

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2010\*

In Case T-97/08,

**KUKA Roboter GmbH**, established in Augsburg (Germany), represented by A. Kohn  
and B. Hannemann, lawyers,

applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs)**  
**(OHIM)**, represented by R. Pethke, acting as Agent,

defendant,

\* Language of the case: German.

ACTION brought against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 14 December 2007 (Case R 1572/2007-4), concerning an application for registration of a shade of orange as a Community trade mark,

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij (Rapporteur), President, S. Papasavvas and L. Truchot, Judges,

Registrar: C. Heeren, Administrator,

having regard to the application lodged at the Court Registry on 20 February 2008,

having regard to the response lodged at the Court Registry on 4 June 2008,

further to the hearing on 17 June 2010,

gives the following

## **Judgment**

### **Background to the dispute**

- <sup>1</sup> On 29 August 2005, the applicant, KUKA Roboter GmbH, filed an application for a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM'), under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

- 2 The sign in respect of which registration was sought is the following shade of orange:



- 3 The goods in relation to which registration of the trade mark was sought belong to Class 7 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, after the restriction made during the proceedings before OHIM, to the following description: 'Articulated robots to handle, treat and weld, with the exception of cleanroom robots, medical robots, and robots to apply lacquer; parts for the above goods.'

- 4 By decision of 7 August 2007, the examiner rejected the application for registration on the basis of Article 7(1)(b) of Regulation No 40/94 (now Article 7(1)(b) of Regulation No 207/2009), on the ground that the mark applied for was devoid of any distinctive character.
  
- 5 On 2 October 2007, the applicant filed an appeal against the examiner's decision under Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009).
  
- 6 By decision of 14 December 2007 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal on the ground that the mark sought was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94. It held, in essence, that the relevant public would not perceive the colour referred to by the application for a Community trade mark as being, per se, an indication of the commercial origin of the goods in question.

### **Forms of order sought**

- 7 The applicant claims that the Court should:
  - annul the contested decision;
  
  - order OHIM to pay the costs.

8 OHIM contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

## Law

### *Admissibility of the evidence submitted before the Court*

9 In support of its argument that the mark applied for has an inherently distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, the applicant, by letter of 25 March 2009, produced the results of two surveys dated 27 June 2008, the first consisting of a telephone survey carried out in Germany, China, the United States and Italy, and the second consisting of a questionnaire submitted to the public during the Automatica 2008 trade fair, held in June 2008 in Munich (Germany). The applicant also produced a CD-ROM containing the advertising leaflets of various manufacturers, and photographs of the stands of the different undertakings in the sector, represented at the trade fairs.

- 10 By letter of 12 May 2009, OHIM challenged the admissibility of those documents, on the ground that they constituted new evidence.
- 11 Apart from the fact that those documents were submitted late during the proceedings before the Court, in infringement of Article 48(1) of the Rules of Procedure of the General Court, without justification for the delay in their submission, it should be noted that, according to settled case-law, the purpose of actions before the Court is to review the legality of decisions of the Boards of Appeal of OHIM for the purposes of Article 63 of Regulation No 40/94 (now Article 65 of Regulation No 207/2009), so that it is not the Court's function to review the facts in the light of documents produced for the first time before it (see, to that effect, Case T-346/04 *Sadas v OHIM - LTJ Diffusion (ARTHUR ET FELICIE)* [2005] ECR II-4891, paragraph 19 and the case-law cited). The legality of a decision of the Board of Appeal cannot therefore be called into question by pleading new facts before the General Court unless it is proved that the Board of Appeal should have taken those facts into account of its own motion during the administrative procedure before adopting any decision in the matter (Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-5301, paragraph 46).
- 12 In the present case, since the documents produced by the applicant clearly do not concern facts which could be taken into account by the Board of Appeal of its own motion under Article 74(1) of Regulation No 40/94 (now Article 76(1) of Regulation No 207/2009), the abovementioned documents must be excluded, without it being necessary to assess their probative value.

*Substance*

- 13 In support of its action, the applicant relies on three pleas in law, alleging, respectively, infringements of Article 28 EC, of Articles 7(1)(b), 73 (now Article 75 of Regulation No 207/2009) and 74 of Regulation No 40/94 and, finally, a misuse of powers.
- 14 It is appropriate first to examine the second plea in law, then the third plea in law and, finally, the first plea in law.

