



OHIM-OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET

TRADE
MARKS
AND DESIGNS



Annual Report

2004

06 08 10 TB-AC-05-001-EN-C ISSN 1681-3766





Annual Report 2004

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (<http://europa.eu.int>).

Cataloguing data can be found at the end of this publication.

ISBN 92-9156-084-7

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Printed in Belgium

PRINTED ON WHITE CHLORINE-FREE PAPER

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Mr Wubbo de Boer
PRESIDENT OF THE OHIM



New challenges

The Office for Harmonization in the Internal Market (Trade Marks and Designs) made significant progress in improving its services to users during 2004. We focused on our goals of cutting delays in applications, improving the quality of our work and increasing the efficiency of procedures. In particular, we were pleased to be able to eliminate the backlog in trade mark examination and reduce the backlog in oppositions during the course of the year.

The OHIM processed some 75 000 trade mark applications in 2004 – thus eliminating the backlog of 35 000 applications that existed at the end of 2003. This remarkable progress was achieved by doubling the number of examinations, formalities checks and publications achieved in 2004 compared to 2003. The result is that 90% of trade mark applications are now published within 10 months of receipt. In October, we decided to write a letter to all applicants once formal examination of their application is complete, and before national searches and translation are conducted, informing them of the outcome of examination.

Speed and consistency of examination are of vital importance to our users and they can expect us to meet certain specified standards. Despite the progress made in 2004, we know there remains room for improvement. With this in mind, the OHIM will work towards implementing – and meeting – strict targets in four areas: acknowledging receipt, sending the information letter after examination, publishing applications and ruling on oppositions. During the course of the coming year, we hope to be able to publish details of these targets and our success in meeting them regularly on the OHIM website.

The OHIM also successfully met the dual challenges of EU enlargement and membership of the Madrid Protocol in 2004, bringing enhanced benefits to users of the Community trade mark system with minimal disruption. We have so far welcomed some 30 staff as well as more than 1 000 registered practitioners from the 10 new EU Member States, and incorporated the extra nine languages into our systems. On 1 October, the link between the CTM and the Madrid Protocol systems was established enabling international applicants

The OHIM made significant progress in improving its services

to designate the EU, and CTM applicants to seek international protection for the first time. We expect Madrid applications to make up a substantial part of the OHIM's workload in the coming years.

Progress has also been made in administering Community designs. The OHIM is now able to meet its self-imposed deadline of publication in three months in those cases where there are no complications (about 70% of applications), and, just 21 months after its launch, the Community design is the second most popular design right in the world.

Continued enhancement of the e-business functions of the OHIM has also contributed to improvement in the service to both trade mark and design applicants. A new online filing service for Community designs was launched in December, and CTM-ONLINE is being developed to make it easier to use and to increase compatibility with users' own systems. Further investment in e-business services is a vital part of our aim to make the OHIM more efficient.

The productivity improvements made in the past year have been made possible by the dedication of our staff and the effectiveness of the management team. I am pleased to be able to say that we agreed new terms with the OHIM staff in 2004. This important achievement should enable harmonious staff relations to be restored. We continue to invest substantially in staff, with each person receiving an average of 12 days' training per year, and we hope to expand teleworking opportunities following successful experiments during 2004. We also anticipate that all the OHIM staff will, from next May, be based within the same group of buildings in Alicante, and that this will further improve productivity.



New options for protection

As a consequence of the growth in activity of the OHIM, as well as rigorous management of costs, the financial position of the OHIM is healthy. There was a surplus of more than €10 million in 2004 meaning the OHIM had a reserve fund of some €80 million at the end of the year. We are thus confident of our continuing financial stability and independence. Moreover, we believe that the current financial position, combined with our budgetary predictions for the coming years, will enable us to pass on some savings to applicants in the form of fee reductions. We expect that the European Commission, which has the authority to set the fees for OHIM's products, will make specific proposals regarding any changes to the fee structure early in 2005.

Mr Carl-Anders Ifvarsson

CHAIRPERSON OF THE
ADMINISTRATIVE BOARD OF THE OHIM

2004 has been a year of improvement of the OHIM's services to its customers concerning both productivity and efficiency. The figures show results well above those for the previous year. The existing backlogs in several areas have been eliminated. This increase in productivity has not led to a decrease in quality: the checks carried out show that the standards of quality are being maintained.

The Madrid Protocol has been successfully integrated into the OHIM activities during 2004. As from 1 October 2004, the OHIM receives and deals with international applications. This new system will enable owners of Community trade marks to extend their protection to no fewer than 62 countries on five continents. Moreover, the EC can be designated in an international trade mark application. The system will offer companies all over the EU a new option for protecting their trade marks in the EU and will encourage greater integration within the internal market.

In 2004, I had the privilege of welcoming ten new Member States to the OHIM. I must say that the OHIM has very successfully dealt with all the aspects of the enlargement.

The new Community design system, which started in 2003, has continued to be a success during 2004. So far the OHIM has dealt with 21 000 design applications containing over 81 000 designs. An increasing number of applications are expected in the next year.

