

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber,
Extended Composition)

12 July 2001 *

In Case T-120/99,

Christina Kik, residing in The Hague (Netherlands), represented by G.L. Kooy,
lawyer, with an address for service in Luxembourg,

applicant,

supported by

Hellenic Republic, represented by K. Samoni-Randou and S. Vodina, acting as
Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: Dutch.

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto and J. Miranda de Sousa, acting as Agents, assisted by J. Bourgeois, lawyer,

defendant,

supported by

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

and

Council of the European Union, represented by G. Houttuin and A. Lo Monaco, acting as Agents,

interveners,

ACTION brought against the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 19 March 1999 (Case R 65/98-3),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: P. Mengozzi, President, R. García-Valdecasas, V. Tiili,
R.M. Moura Ramos and J.D. Cooke, Judges,

Registrar: H. Jung,

having regard to the application lodged at the Registry of the Court of First Instance on 19 May 1999,

having regard to the response lodged at the Registry of the Court of First Instance on 18 August 1999,

having regard to the fact that the matter has been assigned to a Chamber of five judges,

having regard to the statements in intervention of the Kingdom of Spain, the Hellenic Republic and the Council of the European Union, lodged at the Registry of the Court of First Instance on 10, 20 and 22 March 2000 respectively,

having regard to the Order of the President of the Fourth Chamber (Extended Composition) of the Court of First Instance dismissing the application to intervene submitted by the Commission of the European Communities for being out of time,

having regard to the applicant's observations on the statements in intervention, lodged at the Registry of the Court of First Instance on 9 June 2000,

further to the hearing on 23 January 2001

gives the following

Judgment

Legal background

- 1 The use of languages in proceedings before the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter 'the Office') is governed by Article 115 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). That article provides as follows:

'1. The application for a Community trade mark shall be filed in one of the official languages of the European Community.

2. The languages of the Office shall be English, French, German, Italian and Spanish.

3. The applicant must indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings.

If the application was filed in a language which is not one of the languages of the Office, the Office shall arrange to have the application, as described in Article 26(1), translated into the language indicated by the applicant.

4. Where the applicant for a Community trade mark is the sole party to proceedings before the Office, the language of proceedings shall be the language used for filing the application for a Community trade mark. If the application was made in a language other than the languages of the Office, the Office may send written communications to the applicant in the second language indicated by the applicant in his application.

5. The notice of opposition and an application for revocation or invalidity shall be filed in one of the languages of the Office.

6. If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is the language of the application for a trade mark or the second language indicated when the application was filed, that language shall be the language of the proceedings.

If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is neither the language of the application for a trade mark nor the second language indicated when the application was filed, the opposing party or the party seeking revocation or

invalidity shall be required to produce, at his own expense, a translation of his application either into the language of the application for a trade mark, provided that it is a language of the Office, or into the second language indicated when the application was filed. The translation shall be produced within the period prescribed in the implementing regulation. The language into which the application has been translated shall then become the language of the proceedings.

7. Parties to opposition, revocation, invalidity or appeal proceedings may agree that a different official language of the European Community is to be the language of the proceedings.'

- 2 Rule 1(1)(j) of Article 1 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1) repeats the requirement in Article 115(3) of Regulation 40/94 that the application for registration must indicate a 'second language'.

Background to the dispute

- 3 On 15 May 1996 the applicant, who is a lawyer and trade mark agent in the Netherlands in a firm specialising in intellectual property work, submitted an application for a Community word trade mark to the Office pursuant to Regulation No 40/94.

- 4 The trade mark in respect of which registration was requested is the word KIK.

- 5 The services covered by the application for registration are within class 42 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.
- 6 In her application, which was in Dutch, the applicant indicated Dutch as a ‘second language’.
- 7 By a decision of 20 March 1998 the examiner dismissed the application on the ground that a formal condition, that is to say the requirement that the applicant indicate English, French, German, Italian or Spanish as a ‘second language’ was not satisfied.
- 8 On 4 May 1998 the applicant brought an appeal against that decision in which she argued, *inter alia*, that the decision by which the examiner had dismissed her application for registration was unlawful because it was based on unlawful legislation. She brought the appeal in Dutch and also, without prejudice, in English.
- 9 On 2 June 1998 the appeal was remitted to the Board of Appeal of the Office.
- 10 The appeal was dismissed by decision of 19 March 1999 (hereinafter ‘the contested decision’), on the ground that the applicant had indicated as a ‘second language’ the same language as that used for filing the application for registration, with the result that the application was vitiated by a formal irregularity distinct from the other irregularity committed by the applicant, which was not to indicate one of the five languages of the Office as a ‘second language’.

