derogation from the procedural time-limits may be made save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure (judgment of 22 September 2011 in *Bell & Ross v OHIM*, C-426/10 P, ECR, EU:C:2011:612, paragraph 43).
- 27 The Court of Justice has held that the concepts of unforeseeable circumstances and force majeure contain both an objective element, relating to abnormal circumstances unconnected to the applicant, and a subjective element involving the obligation, on the part of the applicant, to guard against the consequences of the abnormal event by taking appropriate steps, without making unreasonable sacrifices. In particular, the applicant must pay close attention to the course of the procedure set in motion and, amongst other things, act diligently in order to comply with the prescribed time-limits (judgment in *Bayer v Commission*, cited in paragraph 19 above, EU:C:1994:412, paragraph 32). Thus, the concept of force majeure does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings (judgment of 12 July 1984 in *Ferriera Valsabbia v Commission*, 209/83, ECR, EU:C:1984:274, paragraph 22, and order of 18 January 2005 in *Zuazaga Meabe v OHIM*, C-325/03 P, ECR, EU:C:2005:28, paragraph 25).
- 28 Therefore, it is necessary to determine whether, as required (see order of 12 December 2011 in *AO v Commission*, T-365/11 P, ECR-SC, EU:T:2011:727, paragraph 33 and the case-law cited), the applicant has established the existence, in the present case, of unforeseeable circumstances or of force majeure which made it impossible for it to comply with the time-limit for bringing an action.
- 29 Accordingly, as a preliminary matter, the expert's report which the applicant submitted as an annex to its reply must be declared admissible.
- 30 Pursuant to the case-law, the prohibition on submitting offers of evidence out of time, prescribed by Article 48(1) of the Rules of Procedure, does not apply to offers of evidence in observations on a plea of inadmissibility. The option to submit new offers of evidence in observations on a plea of inadmissibility must be regarded as inherent to the right of an applicant to respond to the arguments made by the defendant in its plea of inadmissibility since there is no procedural rule which requires an applicant to set out evidence relating to the admissibility of its action at the stage of the application (order of 15 May 2013 in *Post Invest Europe v Commission*, T-413/12, EU:T:2013:246, paragraph 21; see also, to that effect, judgment of 12 December 2006 in *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission*, T-95/03, ECR, EU:T:2006:385, paragraph 50). That case-law must be applied to the present case, where the applicant has submitted new evidence, as an annex to the reply which is limited to the question of the admissibility of the action, responding to the submissions on inadmissibility made by OHIM in its response.

- 31 Nevertheless, the evidence in the expert's report annexed to the reply and all the other information and arguments submitted by the applicant do not establish that the applicant was facing unforeseeable circumstances or force majeure.
- 32 As regards the objective element of the unforeseeable circumstances or force majeure, it must be held that even though the malfunction of the fax machine of the applicant's representative can be categorised as an 'abnormal circumstance', within the meaning of the case-law cited above, it is not 'unconnected' to the representative.
- 33 The machine in question is an internal instrument of the law firm representing the applicant and that law firm is responsible for the machine, in the same way as it is responsible for its employees. According to settled case-law, a company's internal communication problems do not constitute unforeseeable circumstances or force majeure (judgment in *Cockerill-Sambre v Commission*, cited in paragraph 20 above, EU:C:1985:471, paragraph 12; see also order of 28 April 2008, *PubliCare Marketing Communications v OHIM (Publicare)*, T-358/07, EU:T:2008:130, paragraphs 17 and 18 and the case-law cited). It has even been held that an error attributable to a third party appointed by a law firm to carry out acts which are the responsibility of that law firm, does not constitute a circumstance unconnected to the applicant which is represented by that law firm (judgment in *Bell & Ross v OHIM*, cited in paragraph 26 above, EU:C:2011:612, paragraph 50, and order in *AO v Commission*, cited in paragraph 28 above, EU:T:2011:727, paragraphs 37 and 40). Accordingly, in the present case, even if, quod non, the law firm representing the applicant had appointed an external company to manage its information technology and fax equipment, the malfunction of that instrument would not be regarded as a circumstance unconnected to that law firm.
- 34 The claim that that was the first occurrence of the type of malfunction at issue and that it was therefore unforeseeable, does not make this a circumstance unconnected to the representative of the applicant. At the most, that unpredictability could play a role in assessing whether the party concerned could have prevented the malfunction of the fax machine from occurring and, accordingly, may play a role in the analysis of the subjective element of the unforeseeable circumstances or force majeure.
- 35 However, neither is that subjective element of the unforeseeable circumstances or force majeure present in the situation at issue. The representative of the applicant did not take all reasonable steps to meet the deadline for bringing an action and ensure the proper functioning of the fax machine in this instance.
- 36 According to the expert's report annexed to the reply, electrical work causing interruptions to the power supply and network connection took place in March 2013. It is also apparent from the report that the arrival of a fax engenders the generation of multiple files in the information technology system of the law firm representing the applicant, only some of which are accessible to the employees responsible for the receipt of faxes, while the others are only accessible to members of the law firm's information technology department. It is that access that enabled the head of the information technology department to trace the fax notifying the contested decision which was sent by OHIM on 25 March 2013. Finally, it should be noted that the representative of the applicant works in a large law firm which is specialised in the field of intellectual property and is specifically responsible for receiving communications addressed to its clients, particularly those emanating from OHIM. According to the expert's report, that law firm receives between 10 and 15 faxes per day.
- 37 In those circumstances, the law firm representing the applicant should not only have performed checks to ensure the electrical work carried out had not produced disruptions to the fax reception system, but would also have been in a position to carry out such checks, without making unreasonable sacrifices, by verifying the correspondence between the faxes recorded on the server and those forwarded to the inbox. In essence, the representative of the applicant has itself admitted to not carrying out such testing on the ground that the type of malfunction at issue had never occurred before.

38 It follows that the concepts of force majeure and unforeseeable circumstances do not apply to the present situation, since a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings.

39 Consequently, this action must be dismissed as manifestly inadmissible.

Costs

40 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

41 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby orders:

1. The action is dismissed.

2. GEA Group AG shall bear the costs.

Luxembourg, 22 January 2015.

E. Coulon
Registrar

M.E. Martins Ribeiro
President