The second plea in law, alleging infringement of Articles 7(1)(b), 73 and 74 of Regulation No 40/94

— Arguments of the parties

- 15 The applicant claims that the Board of Appeal wrongly held that the mark sought was devoid of any distinctive character in respect of the goods referred to.
- 16 First of all, the applicant claims that the Board of Appeal misconstrued the scope of the judgment in Case C-104/01 *Libertel* [2003] ECR I-3793, from which it follows that the registration of a colour as a Community trade mark is precluded only where the



colour is devoid of distinctive character. Thus, any distinctive character in a mark, however limited, should allow it to be registered.

- 17 The applicant claims that the criteria set out by the Court of Justice in *Libertel* are fulfilled in the present case. The mark applied for covers only one type of specific product, namely articulated robots to handle, treat and weld, with the exception of cleanroom robots, medical robots, and robots to apply lacquer. Furthermore, the relevant market is very specific, in so far as, first, the robots covered by the mark applied for are long-term capital assets whose unit value in euros consists of at least five figures, secondly, the robots are used for highly specialised purposes and, thirdly, the purchase of a robot from the applicant would involve a significant amount of customisation on the premises of the purchaser.
- 18 Next, the applicant disputes the Board of Appeal's analysis concerning the relevant public, in paragraphs 19 and 20 of the contested decision, and alleges that that public consists, in the present case, of purchasers and wholesalers of articulated robots to handle, treat and weld, which are familiar with that product market in Europe. It therefore contests the Board of Appeal's assessment that the relevant public includes not only the purchaser of the goods covered by the mark applied for, but also the technical staff in the factories where those robots are situated.
- 19 The applicant disputes that there is a requirement of availability in relation to colours, because of the limited number of colours which can be distinguished. It claims that word marks consisting only of signs can be registered, despite the fact that the supply of such signs is not unlimited. It notes, moreover, that the monopolisation of the mark applied for concerns only a limited group of goods. Furthermore, according to the applicant, the registration of the mark applied for does not prevent competing undertakings from marketing orange robots, since such marketing does not constitute

a use of the mark applied for within the meaning of Article 9 of Regulation No 40/94 (now Article 9 of Regulation No 207/2009). In that regard, it emphasises the fact that, in principle, customers choose the colour of the goods at the time of the order, so that a competitor of the applicant could not be prevented from selling an orange robot. The mark applied for would only preclude that colour from being used for advertising and promotional purposes, for example at fairs or in leaflets.

<sup>20</sup> Moreover, no other general interests preclude the registration of the mark applied for. No descriptive use is made of the latter and it does not have a technical purpose.

<sup>21</sup> The applicant also disputes the Board of Appeal's finding that the mark applied for is very similar to the colour of minium, an anti-corrosion agent. First, the colours in question are clearly different. Secondly, the use of minium is prohibited by Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ 2003 L 37, p. 19). Finally, the applicant's robots consist essentially of cast aluminium which does not require anti-corrosion treatment.

<sup>22</sup> The applicant also claims that it cannot be held that the number of applications for marks of a contourless red or orange colour indicates that the mark applied for is not unusual and that it is, consequently, devoid of distinctive character. According to the applicant, the mere number of applications made for marks consisting of contourless colours is irrelevant, as it is for the Board of Appeal to assess the mark applied for in each particular case, taking account of the goods and services covered by the mark applied for.

- 23 The applicant claims that, by finding, in paragraph 20 of the contested decision, that the relevant public would make the decision to purchase the goods concerned solely on the basis of their technical or economic features rather than on the basis of their colour, the Board of Appeal failed to have regard to the relevance of the fact that the colour allows the relevant public to connect the goods to a particular manufacturer and to form an idea about their quality. In that regard, the applicant refers to the advertising leaflets produced before the Board of Appeal, from which it is apparent that the colour of the articulated robots to handle, treat and weld constitutes, for the relevant class of persons, an indication of the commercial origin.
- 24 Furthermore, the applicant claims that the document entitled 'Icon Added Value' relating to a survey carried out in 2005, whose representative nature with respect to the whole of the European Union is proved by the document entitled 'World Robotics 2006', produced before the Board of Appeal, shows that the relevant public establishes a connection between a colour and the origin of goods. According to the applicant, the market for robots operates according to different principles from those governing markets for consumer goods. It denies, moreover, that the survey carried out amongst the relevant public is based on a badly formulated question. The mention of the manufacturer is not such as to distort the results.
- 25 Finally, the applicant considers that the Board of Appeal infringed Articles 73 and 74 of Regulation No 40/94, in so far as it did not carry out an examination of the facts and circumstances of the case. For that reason, the contested decision also states insufficient grounds.
- 26 OHIM challenges the merits of the applicant's arguments.