In the contested decision the Board of Appeal also held that the Office, which includes its Boards of Appeal, can but apply Regulation No 40/94, even if its view is that the Regulation is not compatible with primary Community law. In that context the Board of Appeal observed that the Community judicature, whose task it is to ensure that in the interpretation and application of the Treaty the law is observed, does have jurisdiction to review the legality of Article 115 of Regulation No 40/94.

Forms of order sought by the parties

11 The applicant claims that the Court of First Instance should:

- annul or alter the contested decision;

- order the Office to pay the costs.

12 The Office contends that the Court of First Instance should:

- dismiss the action;

- order the applicant to pay the costs.

- 13 The Hellenic Republic submits that the Court should find for the applicant.
- 14 The Kingdom of Spain and the Council submit that the Court should dismiss the action.

Admissibility

Arguments of the parties

- 15 The Office begins by challenging the admissibility of this action which is seeking a declaration that Article 115 of Regulation No 40/94 is unlawful. It considers that, even if the Court were to find the restriction on the choice of languages in Article 115 of Regulation No 40/94 to be unlawful, that cannot lead to the contested decision being set aside. The Office (initially the examiner and then the Board of Appeal) did not dismiss the applicant's request for registration on the ground that the applicant did not indicate one of the languages of the Office as a 'second language', but on the ground that she did not choose a 'second language' at all. On that point, the Board of Appeal was right to find that the term 'second language' in Article 115(3) of Regulation No 40/94 can refer only to a language other than that used for the application for registration.
- 16 The Office submits that it follows that the provision which in fact constitutes the basis for the applicant's request for registration having been dismissed is that

requiring all applicants for a Community trade mark to indicate in the application a language other than that used for the application (first part of the first sentence of Article 115(3): '[t]he applicant must indicate a second language'). The legality of that obligation, however, is not even challenged by the applicant.

- 17 The Office concludes from that that the applicant cannot use the possible illegality of the restriction to five languages in Article 115 of Regulation No 40/94 as a basis for seeking annulment of the contested decision. Her plea of illegality is therefore inadmissible because there is no legal connection between the contested decision and the provision in respect of which the plea is raised. Furthermore, the Office submits that there appears to be an artificial or fictitious aspect to this dispute. The applicant, as indeed she herself acknowledged, is using these proceedings for an application for registration as a mere procedural stratagem to enable her to defend by judicial means her professional interests as a Dutch-speaking trade mark agent.
- 18 The Spanish Government likewise argues that the illegality of Article 115 of Regulation No 40/94 pleaded by the applicant does not affect the actual provision on which the contested decision is based. Also, the applicant's action is hypothetical. Furthermore, the applicant does not have sufficient interest to raise a plea of illegality in regard to Article 115 of Regulation No 40/94 since she is not raising the plea in her capacity as an applicant for a Community trade mark but in her capacity as a trade mark agent. The Spanish Government also considers that the applicant has not clearly indicated which statutory provisions she claims to be illegal. For that reason, too, the plea of illegality is inadmissible.
- 19 The applicant disputes the assertion that her plea of illegality is inadmissible. She emphasises that she is challenging the legality of the rule that the application for registration must indicate a second language the choice of which is not between all the official languages of the European Communities. She submits that the basis for the contested decision is specifically the rule that a second language must be

indicated which cannot be Dutch. The applicant considers, moreover, that she has a clear interest in her action, including the plea of illegality, being upheld by the Court, since she has a genuine interest in how her application for registration is dealt with and indeed in the word filed being registered.