As is stated by the Chairman of the Budget Committee, Mr Peter Lawrence, in his contribution to this Report, the OHIM's financial situation towards the end of 2004 looked markedly better than a year ago. The OHIM has thus been able to preserve its financial autonomy. The improved situation has furthermore enabled the OHIM to present calculations for possible fee reductions, which in principle have been welcomed by the governing bodies. This item will now be dealt with by the European Commission whose responsibility it is to propose specific fee reductions.





Important events

So 2004 has been a good year for the OHIM. This is of course not an end in itself. But it means that the users of the system – our customers – will obtain better and quicker services and also contributes to the successful functioning of the internal market. As I said last year, this work is carried out in a very dedicated way by the President of the OHIM, the management and more than 600 skilled and professional members of the OHIM staff. They all deserve the appreciation of the Administrative Board.

Let me add a very personal concluding remark. At the end of 2004, I took retirement and thus no longer serve as my country's representative to the OHIM and as Chairman of the Administrative Board. I have been a member for almost ten years and Chairman for almost five of these. To me it has been a source of great satisfaction to be allowed to take part in the pioneering work of establishing the system for trade mark and design protection within the European Community. I have seen the OHIM develop over the years, taking some small and somewhat unstable steps in the beginning and finally reaching cruising speed as a very well-functioning, professional and respected player in the IP world. I would like to thank everybody concerned for this time and wish the OHIM, its President and staff all the best for the future.



Mr Peter Lawrence

CHAIRPERSON OF THE BUDGET COMMITTEE

Although other contributions to this Annual Report have mentioned the accession of the 10 new Member States in May, I believe it is right that I should also do so in respect of the Budget Committee. The first meeting at which our new colleagues were full members was in November, but we had already begun to get to know them as a result of their attending as observers since the end of 2003. It has been a great pleasure to welcome them.

Before EU enlargement, many people felt concern about the possible effect on the conduct of business. After all, the reasoning went, it is difficult enough to reach consensus or clear decisions with 15 Member States; so how much more difficult will it be when there are 25? I am pleased to say that so far the indications look very positive. We have had some minor difficulties in terms of physically accommodating everyone around the conference table, particularly at the joint meetings when delegates from both the Administrative Board and Budget Committee have been present. But apart from that, the meetings themselves seem to me to have proceeded very smoothly. This could only have been possible because of the positive and constructive spirit in which delegations approach their work. I am very grateful for that, and would wish to encourage everyone to continue to show this cooperative spirit.

Turning now to the substance of our work, the financial position of the OHIM by the end of 2004 looked markedly better than a year ago. This was to a large extent due to the increase in trade mark filings during the year, but is also helped by the difficult decisions taken in November 2003 concerning the fees for national search reports. This improvement in finances allowed the Budget Committee to give a broad endorsement of a package of fee reductions that should benefit users from 2006 onwards. The responsibility to propose specific fees lies with the European Commission, but the Budget Committee was able to offer advice on some of the strategic issues which it believed the Commission should take into account. This involved thinking about matters such as the relationship between national offices and the CTM system, the likely rate



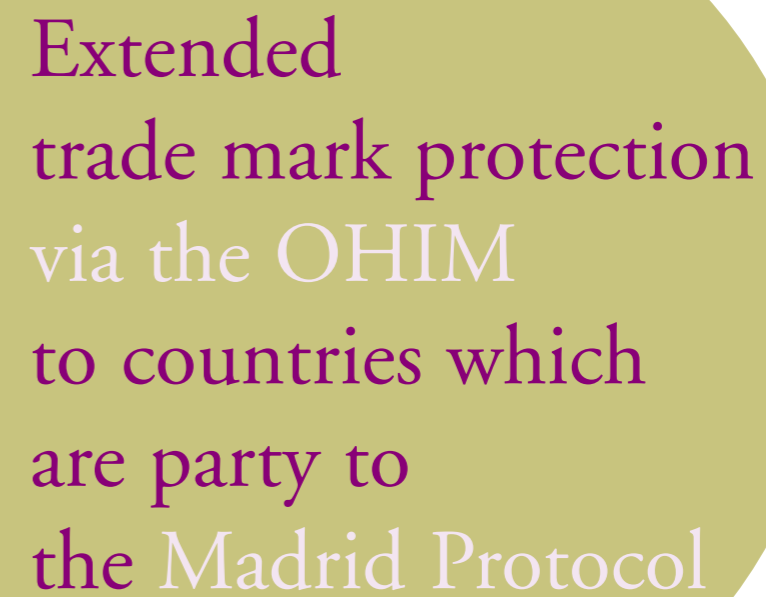


Taking
decisions
effectively


of renewals, and the proper size of the financial reserves the OHIM needs to protect it against unexpected changes in its income, or exceptional calls on expenditure. I understand that the Commission found this debate helpful, and we look forward to seeing its proposals for amended fees in the near future.

We are delighted to welcome a new Deputy Chairperson, Mr Robert Ullrich of Austria, who was elected to succeed Mr Jose Mauricio of Portugal. We are grateful for Mr Mauricio's support over the last few years, and wish him every success in his continuing career. Mr Ullrich has been working on the governing bodies in Alicante since 1996, and brings much experience to our work as well as a calm and courteous manner.

There will be much important work for the Budget Committee over the next few years, as the consequences of joining the Madrid and Hague systems work through, and as the OHIM moves increasingly to electronic filing. But I believe the OHIM can face the future with a sound and proven financial basis, and with the support of its governing bodies who have demonstrated the capacity to face difficult decisions effectively.