## — Findings of the Court

- 27 Under Article 7(1)(b) of Regulation No 40/94, ‘trade marks which are devoid of any distinctive character’ are not to be registered. Furthermore, Article 7(2) of Regulation No 40/94 (now Article 7(2) of Regulation No 207/2009) states that ‘paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community’.
- 28 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 34).
- 29 That distinctive character must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public (*Henkel v OHIM*, paragraph 35).
- 30 In order to determine whether a colour per se is capable of distinguishing the goods or services of one undertaking from those of other undertakings within the meaning of Article 4 of Regulation No 40/94 (now Article 4 of Regulation No 207/2009), it must be determined whether the colours per se are liable to convey precise information, particularly as regards the origin of a product or service (see, by analogy, *Libertel*, paragraph 39, and Case C-49/02 *Heidelberger Bauchemie* [2004] ECR I-6129, paragraph 37).

- 31 In that connection, it must be borne in mind that, whilst colours are capable of conveying certain associations of ideas, and of arousing feelings, they are unlikely to communicate specific information, especially since they are commonly and widely used, because of their appeal, in order to advertise and market goods or services, without any specific message (*Libertel*, paragraph 40, and *Heidelberger Bauchemie*, paragraph 38).
- 32 The perception of the relevant public is not necessarily the same in the case of a sign consisting of a colour as it is in the case of a word or figurative mark consisting of a sign that bears no relation to the appearance of the goods it denotes. While the public is accustomed to perceiving word or figurative marks instantly as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the look of the goods in respect of which registration of the sign as a trade mark is sought (Case *Libertel*, paragraph 65, and Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78).
- 33 In the case of a colour, distinctiveness without any prior use is inconceivable save in exceptional circumstances, particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific (Case *Libertel*, paragraph 66, and *KWS Saat v OHIM*, paragraph 79).
- 34 It should also be noted that, to the extent that trade mark rights constitute an essential element in the system of undistorted competition established by the Treaty, the rights and powers that trade marks confer on their proprietors must be considered in the light of that objective. However, in the light of the fact that a trade mark confers on its proprietor an exclusive right, in relation to certain goods and services, that allows him to monopolise the sign registered as a trade mark for an unlimited period,

the possibility of registering a trade mark may be limited for reasons relating to the public interest (see, by analogy, *Libertel*, paragraphs 48 to 50).

- 35 In that regard, the fact that the number of colours actually available is limited means that a small number of trade mark registrations for certain goods or services could exhaust the entire range of the colours available. Such an extensive monopoly would be incompatible with a system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive advantage for a single trader. It must therefore be acknowledged that there is, in trade-mark law, a public interest in not unduly restricting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought (*Libertel*, paragraphs 54 and 55).
- 36 It is in the light of those considerations that the present plea in law, alleging infringement of Article 7(1)(b) of Regulation No 40/94, should be examined.
- 37 As regards the relevant public, the Board of Appeal took into account, first, in paragraph 19 of the contested decision, the perception of articulated robots to handle, treat and weld, by the technical staff in a machinery room, that is to say the professionals responsible for driving and operating those robots, and, secondly, in paragraph 20 of the contested decision, the perception of the undertakings which purchase such robots.
- 38 The applicant disputes that the relevant public includes also the technical staff working in the factories where the robots are situated. On that point, it suffices to note that, as OHIM was correct to point out, although the technical staff probably do not participate directly in the decision to purchase robots, it cannot be ruled out that, in certain undertakings, that staff has an influence on that decision, since it deals

directly with their operation and daily use. The Board of Appeal did not therefore err by taking into account, first, the perception of the technical staff and, secondly, that of the undertaking's management responsible for the choice and purchase of goods covered by the mark applied for, in order to assess the distinctive character of that mark.