Findings of the Court

- 20 It must be observed at the outset that Article 63(2) of Regulation No 40/94 provides that actions before the Court of First Instance against decisions of the Boards of Appeal ‘may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power’. It is clear from the action brought by the applicant that her complaint is that the Board of Appeal applied a rule that is unlawful because it is incompatible with the Treaty. Thus, although she does not refer explicitly to Article 241 EC, the applicant has raised a plea of illegality within the meaning of that article, submitting, *inter alia*, that the Board of Appeal should have declined to apply Article 115 of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95, because those provisions are unlawful (paragraph 16 of the application), and she requests the Court, in the event that it considers that the Board of Appeal was not entitled to disapply those provisions, to declare them unlawful itself (paragraph 23 of the application).
- 21 It must also be recalled by way of a preliminary observation that, under Article 241 EC, ‘[n]otwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the [European Central Bank] is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation’. It is settled law that that article expresses a general principle conferring upon any

party to proceedings the right to challenge, for the purposes of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision under challenge, if that party was not entitled under Article 230 EC to bring a direct action challenging those acts and by which it was thus affected without having been in a position to seek to have them declared void (Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraph 39). Consequently, the fact that Regulation No 40/94 does not expressly mention the plea of illegality as a collateral legal remedy which persons bringing actions may use before the Court of First Instance when seeking the annulment or alteration of a decision of a Board of Appeal of the Office does not mean that they cannot raise such a plea in those actions. That right follows from the general principle laid down by the case-law cited above.

- 22 Next, it must be observed that, in so far as the applicant challenges the obligation set out in Article 115 of Regulation No 40/94 to indicate a 'second language', the plea of illegality she raises satisfies all the conditions for admissibility established by the case-law cited above.
- 23 First, the contested decision is addressed to the applicant.
- 24 Secondly, contrary to the submissions of the Office and the Spanish Government, there is a direct legal connection between the contested decision on the one hand and the requirement the legality of which the applicant is challenging on the other (see, in that connection, Case 21/64 *Macchiorlati Dalmas e Figli v High Authority* [1965] ECR 175; Joined Cases 275/80 and 24/81 *Krupp v Commission* [1981] ECR 2489, paragraph 32; and Joined Cases T-6/92 and T-52/92 *Reinarz v Commission* [1993] ECR II-1047, paragraph 57). It is certainly true that the applicant used Dutch for the filing of her application, that she also indicated Dutch as the 'second language', and that she therefore failed to observe the rule that a language other than the language of filing must be indicated as a 'second language'; that rule thus constituted sufficient ground for the decisions of the examiner and the Board of Appeal on the application and appeal brought by the

applicant. However, the purpose of the plea of illegality raised by the applicant is precisely to demonstrate that the rule that a language other than that used for the application for registration (in this case, Dutch) must be indicated as a 'second language' is unlawful. That question is no different from the question whether it is lawful to exclude Dutch and certain other official languages of the Community as 'second languages'. The obligation on the applicant to indicate a second language which may not be a language other than English, French, German, Italian or Spanish corresponds to the obligation on her to indicate a second language other than the language used for the application, which is Dutch.

- 25 Accordingly, it is the legality of the rule in Article 115(3) of Regulation No 40/94, whereby the applicant must accept that she does not automatically enjoy the right to participate in all proceedings before the Office in the language of filing which constitutes the direct basis for the decision of the Board of Appeal to which the plea of illegality raised by the applicant is directed. The Office's assertion that the applicant is not challenging the validity of the obligation in Article 115(3) of Regulation No 40/94 to indicate a second language is, moreover, manifestly erroneous. The applicant's written submissions confirm that her plea of illegality is directed at the requirement of having to accept, by indicating a 'second language' other than the language of filing, the possible use of a language other than her own. The rule she is contesting is therefore exactly the same as that which constituted the direct basis for the contested decision.
- 26 Thirdly, it is common ground that the applicant was not entitled, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), to bring an action for annulment of the rules governing languages laid down by Regulation No 40/94 (order of the Court of Justice in Case C-270/95 P *Kik v Council and Commission* [1996] ECR I-1987, upholding on appeal the order of the Court of First Instance in Case T-107/94 *Kik v Council and Commission* [1995] ECR II-1717).
- 27 Moreover, the Office and Spanish Government are not entitled to claim that the action brought by the applicant is 'artificial', 'fictitious' or 'hypothetical'. It is

certainly clear from a letter cited by the Office that the applicant indicated Dutch as a 'second language' knowing that this was not compatible with the rules in force. However, that cannot lead to the conclusion that the application for registration and the dispute which has arisen out of that application is merely the result of a stratagem on the part of the applicant such as to render the litigation an improper use of court proceedings.