Extended
trade mark protection
via the OHIM
to countries which
are party to
the Madrid Protocol



Extended protection

A key change for all users of the OHIM was the enlargement of the European Union on 1 May 2004. The accession of 10 new Member States (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) meant the introduction of new official languages and software systems. From the date of accession, Community trade marks and designs registered or applied for before 1 May were extended immediately to the territory of the 10 new Member States with equal effect, without the need for any formality or extra fees.

Preparations made prior to enlargement by the OHIM and national offices in the candidate countries ensured that there were no complications arising from enlargement. Considerable effort was put into aligning and adapting numerous IT applications that were successfully implemented before or shortly after the enlargement date. Forms (both paper and electronic) were made available on 1 May for users to file in the new languages. Major translation work concerning databases such as Euronice or Eurolocarno was completed before the critical date.

The increase in applications from the new Member States, especially regarding CTMs, suggests that awareness-raising events such as the forums held in the new Member States have yielded results.

Applications filed from 1 May have been translated and will be published in the new languages. In June 2004, the OHIM published, for the first time, a design application in all languages of the EU, and the first CTM applications were published late in 2004. Applications are also being published in Maltese, contrary to the practice adopted by most EU institutions up to 2007.

The national offices of five of the new Member States (Hungary, Slovakia, Czech Republic, Poland and Lithuania) expressed their intention to perform searches pursuant to Art. 39 CTMR, while three offices (Cyprus, Estonia and Latvia) confirmed that they will not. The first CTM applications filed from 1 May 2004 were sent to these offices in September 2004.



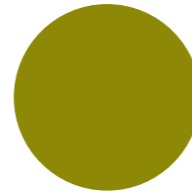
The Vade-mecums of both Bulletins (CTM and RCD) inform users as to when a trade mark or a design is published in the new languages. About 1 000 professional representatives from the new Member States were entered on the OHIM list of representatives, more than half of them from Poland.

In November 2004, representatives of the new Member States participated as full members in the governing bodies of the OHIM. In 2004, a new selection procedure was launched by the OHIM to select temporary staff skilled in the new languages of the EU, following the completion of the first selection process in 2003.

As required by the Accession Treaty, examination of pending applications has not been affected by the new grounds of refusal arising from the new Member States. The OHIM's guidelines on examination and opposition were adopted following the favourable opinion of the Administrative Board. Examiners skilled in one or more of the new languages are now fully operational in the different departments of the OHIM.

NEXT WAVE OF ENLARGEMENT

The enlargement of the EU did not end in May 2004: further enlargement is likely to take place as soon as January 2007. Based on past experience, the OHIM has drawn up its road map to the 2007 enlargement and has started taking the necessary measures to cope with the accession of one or more of the current candidate countries (Bulgaria, Romania, Croatia and Turkey). The impact of new languages (in particular, Bulgarian which has a Cyrillic alphabet) will be one of the major concerns.



Community
trade marks
and designs
now protected
in 25
Member States

CTM PRODUCTIVITY INCREASED

Exceptional year

2004 was an exceptional year for the Community trade mark (CTM). For the second consecutive year a record number of applications were filed at the OHIM. A total of 59 349 applications were received during the year, an increase of 3% compared to 2003. The increase came mainly during March and April, prior to enlargement on 1 May. The rest of the year followed more or less the same trend as previous years.

According to the business plan for the year 2004 the OHIM was expecting around 50 000 new applications. With the addition of the existing backlog of about 35 000 applications, there were around 75 000 to 80 000 trade mark applications to classify and check for absolute grounds of refusal during 2004. To meet the objective of eliminating the backlog, therefore, the OHIM had to examine on formal grounds almost 80 000 files compared to an average of about 40 000 in normal years.

Demanding targets were set at the beginning of the year to remove the backlogs in classification, formality, examination and publication. These ambitious targets – in some areas double those of 2003 – have been reached, and backlogs in the examination process have now been removed except in the area of publication. This spectacular progress has reduced the average time taken for a file to complete the examination process and 90% of straightforward applications are examined for absolute grounds in less than 25 weeks.

Publication fell about 4% short of the 60 000 target because the level of publication in early 2004 was lower than planned. The complete elimination of CTM backlogs requires an increased level of publication in 2004 and 2005 and, in turn, increased translation and search activity. As planned, over 70 000 CTMs were sent to the Translation Centre in Luxembourg. A similar number was sent to national offices to carry out searches under Art. 39 CTMR. The OHIM carried out more than 70 000 CTM searches.



The progress made meant that in October it was decided to send an information letter to applicants immediately after the examination process, but prior to publication, explaining that the examination of the application has been successfully completed. Following this, technical issues such as search reports and translations will be conducted before publication. This new letter was introduced because the OHIM believes that applicants can expect to be informed as soon as possible if and when there is no obstacle raised by the examiner.

How were these improvements achieved? The introduction of a more structured and consistent approach to trade mark examination has allowed both the quantity and the quality of examination to be improved. Three major changes contributed to the reduction in the backlog in examinations.