- 39 It is in any event clearly apparent from the contested decision that the Board of Appeal took into consideration a professional public which is particularly attentive, in its purchasing decisions, to the technical functions of those machines, including, in particular, their uses, models or factors connected with work safety.
- 40 With regard to the assessment of the distinctive character of the sign applied for, it should be noted that, as the Board of Appeal pointed out in paragraphs 11 and 12 of the contested decision, the mark applied for consists of a single colour, namely a contourless shade of orange, used to completely or partially cover either the goods concerned by the mark applied for or their packaging, or, as the case may be, to be used in advertising for those goods.
- 41 In paragraphs 12 and 16 to 20 of the contested decision, the Board of Appeal concluded that the mark applied for lacks distinctive character on the ground that it would not be perceived as an indication of the origin of the goods referred to. It held, in essence, that the colour applied for was not unusual in the sector of industrial robots and plant construction and was not, per se, exceptional to such an extent that it would be perceived as striking in the sector considered.
- 42 However, the applicant does not show that the Board of Appeal erred in that regard. It should be noted that consumers are not in the habit of making assumptions about

the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification. A colour is not normally inherently capable of distinguishing the goods of a particular undertaking (*Libertel*, paragraph 65).

- 43 In that regard, it must be noted that the Board of Appeal stated, in paragraph 26 of the contested decision, without this point being disputed by the applicant, that, in the relevant sector, industrial robots are usually marketed in a great many colours. However, the applicant submitted no evidence showing that, in the relevant sector, the colours of industrial robots are generally perceived as indicating their commercial origin.
- 44 In any event, it should be noted that the requirement of availability of colours, which has an influence on the interpretation of Article 7(1)(b) of Regulation No 40/94, tends to constitute, except in exceptional situations, a bar to registration of a mark consisting of a colour.
- 45 In that regard, concerning the applicant's challenge of the requirement of availability of colours in the sector of articulated robots, it should be noted that the registration as a Community trade mark of a shade of orange would not create a monopoly of that shade only, but would tend to prohibit competing undertakings from using any shade of orange, at the very least, since it cannot be ruled out that a likelihood of confusion could be demonstrated between the shade of orange for which the application for a mark is made in the present case and other shades of orange, or other similar colours. However, in the light of the particularly limited number of available colours, the monopoly of a given colour and, therefore, potentially of the whole range of colours and shades which are similar, would be liable to lead to the entire range of available colours being quickly used up and to granting certain economic operators a competitive advantage incompatible with a system of undistorted competition and with the



general interest in the availability of colours for other economic operators not being unduly restricted (see, to that effect, *Libertel*, paragraphs 54 and 56).

<sup>46</sup> In the present case, the applicant has not submitted evidence before the Board of Appeal allowing it to be held that there are exceptional circumstances in the present case and, in particular, that the number of goods for which the mark is applied for is limited to such an extent and that the market is specific to such an extent that, first, a colour per se would be capable of indicating the commercial origin of the goods of that colour and that, secondly, its monopoly would not create an unjustified competitive advantage in favour of the proprietor of that mark, contrary to the public interest.

<sup>47</sup> The applicant cites, in that regard, the specific characteristics of the relevant sector, insisting in particular on the fact that the robots covered by the mark applied for are very specific goods, that they are long-term capital assets, expensive, used for highly specialised purposes and that the purchase of a robot requires a significant amount of customisation on the premises of the purchaser. However, those factors do not alter the fact, observed by the Board of Appeal in paragraph 26 of the contested decision, that it is usual, in the sector of the goods in question, for them to be available in a great many colours. Concerning that point, the applicant alleges itself that the customers choose the colours of the goods at the time of the order. It must therefore be held that, in the sector concerned, the relevant public is usually confronted with the goods in question in various colours, without those colours being perceived as indicating the commercial origin of those goods.