- 28 In that regard, the Court finds first of all that the file does not contain sufficiently clear grounds for concluding that the applicant is not genuinely interested in the word claimed being registered as a trade mark in Class 42. Furthermore, the Office dealt with the applicant's application for registration in the normal way, by referring it to the examination division and then assigning the dispute to the Board of Appeal; those bodies then applied the rules and did not find the application to be artificial, fictitious or hypothetical.
- 29 Next, the applicant's irregular approach to filing the application merely demonstrates that she was insisting on her purported right to be able to communicate with the Office in Dutch at any stage of the procedure, which shows that there is a very genuine and serious conflict between the applicant and the Community authority that may, under the general principle referred to above at paragraph 21, be remitted to the Community judicature.
- 30 Similarly, the argument of the Spanish Government that the applicant does not have a sufficient interest to raise a plea of illegality because she is not raising it in her capacity as an applicant for a Community trade mark but as a trade mark agent cannot be upheld. It is clear from the background to the dispute and the form of order sought by the applicant that her object in raising the plea of illegality is to obtain recognition that it was not lawful to require her, as the applicant for registration of a Community trade mark, to indicate a second language. It follows that the applicant is raising the plea of illegality in her capacity as an applicant for a Community trade mark with a view to having the

decision of the Board of Appeal annulled or altered, so that the examination of her application may be resumed. That is not contradicted by the fact that the applicant raises her professional interests and competitive position to demonstrate that the contested rule is illegal.

- 31 Finally, the Court holds that, contrary to the contention of the Spanish Government, the applicant has identified with sufficient precision the statutory provisions she claims are illegal. In her application she criticised the allegedly discriminatory nature of Article 115 of Regulation No 40/94, in particular the obligation on an applicant to indicate a 'second language' which he accepts for use as the language of proceedings for opposition, revocation and invalidity, and the legal effects of that obligation as set out in the other subparagraphs of Article 115. She also criticised the exclusion, under Article 115(5) of Regulation No 40/94, of official languages of the European Communities other than the languages of the Office as possible languages for filing notices of opposition and applications for revocation or invalidity.
- 32 It follows from the foregoing that, in so far as the plea of illegality raised by the applicant in support of her action for annulment or alteration of the contested decision relates to the obligation under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95, it is admissible. To that extent, the subject-matter of the plea of illegality encompasses the obligation laid down by those provisions, as clarified — in regard to its scope and legal effects — by certain other paragraphs of Article 115 of Regulation No 40/94.
- 33 However, in so far as the plea of illegality raised by the applicant relates to the remainder of Article 115 of Regulation No 40/94, it is inadmissible. The provisions in the remainder of Article 115 did not constitute any basis for the contested decision, since that decision related only to an application for

registration and the obligation on an applicant to indicate a second language which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings that might be filed against him.

Substance

- 34 The action is based on a single plea, namely infringement of the principle of non-discrimination in Article 6 of the EC Treaty (now, after amendment, Article 12 EC).

Arguments of the parties

- 35 The applicant submits that the rules governing languages established by Article 115 of Regulation No 40/94 put her at a competitive disadvantage in relation to trade mark agents in States where the language is one of the languages of the Office. She has to employ translators, whereas trade mark agents in those States can pursue proceedings before the Office in their mother tongue. That causes her to lose clients, particularly those established outside the European Community who are required by Articles 88 and 89 of Regulation No 40/94 to be represented before the Office by a legal practitioner or approved professional trade mark representative. It is also clear that there will be a loss of clients established in the Community since the knowledge that engaging the services of a Dutch-speaking lawyer or agent will entail translation costs leads them to prefer to use the services of an agent established in one of the countries that use a language of the Office. The loss of clients in turn damages the reputation of a firm such as that of the applicant, whose reputation in the field of trade marks has been established for years.