First, a small team of six experienced examiners was set up to screen all incoming files. By the end of the year, this team had checked on absolute grounds some 83% of straightforward files, and passed on those requiring a more detailed examination. To ensure that quality is maintained, another team checks at random 100 of these straightforward files every week, with the result so far that just 0.3% of files are found to contain errors. Second, a linguistic team was created, comprising 33 language checkers (three checkers per language) to facilitate the examination on absolute grounds in 20 languages. Examiners have also been relieved of certain administrative tasks by the hiring of interim staff. Third, time quality standards for the treatment of incoming mail were established during 2004.

Other internal improvements have helped to reduce the backlog. For example, several new databases available on the Intranet simplify the search for examiners. Improvements were also made in the structure of opposition decisions, so as to focus more on the core of the conflict. To improve the consistency of examination, the following were adopted during 2004:

- > Opposition Guidelines;
- > Guidelines for the examination of international applications;
- > Guidelines for dealing with legal questions relating to enlargement; and
- > Practice notes on colour marks and geographical terms.

OPPOSITIONS AND CANCELLATIONS

The OHIM received 10 725 oppositions in 2004, an increase from 2003 when there were 9 929. A moderate target was set regarding opposition decisions at the beginning of the year. This target has been surpassed by 19%, thus reducing the backlog by more than 1 000 files. The average time for a decision to be taken has fallen from 15 months in 2003 to 12 months at the end of 2004.

Due to the high number of files examined in 2004, more oppositions can be expected in 2005 and the challenge for the OHIM will be to continue to reduce the backlog in this area.

The number of requests for cancellation rose in 2004 to 298, compared to 266 in 2003. The number of closed cases also rose considerably to 250, compared to 162 in 2003. Time targets have been put in place in this area and by the end of 2004 very few files ready for a decision to be taken should be more than three months old.

Ensuring quality:
guidelines, practice
notes, consistent
approach and
quality check



MADRID PROTOCOL

1 October 2004 was a remarkable day for the OHIM and the international trade mark community as it was the date when the Madrid Protocol entered into force with effect for the European Community. This means it is now possible to designate the European Community in an international application, and to file an international application with the OHIM as an office of origin, based on a Community trade mark application or a registered Community trade mark.

31 international applications were received on 1 October itself, and the first were transmitted to WIPO within three working days. This number had increased to over 200 by the end of November. Designations of CTMs were received from the beginning of November. By the end of 2004, the level of international applications was slightly above that expected and the level of designations slightly lower. The OHIM continues to expect a significant growth in designations of the CTM in future years.

The link between the Madrid Protocol and the CTM was the culmination of many years of legislative change and preparation. The OHIM ensured that the introduction of the link went smoothly by setting up a cross-departmental working group; implementing a new trade mark processing system for international registrations and applications; establishing an interface for full electronic communication and data exchange with WIPO; preparing forms, standard letters, and examination guidelines concerning international applications; and communicating these developments to users on the website and in a mailing. Special training courses for OHIM staff on Madrid Protocol issues were organised both inside and outside the OHIM.



PROCESSING INTERNATIONAL APPLICATIONS

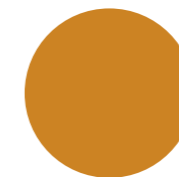
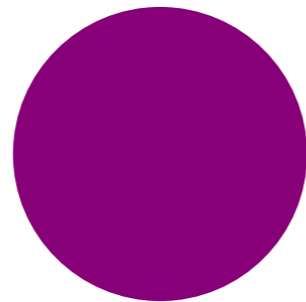
The international application is re-published by the OHIM but without the list of goods and services. It is then examined on absolute grounds, and (within an opposition period ending nine months after this re-publication) can be opposed in the same way as a directly-filed CTM application. However, the OHIM takes advantage of the rationalisation potential of the Madrid Protocol; in particular, it does not review the classification established by WIPO.

The OHIM has 18 months to notify provisional refusals. However, if the mark is not subject to absolute grounds for refusal, the OHIM will issue a first statement of grant of protection within six months, and if there is also no opposition, a second statement of grant of protection will be issued with the effect that as of that date the mark is protected as a CTM. Protection will thus, in the majority of cases, be accorded much earlier than 18 months. The financial savings the Madrid Protocol generates mean the individual fee is €200 less than the fees paid for a directly-filed CTM. Since the first day, international registrations have been included in CTM-ONLINE in the same way as directly-filed CTMs.

INTERNATIONAL APPLICATIONS FILED AT THE OHIM

The international application can be filed in any official language of the European Community but the official form must be used. If the list of goods and services is not in one of the languages accepted by WIPO, the OHIM will carry out the translation. This will be done through the intermediary of the Translation Centre and it has been assured that no more than one week is needed for this. The fact that there is electronic communication between the OHIM and WIPO simplifies matters for the applicant, who does not need to re-file a representation of the trade mark.

Savings due to the Madrid Protocol leading to lower individual fees



E-BUSINESS AND THE CTM

The percentage of CTMs that are applied for using e-filing continues to grow. By the end of 2004, e-filing had risen to 25% compared to less than 10% when it began towards the end of 2002. In addition, the CTM Bulletin appeared in electronic form from September 2003. During 2004 it has made the target of doubling the number of CTMs published weekly much easier.