- 48 Furthermore, the applicant does not explain how the evidence it relies on allows it to be considered that, in the sector concerned, the registration of the mark applied for would not prejudice the general interest in the availability of colours not being unduly restricted.
- 49 The applicant however claims that it intends to use the mark applied for solely for advertising and promotional purposes and that the registration of that mark will not restrict competing undertakings from freely choosing colours to be applied to their robots. In that regard, it should be noted that, under Article 9 of Regulation No 40/94, the exclusive right conferred by a Community trade mark grants to its proprietor the legal means of preventing all third parties from using for commercial purposes a sign which is similar or identical. Article 9(2) of Regulation No 40/94 (now Article 9(2) of Regulation No 207/2009) prohibits, inter alia, affixing the sign to the goods or to the packaging thereof; offering the goods, putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder; importing or exporting the goods under that sign and using the sign on business papers and in advertising.
- 50 The applicant cannot therefore claim that the use by competing undertakings of the colour orange on their robots does not constitute a use of the mark applied for within the meaning of Article 9 of Regulation No 40/94.
- 51 Furthermore, it should be noted that a marketing concept is purely a matter of choice for the undertaking concerned and may therefore change after a sign has been registered as a Community trade mark. That concept cannot therefore have any bearing on the assessment of the sign's registrability (Case T-355/00 *DaimlerChrysler v OHIM (TELE AID)* [2002] ECR II-1939, paragraph 42). Thus, although the applicant claims that it will use the mark applied for only for advertising purposes, it cannot be excluded that it would exercise its exclusive right to prohibit its competitors from applying the shade of orange at issue in the present case to the robots themselves.

Therefore, the applicant's argument alleging that the use of the mark applied for will be limited to advertising purposes cannot have any useful bearing on the assessment of the requirement of availability of the sign applied for.

52 The applicant is however justified in claiming that the fact, pointed out by the Board of Appeal in paragraph 20 of the contested decision, that the relevant public would decide to purchase the goods in question solely on the basis of their technical or economic features is irrelevant as regards the question of whether a colour is liable per se to indicate the commercial origin of goods. That consideration does not however allow it to be concluded that the Board of Appeal erred in holding that Article 7(1)(b) of Regulation No 40/94 precluded the registration of the mark applied for, in the light of the other factors taken into consideration in the contested decision.

53 Likewise, the applicant's arguments challenging the relevance of the Board of Appeal's findings that, first, the colour of the mark applied for is similar to the colour of minium, an anti-corrosion agent and, secondly, that a great many OHIM decisions concern applications for registration of shades from red to orange, also do not allow the merits of the Board of Appeal's finding to be called into question, in the light of the considerations in paragraphs 42 to 48 above.

54 The applicant claims also that the document entitled 'Icon Added Value' shows that, in the sector concerned, the relevant public will establish a connection between a colour and the origin of the goods.

- 55 In that regard, it must however be found that the questionnaire of the inquiry referred to in that document includes questions, the formulation and order of which was highly likely to influence the results of the survey. The questionnaire at issue is in three parts. The first part, namely questions K1 to K10, concentrates entirely on the image that the person interviewed has of the applicant and, as noted by the Board of Appeal, encourages that person to create an image of that applicant. The second part, namely questions HW1 to HW3, concerns certain of the applicant's competitors and does not mention the applicant. The third part, which contains five questions, includes, on the other hand, two questions seeking to compare the applicant with one of its competitors. Within that third part, one question encouraging the persons surveyed to attribute colours to the applicant and to three of its competitors is in the penultimate position.
- 56 Therefore, both the content of the questions and the order in which they are arranged conveyed to the persons questioned the fact that that questionnaire focussed on the applicant. In those circumstances, the question asking the persons interviewed which colour they associate with the applicant does not allow it to be determined whether, in the relevant sector, the shade of orange which is the subject of the trade mark application had an inherent distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94, or whether the relevant public perceived the colours as an indication of the commercial origin of the goods. As the Board of Appeal correctly held in paragraph 25 of the contested decision, the method used was likely to be relevant for the purposes of demonstrating a distinctive character acquired by the use of the sign applied for, within the meaning of Article 7(3) of Regulation No 40/94 (now Article 7(3) of Regulation No 207/2009). That is, however, not the basis on which the application for a trade mark was brought in the present case.
- 57 In the light of the foregoing, it cannot be held that the Board of Appeal erred by concluding that, having regard to the formulation and the order of the questions of the questionnaire at issue, the results of the document entitled 'Icon Added Value' allowed neither trade mark custom in the relevant sector to be taken into account,

nor the inherent distinctive character of the sign applied for to be verified, within the meaning of Article 7(1)(b) of Regulation No 40/94.