- 36 The applicant emphasises that the disadvantages associated with having to use translators relate not only to the costs involved but also to the risk of less than perfect translations. Translators necessarily need to undergo a period of training and have to acquire some knowledge of trade mark issues. In addition, certain expressions and meanings in the mother tongue do not easily lend themselves to translation.
- 37 Next, the applicant observes that, whilst it is true that the Office can always decide to pursue proceedings in the language of the application for registration, even if that is not a language of the Office, experience shows that it is the Office's practice to conduct proceedings in the second designated language. The procedure that led to this case is the one exception in that respect.
- 38 Finally, the applicant argues that discrimination occurs not just at the application stage but also, for example, in the event of an opposition. In that regard, she acknowledges that, in choosing a second language, each party may be obliged to conduct opposition proceedings in a language other than their mother tongue, but says that that is a matter of certainty for those whose language is not one of the Office's languages whereas those whose language is a language of the Office might have the opposition proceedings conducted in their own language.
- 39 The applicant concludes that Article 115 of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95 are discriminatory in view of the Treaty. The rules governing languages laid down for the Office are also contrary to Regulation No 1 of the Council determining the languages to be used by the European Economic Community (OJ, English Special Edition, 1952-1958, p. 59). In that connection, the applicant states that the Office must be treated as a

Community institution for the purposes of Regulation No 1 and that that regulation lays down clearly one of the principles of Community law from which no derogation by subsequent regulation of the Council is permitted.

- 40 In the alternative, the applicant submits that the contested decision is contrary to the principle of non-discrimination in so far as the Board of Appeal held that the second language must necessarily be one of the languages of the Office. The applicant argues that the principle of non-discrimination requires the Office to allow her to indicate any of the official languages of the European Community.
- 41 Further in the alternative, the applicant argues that, if the Court were to consider that the Board of Appeal of the Office was not in a position to interpret Article 115 of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95 in a manner compatible with the Treaty, it could always rule on the legality of those provisions itself and annul the contested decision on the basis of its findings. The applicant reiterates, however, that the Board of Appeal is under a duty to apply the rules in a manner compatible with the Treaty and that it could therefore have decided otherwise.
- 42 The Greek Government submits that the Community legal order does not recognise the superiority of particular official languages in relation to the others and that the EC Treaty as well as Regulation No 1 lay down the principle of plurilingualism and language neutrality.
- 43 In that regard, the Greek Government relies in particular on the third paragraph of Article 21 EC and Article 248 of the EC Treaty (now, after amendment, Article 314 EC). It points out that Article 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, Vol. 788, p. 354) establishes the general rule of equivalence for different language versions of treaties where the text is authentic in two or more languages. It adds that in any

event there is no rule of international law which accords primacy to one language over others.

- 44 Furthermore, the equivalence of the official languages of the European Communities has been recognised on many occasions by the Court of Justice. The Greek Government infers from that that the prohibition of discrimination on grounds of nationality includes a prohibition on discrimination based on language.
- 45 It follows, the Greek Government contends, that by instituting the rules governing languages set out in Article 115 of Regulation No 40/94, the Council failed to take account of the prohibition on discrimination established by primary Community law. That departure from primary Community law is all the more serious because no grounds are given for it in the regulation.
- 46 The Greek Government observes, lastly, that the Community administration's practice of using certain languages as 'working languages' does not undermine the equivalence of languages. It states also that the rules governing languages instituted by Article 115 of Regulation No 40/94, whilst serving the goals of simplifying and shortening proceedings, only do so in relation to some of the interested parties, while large numbers of applicants for Community trade marks are placed at a disadvantage. In the view of the Greek Government, if a choice is to be made between the goal of facilitating the work of the Office on the one hand, and the interests of all applicants in being able to communicate in their own official Community language on the other, it is the latter that ought always to prevail in view, in particular, of primary Community law and the principle of proportionality.
- 47 The Office emphasises first of all that the provisions of secondary Community law are fully effective so long as the Community judicial authorities have not found them to be illegal. It infers from that that all those subject to Community law, including the Office itself, must acknowledge the full effectiveness of

legislative acts of the institutions so long as neither the Court of Justice nor the Court of First Instance has found them to be illegal.

