

Is the declaration made in an export declaration that the product in respect of which a refund is sought is of Community origin information to which a penalty may attach under Article 51(2) of Regulation (EC) No 800/1999<sup>(1)</sup> in conjunction with Article 5(4) thereof?

<sup>(1)</sup> OJ 1999 L 102, p. 11.

**Appeal brought on 28 January 2005 (fax: 25 January 2005) by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) against the judgment delivered on 10 November 2004 by the Fourth Chamber of the Court of First Instance in Case T-164/02 between Kaul GmbH and Office for Harmonisation in the Internal Market (other party to the proceedings before the Board of Appeal of OHIM: Bayer AG)**

**(Case C-29/05 P)**

(2005/C 82/23)

*(Language of the case: German)*

An appeal against the judgment delivered on 10 November 2004 by the Fourth Chamber of the Court of First Instance of the European Communities in Case T-164/02 between *Kaul GmbH* and *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* was brought before the Court of Justice of the European Communities on 28 January 2005 (fax: 25 January 2005) by the Office for Harmonisation in the Internal Market (Trade Marks and Designs), represented by Alexander von Mühlendahl, Vice President of the Office, and Gregor Schneider, a member of the Industrial Property Litigation Unit, the other party to the proceedings before the Board of Appeal of OHIM having been Bayer AG.

The appellant claims that the Court should:

1. set aside the contested judgment;
2. refer the case back to the Court of First Instance for a decision on the additional pleas in law;
3. order the other parties to the proceedings to pay the costs of the appeal proceedings.

*Pleas in law and main arguments*

1. The Court of First Instance infringed Article 43(2) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) ('the CTMR') and Rules 16(3) and 20(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) by obliging the Board of Appeal of the Office, by virtue of continuity in terms of functions, to take into consideration new submissions of fact and new evidence in opposition proceedings, even though the party to the proceedings did not lodge those submissions or submit that evidence within the time-limit set by the Opposition Division. The obligation to examine evidence submitted for the first time before the Board of Appeal, which the Court of First Instance infers in *inter partes* proceedings from continuity in terms of functions, has no basis in the provisions of the CTMR or the implementing regulation.
2. The Court of First Instance infringed Article 74(2) of the CTMR by requiring the Board of Appeal to have regard to new submissions of fact and new evidence even though the time-limits applicable to such submissions are 'mandatory time-limits' in proceedings before the Opposition Division and the opposing party did not lodge those submissions or submit that evidence within the time-limit set by the Opposition Division.
3. The Court of First Instance also infringed Article 74(2) of the CTMR by allowing application of that provision in appeal proceedings only where new submissions are lodged or new evidence submitted after the expiry of the time-limit for substantiating the appeal.

**Action brought on 28 January 2005 by the Commission of the European Communities against the Grand Duchy of Luxembourg**

**(Case C-30/05)**

(2005/C 82/24)

*(Language of the case: French)*

An action against the Grand Duchy of Luxembourg was brought before the Court of Justice of the European Communities on 28 January 2005 by the Commission of the European Communities, represented by C.F. Durand and F. Simonetti, acting as Agents, with an address for service in Luxembourg.