- 58 Consequently, the applicant's argument that the representative nature with respect to the whole of the European Union of the document entitled 'Icon Added Value' is proved by the document entitled 'World Robotics 2006' is irrelevant.
- 59 With regard to the applicant's argument that the Board of Appeal did not provide an adequate statement of reasons for the contested decision, it must be noted that, according to Article 73 of Regulation No 40/94, the obligation to state the reasons for OHIM decisions must enable the applicant, if need be, to take cognisance of the reasons for refusing its application for registration and to challenge the contested decision effectively (see Case T-173/00 *KWS Saat v OHIM (shade of orange)* [2002] ECR II-3843, paragraph 55 and the case-law cited).
- 60 In the present case, it follows from the contested decision that the Board of Appeal indicated the different factors to take into consideration in order to determine whether a colour is distinctive, namely, inter alia, the perception of the mark applied for by the relevant public, the usual character of that colour and the trade mark habits in the relevant sector. The Board of Appeal then analysed not only the general perception of a shade of orange, but also the specific context of the industrial robot sector, on the basis of evidence submitted by the applicant. Therefore, the applicant had the evidence necessary to understand the contested decision and to challenge the lawfulness thereof before the judicature of the European Union. Consequently, it cannot be held that the Board of Appeal infringed Article 73 of Regulation No 40/94.

- 61 Finally, with regard to the applicant's argument that the Board of Appeal did not carry out a specific and individual examination of the facts and circumstances of the present case, in accordance with Article 74(1) of Regulation No 40/94, it should be noted, as is apparent from inter alia paragraphs 22 to 25 of the contested decision, that the Board of Appeal examined the relevant facts put forward by the applicant itself in order to determine the distinctive character of the mark applied for in relation to the goods referred to in the application for registration. It must therefore be held that the Board of Appeal did not infringe Article 74(1) of Regulation No 40/94.
- 62 In the light of the foregoing, the second plea in law must be rejected.

The third plea in law, alleging a misuse of powers

— Arguments of the parties

- 63 The applicant claims that the contested decision is vitiated by misuse of powers, in so far as it is based on factors which it considers it has shown to be irrelevant.
- 64 OHIM challenges the merits of the applicant's arguments.

## — Findings of the Court

- <sup>65</sup> The concept of misuse of powers has a precisely defined scope in European Union law and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. In that respect, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 168, and Case T-19/99 *DKV v OHIM (COMPANYLINE)* [2000] ECR II-1, paragraph 33).
- <sup>66</sup> In this case, however, the applicant has not established or even alleged that there was any evidence to that effect. More particularly, even if, as the applicant claims, the Board of Appeal based the contested decision on considerations which the applicant claims to have shown to be irrelevant, that fact would not constitute evidence that the decision was taken exclusively, or at the least essentially, for purposes other than those stated. Furthermore, it should be noted that the Board of Appeal did not err in the assessment of the distinctive character of the mark applied for (see paragraphs 41 to 58 above). The third plea in law must therefore be rejected.

The first plea in law, alleging an infringement of Article 28 EC

— Arguments of the parties

<sup>67</sup> The applicant claims that the refusal to register the mark applied for amounts to a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC. That refusal would allow counterfeit goods to enter the market, which would result in a reduction of the applicant's turnover. According to the applicant, none of the exceptions referred to in Article 30 EC is applicable in the present case.

<sup>68</sup> OHIM challenges the merits of the applicant's arguments.

— Findings of the Court

<sup>69</sup> Concerning the applicant's first plea in law, alleging an infringement of Article 28 EC, it must be held that the rights in a Community trade mark, and the protection afforded by that mark, are liable to apply only to the extent that the applicant is the proprietor of a Community trade mark (see, to that effect and by analogy, Case C-10/89 *HAG GF* [1990] ECR I-3711, paragraph 14). Since the Board of Appeal did not err in holding that the mark applied for lacked distinctive character



within the meaning of Article 7(1)(b) of Regulation No 40/94 (see paragraphs 41 to 58 above), the present plea in law must also be rejected.

## **Costs**

- <sup>70</sup> 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.
- <sup>71</sup> Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by OHIM.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders KUKA Roboter GmbH to pay the costs.**

Meij

Papasavvas

Truchot

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]