- 48 In the same context, the Office observes that all constituent aspects of the Office were established by the Community legislature for the purposes of implementing the relevant legislative provisions, rather than setting them aside or monitoring whether they might be unlawful. For that reason, the Board of Appeal was right to declare that it did not have jurisdiction to rule on the alleged illegality raised by the applicant.
- 49 Next, the Office explains that it is not for it but rather for the Council to present arguments to show that the rules governing languages instituted by Regulation No 40/94 are compatible with Community law. It refers, however, to the finding of the Board of Appeal that, in any event, the requirement to indicate a second language cannot amount to discrimination, given that all applicants are subject to that obligation, including applicants who have filed their application for registration in one of the languages of the Office. It also points out that the language issue was the subject of numerous meetings at the Council and caused the adoption of the regulation to be delayed by some years. It submits that the rules governing languages ultimately adopted secure both the viability of the Office and compliance with fundamental rights.
- 50 The Spanish Government contends that Article 115 of Regulation No 40/94 cannot be incompatible with Regulation No 1 because it was adopted later. Moreover, Regulation No 40/94 in no way contradicts Regulation No 1. It goes on to explain that the rules governing languages instituted by Article 115 of Regulation No 40/94 are entirely reasonable, *inter alia*, because there is a choice between the five most common languages in the Community and because there is always a possibility of the language of procedure before the Office being a less common one, for example, where the parties reach agreement to that effect. According to the Spanish Government, any discrepancies to which the rules governing languages might lead to are a consequence of the linguistic situation in the European Community and the need to guarantee the proper functioning of Community bodies.

- 51 The Council submits first of all that it was entitled to derogate from the rules governing languages instituted by Regulation No 1, since that regulation contains no fixed principle of Community law. It goes on to note that the Office is not in any event an institution for the purposes of Regulation No 1, nor can it be treated as such an institution.
- 52 The Council goes on to argue that there is no Community law principle of absolute equality between the official languages. Otherwise there would be no Article 217 of the EC Treaty (now Article 290 EC).
- 53 Nor are the rules governing languages instituted by Regulation No 40/94 disproportionate, according to the Council. In that connection, it explains that the purpose of those rules is to enable undertakings to obtain, following a single, practical and accessible procedure, registration of a Community trade mark. As regards the practical nature of the procedure, the Council observes that, given the structure of the Office and the needs of translators, proceedings before a Board of Appeal of the Office cannot, for instance, be conducted in different languages. The choice which the Council made in adopting Regulation No 40/94 was based on a balancing of the interests of undertakings on the one hand and the possible drawbacks such as those raised by the applicant on the other. In that regard, the Council observes that the Court of First Instance only has a marginal power of supervision and then contends that the rules governing languages which were introduced are reasonable, *inter alia*, having regard to the fact that the application for registration can be filed in any of the official language of the European Communities, that the Office has five languages and, that it translates the application into the 'second language' itself.
- 54 Finally, the Council explains that its decision was also based on budgetary considerations. It points out in that connection that, without the chosen rules governing languages, it would be necessary to provide for an additional budget of several tens of millions of euros per year for the Office.

Findings of the Court

- 55 It must be observed at the outset that, contrary to the submissions of the applicant, the examiner and the Board of Appeal did not have jurisdiction to decide not to apply the rule laid down by Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95. Such a decision would necessarily have been based on a refusal to apply those rules by interpreting them contrary to their clear wording. That would have entailed disregarding the presumption of legality principle, according to which Community rules remain fully effective until they have been found to be unlawful by a competent court.
- 56 It is therefore for the Court of First Instance, on foot of the plea of illegality raised by the applicant, to rule on the legality of the rules governing languages established for the Office by the Council.
- 57 The applicant claims that there is a conflict between Article 115 of Regulation No 40/94 on the one hand and Article 6 of the Treaty, read in conjunction with Article 1 of Regulation No 1, on the other, in that Article 115 infringes an alleged principle of Community law of non-discrimination between the official languages of the European Communities.
- 58 In that regard, it must first be pointed out that Regulation No 1 is merely an act of secondary law, whose legal base is Article 217 of the Treaty. To claim, as the applicant does, that Regulation No 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law. Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish

different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law.