Expansion and improvements to make these systems even more attractive to users are planned. For example, the development of a system to transmit Community and national search reports to applicants and their representatives electronically is well advanced. It will be available in the first half of 2005.

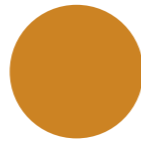
For CTMs, claims for priority and seniority will no longer need documentary support provided that the information is available to the OHIM, in an accessible form, on the website of the relevant industrial property office. This reduces the administrative burden on applicants for and proprietors of CTMs.

The OHIM has been working intensively to improve the version of e-filing which has been operational since 12 November 2002. There are two main priorities: to improve communication with clients, especially to provide them with relevant information, and to give them direct access to the relevant classification information.

To improve communication with clients, the e-filing 2004 project aimed to provide full bi-directional e-communication. This would permit the exchange of all relevant data concerning a file using the same communication tool in a user-friendly manner. In other words, trade mark examiners will be able to send communications to trade mark owners or representatives by electronic means as well as by fax.

As part of the e-filing 2004 project, the OHIM clients will have direct access to the on-line classification system. This will allow them to select the appropriate list of goods and services and to insert them into the application filed electronically. The goods and services selected will be already-accepted terms for classification and this will simplify and speed up the examination of their file. This new system will replace the EURONICE-ONLINE database.





BOARDS OF APPEAL

NEW ORGANISATION

The measures adopted in the recently reformed CTMR, which were designed to improve the functioning of the Boards, entered into force on 27 December 2004. They will allow the creation of the enlarged Board and enable straightforward decisions to be taken by a single member. They also provide for the creation of a Praesidium, consisting of the President of the Boards of Appeal, the three chairpersons and three members of the Boards, competent to lay down rules for the allocation and processing of cases and the organisation of the Boards' work.

The current criteria for allocating appeal cases enable the Boards to make better use of the language capacities of their members so that appeals can be dealt with more quickly.

The Third Board – which is exclusively competent in design cases and is composed of members of the other Boards – has rendered two decisions so far, both on formalities issues. To guarantee the confidentiality necessary in design cases, the President of the Boards adopted special security measures for handling these cases.

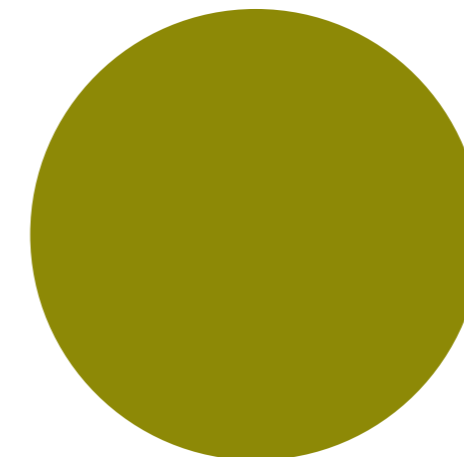
PROCESSING APPEALS

There was a slight fall in the number of appeals closed in 2004 compared to 2003. This is linked to the fact that the number of incoming appeals was unusually low in 2003. In contrast to 2003, the number of incoming appeals has risen considerably in 2004, especially since the summer, as many more decisions have been taken (particularly on oppositions) than in 2003.

The Boards now face an incoming tide of new appeals and will have to increase production to at least 1 200 decisions per year. The new rules of procedure may help the Boards to deal with this increased workload. However, it is possible that in the short term the average time taken for appeal cases will increase.

The distribution among languages is the same as in previous years. English has the lead with two thirds of all appeals filed, followed by German with roughly one fifth of cases. Interestingly, Spanish and French cases have more or less the same share, namely about 6% of all cases filed, reflecting an increase in Spanish language cases. Until now, the Boards have not had to deal with cases in any of the new languages.

The ratio between *ex parte* and *inter partes* appeals remains stable at 1:2. Decisions on the fixing of costs (which are taken by the Registry of the Boards) are steadily rising, with over 160 being taken in 2004.



CASE-LAW FROM THE BOARDS OF APPEAL, CFI AND ECJ

Distinctive character

ABSOLUTE GROUNDS FOR REFUSAL

PROCEDURAL QUESTIONS

In the *KWS Saat v OHIM* case, the ECJ overturned the line hitherto followed by the CFI¹ in deciding that the Board of Appeal violated Art. 73 CTMR when it did not first communicate to the appellant some “confirmatory documents” taken from the Internet which supported the conclusion of a lack of distinctive character for the colour orange for agricultural machinery due to the fact that this colour was very widely used for these goods². However, such a violation of the right to be heard does not justify the annulling of the contested decision when this decision is in fact correct³.

GRAPHICAL REPRESENTATION

The graphic representation of a sign must be clear, precise, self-contained, easily accessible, intelligible, durable and objective⁴. If the sign is in colour, the ECJ has indicated that the identification of the colour by an internationally recognised code satisfies the above criteria⁵.

If the sign consists of a combination of colours a further condition has to be satisfied. Such signs must be “systematically arranged by associating the colours concerned in a predetermined and uniform way”⁶, so that third parties can determine with some certainty the range of protection. The requirement of graphical representation is an obstacle to the protection of non-traditional marks, which by their nature are invisible, for example taste and smell marks.

