

Mark or sign cited in opposition: The national word mark 'METRO'

Decision of the Opposition Division: Rejection of the opposition

Decision of the Board of Appeal: Annulment of the decision of the Opposition Division

Pleas in law: The applicant submits that the time an earlier right as basis for an opposition has to be in force and to be proved to have this status, should be the time of the decision by the Opposition Division, or, alternatively, when the time-limit to provide further evidence expires. In support of its application, the applicant invokes a violation of the parameters of the proceedings, enshrined in Article 74 of Council Regulation No 40/94 ⁽¹⁾ and Rules 16 and 20 of Commission Regulation No 2868/95 ⁽²⁾. According to the applicant, Article 8 (1) (b) of Council Regulation 40/94 does not indicate that the validity of the earlier mark is only required at the time of filing an opposition.

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

⁽²⁾ 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).

Action brought on 27 May 2004 by The Bavarian Lager Company against the Commission of the European Communities

(Case T-194/04)

(2004/C 201/44)

(Language of the case: English)

An action against the Commission of the European communities was brought before the Court of First Instance of the

European Communities on 27 May 2004 by The Bavarian Lager Company, Clitheroe, United Kingdom, represented by Mr J. Pearson and Mr C. Bright Solicitors with an address for service in Luxembourg.

The applicant claims that the Court should:

- Declare that the Commission's acceptance of the UK Government's amendment to Article 7(2)(a) of the Supply of Beer (Tied Estate) Order 1989 (S.I. 1989 No 2390) (the 'guest beer provision') was in breach of Article 28 (then Article 30) of the EC Treaty;
- Declare that the Commission should not have accepted the aforementioned amendment and in doing so, the Commission is itself was in breach of Article 28 (then Article 30) of the EC Treaty;
- Annul the Decision of the Commission dated 18 March 2004 to refuse to disclose to the applicant certain documents;
- Order the Commission to produce the full set of names of persons attending the meeting held on 11 October 1996 at which were present officers of the Directorate-General for the Internal Market, officials of the UK Government Department of Trade and Industry and representatives of the Confédération des Brasseurs du Marché Commun; and
- Order the Commission to pay costs

Pleas in law and main arguments:

The applicant company was formed on 28 May 1992 to import German beer for sale in public houses in the United Kingdom. In 1993 the applicant complained to the Commission about an alleged violation of Article 28 EC (then Article 30 of the EC Treaty) in connexion with the 'guest beer provision' in UK legislation. Under this provision breweries are required to allow public houses bound to them by exclusive purchasing agreements to offer a 'guest' beer from a different brewery. The guest beer had to be a beer undergoing fermentation in the cask from which it was sold, a type of beer which is almost exclusively produced in the United Kingdom. The beer sold by the applicant as well as most beers produced outside the United Kingdom could not be covered by this provision and the applicant considered this a measure of equivalent effect to a quantitative restriction. In a letter of 21 April 1997 the Commission informed the applicant that, in view of a proposed amendment of the guest beer provision, the procedure against the United Kingdom had been suspended and would be brought to a close as soon as the amendment had been adopted.

On 5 December 2003 the applicant requested the Commission, on the basis of Regulation 1049/2001⁽¹⁾, to grant it full access to the minutes of a meeting on this matter, which took place on 11 October 1996 between representatives of the Commission, the United Kingdom government and breweries. In particular, the applicant asked the Commission to reveal the identity of certain persons whose names had been blanked out in the minutes previously disclosed to the applicant. The Commission rejected the applicant's request and confirmed its refusal in a letter of the Secretary General to the applicant, dated 18 March 2004. In support of its refusal it invoked the need to protect personal data of the persons present at the meeting, as well as a potential risk to the Commission's ability to carry out investigations in such cases if the identity of persons giving information to the Commission were to be disclosed.

By its application, the applicant requests first of all a declaration against the Commission's decision to suspend the procedure against the United Kingdom. In this respect, the applicant invokes a violation of Articles 28 and 12 EC.

Concerning the Commission's refusal to grant it access to the documents requested, the applicant submits that Article 2 of Regulation 1049/2001⁽¹⁾ obliges the Commission to make full disclosure of the persons who attended the meeting in question, and that none of the exceptions contained in Article 4 apply. The applicant further contends that the exception in Article 4 paragraph 3 may be disregarded because there is overwhelming public interest in disclosure.

⁽¹⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001 P. 43 - 48

Action brought on 27 May 2004 by Madaus Aktiengesellschaft against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case T-202/04)

(2004/C 201/45)

(Language of the case to be determined pursuant to Article 131(2) of the Rules of Procedure - language in which the application was submitted: English)

An action against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) was brought before

the Court of First Instance of the European Communities on 27 May 2004 by Madaus Aktiengesellschaft, Köln, (Germany), represented by I. Valdelomar Serrano, lawyer.

The Optima Health Limited was also a party to the proceedings before the Board of Appeal.

The applicant claims that the Court should:

- recognise that the OHIM made a judicial error when issuing the contested decision;
- annul the contested decision.

Pleas in law and main arguments:

Applicant for Community trade mark:	Optima Healthcare Ltd, changed to The Optimal Health Ltd.
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Community trade mark sought:	The word mark 'ECHINAID' for goods in class 5 (vitamins, food supplements, herbal preparations, pharmaceutical and medical preparations) (CTM application No 1666239)
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Proprietor of mark or sign cited in the opposition proceedings:	Madaus AG
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Mark or sign cited in opposition:	The international trade mark registration of the word mark 'ECHINACIN' for goods in class 5 (chemical pharmaceuticals)
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Decision of the Opposition Division:	Rejection of the opposition
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Decision of the Board of Appeal:	Dismissal of the appeal brought by Madaus
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Pleas in law:	The applicant submits that the Board of Appeal erred in applying the concept of relevant territory and relevant public. The applicant also claims that the prefix Echina is not descriptive and that there is a likelihood of confusion between the marks.
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