

Case T-318/03

Atomic Austria GmbH

v

**Office for Harmonisation in the Internal Market
(Trade Marks and Designs) (OHIM)**

(Community trade mark — Word mark ATOMIC BLITZ — Opposition of the proprietor of national word marks ATOMIC — Evidence of renewal of registration of the earlier mark — Scope of the examination conducted by OHIM — Rejection of opposition — Article 8(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Second Chamber), 20 April 2005 . . II - 1322

Summary of the Judgment

- 1. Community trade mark — Procedural provisions — Examination of the facts by OHIM of its own motion — Opposition proceedings — Examination restricted to the submissions of the parties — Assessment by OHIM of the correctness of the facts pleaded and the probative value of the evidence submitted — Scope — Observance of the rights of the defence*

(Council Regulation No 40/94, Art. 74(1))

2. *Community trade mark — Procedural provisions — Examination of the facts by OHIM of its own motion — Opposition proceedings — Examination restricted to the submissions of the parties — Compulsory form of evidence to prove the existence of an earlier right of the opponent — None*
(Council Regulation No 40/94, Art. 74(1))
3. *Community trade mark — Procedural provisions — Examination of the facts by OHIM of its own motion — Opposition proceedings — Audi alteram partem rule — Relevance — Limits*
(Council Regulation No 40/94, Art. 74(1))

1. Although, pursuant, in particular, to Article 74(1) of Regulation No 40/94 on the Community trade mark in fine, in proceedings relating to relative grounds for refusal of registration, the onus is upon the party opposing the registration of a Community trade mark in reliance on an earlier national trade mark, to prove its existence and, as the case may be, the extent of protection, it is for the Office for Harmonisation in the Internal Market (Trade Marks and Designs) to examine whether the conditions for the application of the ground for refusal of registration which has been pleaded have been fulfilled. In that context, it is necessary to assess the correctness of the facts pleaded, and the probative value of the evidence submitted by the parties.

OHIM may be called upon to take account, in particular, of the national law of the Member State in which the earlier mark on which the opposition is based is protected. In that case, it must, of its own motion and by whatever means considered appropriate, obtain information about the national law of the Member State concerned, where

such information is necessary to assess the applicability of the ground for refusal of registration in question and, in particular, the correctness of the facts pleaded or the probative value of the documents lodged. Restricting the factual basis of the examination by OHIM does not preclude it from taking into consideration, in addition to the facts which have been expressly put forward by the parties to the opposition proceedings, facts which are well known, that is, facts which are likely to be known by anyone or which may be learnt from generally accessible sources. OHIM may also, if it considers it helpful, invite the parties to provide it with guidance on certain specific points of national law. The interested party is not, however, obliged to provide, on its own initiative, general information on the law of intellectual property in force in the Member State concerned.

The examination of the facts and evidence submitted to OHIM must be

conducted in such a way as to respect the right to a fair hearing of the parties to the opposition proceedings and the right to procedural equity. If an applicant for a Community trade mark doubts the probative value of documents submitted by the opponent to prove the existence of a claimed earlier right, or even the extent of that right, he may say so in the proceedings before OHIM, which is required to consider the relevant observations carefully. However, OHIM cannot avoid conducting a comprehensive assessment of the facts and documents presented to it by arguing that it is for the opponent, on his own initiative, to provide OHIM with supporting evidence in the form of detailed information on the law of the Member State in which there is protection for the earlier mark on which the opposition is based.

(see paras 33-38)

2. Neither Regulation No 40/94 on the Community trade mark nor Regulation No 2868/95 implementing Regulation No 40/94 specifies a compulsory form of evidence to be lodged by the opponent to prove the existence of his earlier right in the context of opposition proceedings. It follows from this that, on the one hand, an opponent is free to choose the evidence he considers useful to submit to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in support of his opposition and, on the other hand, OHIM is obliged

to examine all the evidence submitted to it in order to determine whether it does prove that the earlier mark was registered or filed, and cannot reject out of hand a particular type of evidence on the basis of the form it takes. That conclusion is supported by the variations which exist between administrative practices in the Member States. If OHIM could impose conditions as to the form of the evidence to be produced, the result would be that the parties would find it impossible to produce such evidence in certain cases.

(see paras 39-41)

3. Although, in the context of opposition proceedings brought against the registration of a Community trade mark, the rule that the parties should be heard means that the other party to the opposition proceedings should be in a position to see the evidence submitted by the opponent in the language of the proceedings, it cannot be interpreted as meaning that the evidence must, by itself, enable that party to verify the existence of the earlier marks, without recourse to the assistance of an adviser or to generally accessible sources of information, beyond the evidence produced.

(see para. 51)