In respect of smell marks, the 1st Board of Appeal rejected two applications on the basis of Arts. 4 and 7(1)(a) CTMR, the graphical representation of which consisted, in one case, of the olfactory spectrum associated with the description

¹ CFI Judgment of 9 October 2002 in Case T-173/00 (Orange); CFI Judgment of 5 June 2002 in Case T-198/00 (Kiss device with plume).

² ECJ Judgment of 21 October 2004 in Case C-447/02 P (Orange), paras. 43-45.

³ ECJ Judgment 'Orange' cited above, para. 60.

⁴ ECJ Judgment of 12 December 2002 in Case C-273/00, Sieckmann, paras. 46-55.

⁵ ECJ Judgment of 6 May 2003 in Case C-104/01, Libertel, para. 38.

⁶ ECJ Judgment of 24 June 2004 in Case C-49/02 (colour blue and yellow), para. 33.



“a hint of green lawn, hesperidia (bergamot, lemon), flowers (orange blossom, jacinth) roses, musk”, and for the other, of a photograph of a strawberry with the description “odour of ripe strawberry”.

In the first case, the Board considered that the olfactory spectrum was not intelligible to the general public⁷ and a description of the odours attached to the representation did not make up for these deficiencies. In the second case, the figurative representation of the strawberry and the description did not provide, either individually or in combination, an objective, clear and precise graphical representation⁸. An appeal against this finding is pending before the CFI.

DISTINCTIVE CHARACTER

In *Nichols plc v Registrar of Trade Marks*, the ECJ confirmed that family names can be distinctive independently of possibly widespread use as family names and of their prior use as marks. The limitations on the rights of trade mark owners set out in Art. 6(1)(a) of the Trade Mark Directive, or Art. 12(1)(a) CTMR that permit third parties to use their own name commercially do not have any role to play in the examination of distinctive character. This limitation is only of consequence after registration⁹.

The threshold of distinctive character required of a mark should be invariable regardless of the nature of the sign concerned. An “additional element of originality” cannot therefore be required for slogans if this criterion is not required for other types of marks (*Erpo Möbelwerk v OHIM*)¹⁰. On the other hand, it can be more difficult to establish distinctive character for slogans consisting of laudatory epithets as the average consumer is not used to identifying the origin of goods and services upon the basis of slogans that consist of mere puff¹¹.

The CFI held that slogans of which the information content is directly accessible and of which the construction is banal are not distinctive if they are, or are likely to be, used by competitors in the normal run of trade.

This was the case with the slogan “Looks like grass...Feels like grass... Plays like grass” for the goods “synthetic lawns” and the services related to the installation of these lawns¹². The same decision was made in the case of the slogan *Mehr für Ihr Geld* (“more for your money”) for goods and services in classes 3, 29, 30 and 35¹³. It is irrelevant that the information content of this last slogan does not bear a clear relation to any characteristic of the products or services since this sign will be perceived as a laudatory epithet alluding to their price.

In the same fashion, the sign BESTPARTNER is devoid of distinctive character for financial services, insurance and data processing on the Internet, as each of the terms of which it is composed is descriptive and the combination of these terms produces a whole that does not present any “perceptible difference” with regard to the sum of its parts¹⁴.

These two criteria – used or susceptible to be used in the normal run of trade, and perceptible difference between the individual non-distinctive elements and the resulting whole – have been applied in the same manner to three-dimensional signs by the CFI. Thus the packaging of fruit juice combining a common shape with minor design elements does not make any markedly different impression from that of the appearance of a generic stand-up pouch, and this form of packaging is either already in common use on the market, or is susceptible to be generally used for all types of drinks¹⁵.

The shape of a long-necked bottle in which a slice of lemon is fixed does not “differentiate itself materially” from the ordinary shapes of containers for the drinks in question that are commonly used in trade; rather it appears to be a variant of these shapes¹⁶. Similarly, it is (or could be) usual to display a bottle with a slice of lemon that is likely to be placed in the neck of the bottle. The sum of these elements in this configuration does not present any “added value” in comparison with the individual elements taken together.

7 Decision of the Fourth Board of Appeal of 19 January 2004 in Case R 186/2000-4 (Fragrance (olfactory mark)), paras. 17-19.
8 Decision of the First Board of Appeal of 24 May 2004 in Case R 591/2003-1 (Smell of ripe strawberry (olfactory mark)), paras. 16-24 (appeal pending before the CFI).
9 ECJ Judgment of 16 September 2004 in Case C-404/02, *Nichols plc v Registrar of Trade Marks*, paras. 31-33.
10 ECJ Judgment of 21 October 2004 in Case C-64/02 P (*Das Prinzip der Bequemlichkeit*), paras. 32 and 36 (this is an appeal against the judgment of the CFI of 11 December 2001 in Case T-138/00).
11 ECJ Judgment ‘*Das Prinzip der Bequemlichkeit*’ cited above, para. 35.

12 CFI Judgment of 31 March 2004 in Case T-216/02 (LOOKS LIKE GRASS... FEELS LIKE GRASS... PLAYS LIKE GRASS), paras. 30-34.
13 CFI Judgment of 30 June 2004 in Case T-281/02 (*Mehr für Ihr Geld*), paras. 29-31.
14 CFI Judgment of 8 July 2004 in Case T-270/02 (*Bestpartner*), paras 25-26.
15 CFI Judgment of 28 January 2004 in Joined Cases T-146/02 to T-153/02 (shape of an upright carton), paras. 49-52
16 CFI Judgment of 29 April 2004 in Case T-399/02 (Long necked bottle in which is a slice of lemon has been plugged), para. 33.

