

*Other party to the proceedings before the Board of Appeal:* Vitra Collections AG

### Form of order sought

— Annul the contested decision and declare Community trade mark No 2.298.420 invalid

### Pleas in law and main arguments

*Registered Community trade mark in respect of which a declaration of invalidity has been sought:* A three-dimensional figurative mark based on the 'Alu chair' (Community trade mark No 2 298 420), for goods in Class 20

*Proprietor of the Community trade mark:* Vitra Collections AG

*Applicant for the declaration of invalidity of the Community trade mark:* High Tech Srl

*Grounds for the application for a declaration of invalidity:* Infringement of Article 7(1)(e)(iii) of Regulation 207/2009. The applicant also claimed that the mark should be declared invalid on the ground that its registration is intended to exclude the applicant from the market in design objects that have entered the public domain and therefore the registration was in bad faith.

*Decision of the Cancellation Division:* Rejection of the application for a declaration of invalidity

*Decision of the Board of Appeal:* Dismissal of the appeal

*Pleas in law:* Misinterpretation and misapplication of Articles 7(1)(e)(iii) and 52(1)(b) of Regulation 207/2009.

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**Action brought on 17 March 2011 — Cofra v OHIM — O2 (can do)**

**(Case T-162/11)**

(2011/C 139/51)

*Language in which the application was lodged:* German

### Parties

*Applicant:* Cofra Holding AG (Zug, Switzerland) (represented by: K.-U. Jonas and J. Bogatz, lawyers)

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

*Other party to the proceedings before the Board of Appeal:* O2 Holdings Ltd (Slough, United Kingdom)

### Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 10 January 2011 in Case R 242/2009-4;

— Order the defendant and, if appropriate, the other party to the proceedings to pay the costs.

### Pleas in law and main arguments

*Applicant for a Community trade mark:* O2 Holdings Ltd.

*Community trade mark concerned:* Word mark 'can do' for goods and services in Classes 9, 16, 25, 35, 36, 38 and 43.

*Proprietor of the mark or sign cited in the opposition proceedings:* The applicant.

*Mark or sign cited in opposition:* Word mark 'CANDA' for goods in Class 25.

*Decision of the Opposition Division:* Rejection of the opposition.

*Decision of the Board of Appeal:* Dismissal of the appeal.

*Pleas in law:* Infringement of Article 15 and Article 42(2) of Regulation (EC) No 207/2009 <sup>(1)</sup> and of Rule 22 of Regulation (EC) No 2868/95, <sup>(2)</sup> in that the Board of Appeal applied criteria which are too narrow in assessing the proof of use sufficient to maintain the right and failed to have sufficient regard to the particular distribution situation in the applicant's undertaking. Further, infringement of Article 76(2) of Regulation (EC) No 207/2009, in that the Board of Appeal wrongly failed to have regard to various documents submitted as proof of use sufficient to maintain the right in the opposing mark. Finally, infringement of Article 75(2) of Regulation (EC) No 207/2009, in that the Board of Appeal did not inform the applicant that it regarded the proof of use submitted as insufficient and did not provide the applicant with an opportunity of submitting further proof in oral proceedings.

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<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

<sup>(2)</sup> Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 2009 L 303, p. 1).

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**Action brought on 17 March 2011 — Cofra v OHIM — O2 (can do)**

**(Case T-163/11)**

(2011/C 139/52)

*Language in which the application was lodged:* German

### Parties

*Applicant:* Cofra Holding AG (Zug, Switzerland) (represented by: K.-U. Jonas and J. Bogatz, lawyers)

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

*Other party to the proceedings before the Board of Appeal:* O2 Holdings Ltd (Slough, United Kingdom)

### Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 10 January 2011 in Case R 246/2009-4;

— Order the defendant and, if appropriate, the other party to the proceedings to pay the costs.

### Pleas in law and main arguments

*Applicant for a Community trade mark:* O2 Holdings Ltd.

*Community trade mark concerned:* Word mark 'can do' for goods and services in Classes 9, 16, 25, 35, 36, 38 and 43.

*Proprietor of the mark or sign cited in the opposition proceedings:* The applicant.

*Mark or sign cited in opposition:* National figurative mark, including the word element 'CANDA', for goods in Class 25.

*Decision of the Opposition Division:* Rejection of the opposition.

*Decision of the Board of Appeal:* Dismissal of the appeal.

*Pleas in law:* Infringement of Article 15 and Article 42(2) of Regulation (EC) No 207/2009 <sup>(1)</sup> and of Rule 22 of Regulation (EC) No 2868/95, <sup>(2)</sup> in that the Board of Appeal applied criteria which are too narrow in assessing the proof of use sufficient to maintain the right and failed to have sufficient regard to the particular distribution situation in the applicant's undertaking. Further, infringement of Article 76(2) of Regulation (EC) No 207/2009, in that the Board of Appeal wrongly failed to have regard to various documents submitted as proof of use sufficient to maintain the right in the opposing mark. Finally, infringement of Article 75(2) of Regulation (EC) No 207/2009, in that the Board of Appeal did not inform the applicant that it regarded the proof of use submitted as insufficient and did not provide the applicant with an opportunity of submitting further proof in oral proceedings.

<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

<sup>(2)</sup> Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 2009 L 303, p. 1).

### Action brought on 18 March 2011 — Modelo Continente Hipermercados v Commission

(Case T-174/11)

(2011/C 139/53)

*Language of the case:* Spanish

### Parties

*Applicant:* Modelo Continente Hipermercados, SA (Alcorcón, Spain) (represented by: J.Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan, R. Calvo Salinero, lawyers)

*Defendant:* European Commission

### Form of order sought

— Admit and uphold the pleas in support of annulment put forward in this application and accordingly annul Article 1(1) [of the contested decision], in so far as it declares that Article 12(5) of the Texto Refundido de la Ley del Impuesto sobre Sociedades ('TRLIS') (Consolidated version of the Law on Corporation Tax) contains elements of State aid;

— in the alternative, annul Article 1(1) of the contested decision in so far as it declares that Article 12(5) TRLIS contains elements of State aid when it applies to acquisitions of shareholdings entailing acquisition of control;

— in the further alternative, annul the contested decision on account of a procedural irregularity;

— order the Commission to pay the costs.

### Pleas in law and main arguments

This action is brought against the Commission's Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions (C 45/07, ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

In support of its action, the applicant puts forward three pleas in law.

1. First plea, alleging that the contested decision infringes Article 107(1) TFEU in finding the measure to constitute State aid

— The Commission has not shown that the tax measure at issue favours 'certain undertakings or the production of certain goods'. The Commission merely assumes that the measure is selective because it applies only to the acquisition of shareholdings in foreign companies and not in domestic companies. The applicant submits that such reasoning is erroneous and circular. The fact that the application of the measure examined (as for any other tax rule) depends on the fulfilment of certain objective requirements does not render it, in law or in fact, a selective measure. The Commission's reasoning would result in every tax rule being considered to be *prima facie* selective.