59 Accordingly the applicant cannot rely on Article 6 of the Treaty, in conjunction with Regulation No 1, as a basis for demonstrating that Article 115 of Regulation No 40/94 is illegal.

60 As regards the obligation on an applicant for registration of a Community trade mark under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95 to 'indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings', it is clear that, contrary to the claims of the applicant and the Greek Government, this does not involve an infringement of the principle of non-discrimination.

61 First, it is apparent from the actual wording of Article 115(3) of Regulation No 40/94 that, by indicating a second language, the applicant accepts use of that language as a language of proceedings only in relation to opposition, revocation or invalidity proceedings. It follows, as indeed is confirmed by the first sentence of Article 115(4) of Regulation No 40/94, that so long as the applicant is the sole party to proceedings before the Office, the language used for filing the application for registration remains the language of proceedings. Consequently, in such proceedings, Regulation No 40/94 cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted.

- 62 Next, in so far as Article 115(3) of Regulation No 40/94 requires the applicant to indicate a second language for the purposes of the possible use of that language as the language of proceedings for opposition, revocation or invalidity proceedings, the fact remains that that rule was adopted for the legitimate purpose of reaching a solution on languages in cases where opposition, revocation or invalidity proceedings ensue between parties who do not have the same language preference and cannot agree between themselves on the language of proceedings. In that regard, it is to be noted that, under Article 115(7) of Regulation No 40/94, parties to opposition, revocation or invalidity proceedings are entitled to agree that any one of the official languages of the European Community is to be the language of the proceedings, an option which might particularly suit parties with the same language preference.
- 63 In pursuing the objective of determining the language of the proceedings where parties who do not share the same language preference fail to agree, the Council must be considered to have made an appropriate and proportionate choice, even if the official languages of the Community were treated differently. First of all, Article 115(3) of Regulation No 40/94 accords the applicant for registration of a trade mark an opportunity to fix, from among the most widely known languages in the European Community, the language that is to be used for opposition, revocation or invalidity proceedings in the event that the first language chosen by the applicant is not that requested by another party to the proceedings. Secondly, by limiting that choice to the languages which are the most widely known in the European Community, and thus avoiding the possibility of the language of proceedings being particularly remote in relation to the linguistic knowledge of the other party to the proceedings, the Council remained within the limits of what is necessary for achieving the aim in view (Cases 222/84 *Johnston* [1986] ECR 1651, paragraph 38, and C-285/98 *Kreil* [2000] ECR I-69, paragraph 23).
- 64 Finally, the applicant and the Greek Government are not entitled to rely on the paragraph added by the Amsterdam Treaty to Article 8d of the Treaty (now, after amendment, Article 21 EC) according to which 'every citizen of the Union may

write to any of the institutions or bodies referred to in this Article or in Article 7 [EC] in one of the languages mentioned in Article 314 [EC] and have an answer in the same language'. Article 21 EC refers to the Parliament and the Ombudsman and Article 7 EC mentions the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors and also the Economic and Social Council and the Committee of the Regions. In so far as the paragraph in question is applicable *ratione temporis* to this case, the Office is in any event not one of the institutions or bodies referred to in Article 7 EC or Article 21 EC.

65 If follows from all the foregoing that the action must be dismissed.

Costs

66 Article 87(2) of the Rules of Procedure of the Court of First Instance provides that the unsuccessful party will be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, she must be ordered to pay the costs incurred by the Office pursuant to the form of order sought by it, in addition to her own costs.

67 The Hellenic Republic, the Kingdom of Spain and the Council which intervened in the case will bear their own costs pursuant to the first paragraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition),

hereby:

1. Dismisses the action;
2. Orders the applicant to pay her own costs and those incurred by the defendant;
3. Orders each of the interveners to bear their own costs.

Mengozzi

García-Valdecasas

Tiili

Moura Ramos

Cooke

Delivered in open court in Luxembourg on 12 July 2001.

H. Jung

Registrar

P. Mengozzi

President