CAN A BUILDING BE A TRADE MARK?

Basically yes, according to the Boards of Appeal. The fact that Art. 4 CTMR refers only to “the shape of goods or of their packaging” in relation to three-dimensional signs does not invalidate this assessment. The decisive factor in assessing a sign is its capability of being represented graphically and its distinctive character in the abstract, not its inclusion in a list of examples (“particularly”). However, the sign applied for, the Smart Tower, was not found to have distinctive character according to Art. 7 CTMR and therefore was denied registration.

The same reasoning is valid for colour marks, rejected under Art. 7(1)(b) CTMR when “...the shade employed does not present a sufficiently perceptible difference with respect to the shades of plum or of red commonly utilised in the designated product sector” (alcoholic drinks, in particular wines)¹⁷. The Boards of Appeal also rejected an application for a two-colour mark, stating that a reference to two colours “claimed as a separate colour combination in any manifestation” does not meet the requirements of graphical representation under Art. 4 CTMR.

The factors permitting a judgment to be made on the absence of distinctive character therefore seemed to be firmly established, until the ECJ cast doubt on the matter with its decision SAT.2, which accepted the appeal and found that the sign in question was distinctive for services “connected to satellite broadcasting”¹⁸.

The ECJ found that the criterion according to which the need of others to be able to use a particular sign is a criterion applicable to an examination of *descriptiveness* under Art. 7(1)(c), but not to distinctiveness under Art. 7(1)(b) CTMR¹⁹. As regards the public policy underlying the refusal for lack of distinctiveness, the Court referred to its decision in *Libertel*²⁰ that as regards colours the public interest behind Art. 7(1)(b) CTMR is aimed at the need not to restrict unduly their availability, while as regards other signs the public interest coincides with the requirement of distinctiveness²¹.

17 Decision of the First Board of Appeal of 17 December 2003 in Case R 287/2001 (Plum colour), para. 18.

18 ECJ Judgment of 16 September 2004 in Case C-329/02 P (SAT.2), (appeal against the judgment of the CFI of 2 July 2002 in Case T-323/00).

19 ECJ Judgment ‘SAT.2’ cited above, para. 36.

20 ECJ Judgment ‘Libertel’ cited above, para. 60.

21 ECJ Judgment ‘SAT.2’ cited above, para. 26.

The ECJ criticised the CFI for having based its analysis on the “...presumption that elements individually devoid of distinctive character cannot, on being combined, present such a character...”, and for having “...examined the impression as a whole produced by the term only secondarily, refusing to give any relevance to aspects such as the existence of an element of imaginativeness, which ought to be taken into account in such analysis”²². As a consequence of this analysis the CFI had, according to the ECJ, come to the conclusion that there was a lack of distinctive character without submitting the sign as a whole to the test of perception by the average consumer.

The ECJ then considers relevant a circumstance which is usually used to support a finding of lack of distinctiveness when it states: “The frequent use of trade marks consisting of a word and a number in the telecommunications sector indicates that that type of combination cannot be considered to be devoid, in principle, of distinctive character”²³.

Whether the SAT.2 decision signals a general departure from previously accepted principles appears doubtful in view of subsequent decisions, as, for example, the ECJ’s decision in *Mag Instruments v OHIM*²⁴. The ECJ rejected the appeal in this case and supported the decision of the CFI that the sign (a torch shape) should not be registered to the extent that it was “not distinguishable from the shapes of the same type of goods commonly found in the trade”²⁵.

In paragraph 31 of its decision, the ECJ follows the reasoning of the CFI and confirms its own previous case-law when it finds that “...the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Art. 7(1)(b) of Regulation No 40/94. Only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin, is not devoid of any distinctive character for the purposes of that provision”²⁶.

22 ECJ Judgment ‘SAT.2’ cited above, para. 35.

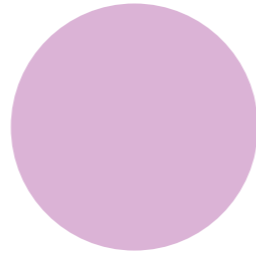
23 ECJ Judgment ‘SAT.2’ cited above, para. 44.

24 ECJ Judgment of 7 October 2004 in Case C-136/02 P (Three-dimensional torch shapes).

25 CFI Judgment of 7 February 2002 in Case T-88/00 (Three-dimensional torch shapes), para. 37.

26 See also ECJ Judgment of 29 April 2004 in Joined Cases C-468/01 P to C-472/01 P (Three-dimensional tablets for washing machines or dishwashers), (appeals against CFI Judgments T-117/00 to T-121/00), para. 37.





Finally, in its decision in *Orange*, the ECJ rejected the appeal and confirmed that the shade of the colour was neither distinctive for agricultural, horticultural and forest products in class 31, nor for treatment installations in classes 7 and 11, to the degree that “the shade of orange claimed or very similar shades, is not rare”²⁷.

DESCRIPTIVE SIGNS

In two judgments made on the same day, *Postkantoor*²⁸, and *Biomild*²⁹, the ECJ defined precisely what criteria are applicable when deciding whether a sign is descriptive.

First, the Court confirmed that there exists an overlap between Arts.3(1)(a), (b), (c) and (d) of the Trade Mark Directive (equivalent to Arts.7(1)(a) to (d) of the CTMR) even if each of these grounds of refusal must be examined separately. A word mark that is descriptive is, from this fact, *necessarily* devoid of distinctive character.

The ECJ then established a presumption that if a mark is composed exclusively of descriptive elements, it is itself descriptive, unless there is a perceptible difference between the word and the mere sum of its parts³⁰. The ECJ also stated that when it is a question of determining if a mark is to be considered as consisting exclusively of descriptive signs or indications, the fact that there are synonyms capable of indicating the same characteristics is irrelevant³¹.

The ECJ in these two cases has introduced some radical changes in the way descriptive character is assessed that are open to a certain degree of criticism. First, the Court considers that if the mark is a word mark, destined to be heard as much as read, registration should be refused if the descriptive character of the mark is either visually perceptible or aurally perceptible³².

In its decisions since February 2004 (the date of the ECJ’s *Postkantoor* decision), the CFI has made no reference to this double prohibition. In addition the Board of Appeal has not followed this analysis when it accepted the mark WRIGHT

²⁷ ECJ Judgment ‘Orange’ cited above.

²⁸ ECJ Judgment of 12 February 2004 in Case C-363/99 (*Postkantoor*).

²⁹ ECJ Judgment of 12 February 2004 in Case C-265/00 (*Biomild*).

³⁰ ECJ Judgment ‘*Postkantoor*’ cited above, para.100.

³¹ See also ECJ Judgment of 23 October 2003 in Case C-191/01 P (*Doublemint*).

³² ECJ Judgment ‘*Postkantoor*’ cited above, para.99.



TOOL (that is “right tool”) for tools and tool boxes in classes 6, 8 and 20³³. In three decisions taken after *Postkantoor*, that is *Telepharmacy Solutions*, *Limo*, and *Applied Molecular Evolution*, the CFI has not followed the innovations of the ECJ and has maintained the reasoning that to be descriptive a sign must either directly describe the goods and services, or designate one of their essential characteristics³⁴.

FUNCTIONAL SHAPES

This ground of refusal has rarely been raised before the OHIM; it is therefore of particular interest that it has been the subject of a carefully reasoned decision of the Cancellation Division which revoked the registration of a three-dimensional mark in the form of a brick for a construction game. The form of the brick is “necessary to obtain a technical result...” if “the respective element was absent, the technical result would not be obtained, and if the respective element was altered substantially, the technical result would also alter substantially”³⁵.

It is irrelevant whether or not other means of achieving the same technical result exist. The Cancellation Division found that the shape as a whole of the toy bricks was necessary to perform a technical function and that this technical function was itself essential to the bricks. Finally, the application specified that the bricks were red. The Cancellation Division found that this, in accordance with the case-law of the ECJ, was not sufficient to be an indicator of commercial origin³⁶, and that it was not possible to overcome an objection under Art. 7(1)(e)(ii) by adding non-distinctive elements.

GEOGRAPHICAL INDICATIONS

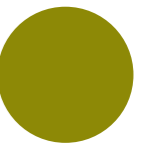
Trade marks for wines which contain or consist of a geographical indication identifying wines or spirits must be refused when the wines or spirits identified do not actually have the origin indicated by the geographical origin. This principle was elaborated by the Board of Appeal when it confirmed

³³ Decision of the Second Board of Appeal of 27 April 2004 in Case R 063/2003-2 (*Wright tool*).

³⁴ CFI judgments of 8 July 2004 in Case T-289/02 (*Telepharmacy Solutions*), of 20 July 2004 in Case T-311/02, (*Limo*), para. 41, and of 14 September 2004 in Case T-183/03 (*Applied Molecular Evolution*), para. 14.

³⁵ Decision of the Cancellation Division of 30 July 2004, 63 C 107029/1, (*Toy Bricks*), paras. 47-49, 52, 68.

³⁶ ‘*Toy Bricks*’ decision of the Cancellation Division as cited above, paras. 66 to 71.



the revocation of the figurative mark *Manzanilla Gonzalez Palacio* for “manzanilla type wines”. The Board held that this phrase was wider than “Manzanilla wines” and therefore covered more than wines with the “Manzanilla” appellation of origin, and thus breached Art. 7(1)(j) CTMR.³⁷

ACQUISITION OF DISTINCTIVENESS THROUGH USE

A combined reading of Arts.7(2) and (3) CTMR indicates that the acquisition of distinctiveness must be proved in that part of the Community where distinctiveness is lacking. It should be kept in mind that, save for rare exceptions, a three-dimensional mark for a “bare” shape is likely to lack distinctiveness *per se* in all of the Community.

The commonly accepted position is that the European Community must be considered as a whole and that the distinctive character acquired through the use of that trade mark must be demonstrated in the substantial part of the Community where it was devoid of any such character³⁸. Thus, neither the letter nor the spirit of Art. 7(3) CTMR seem to be opposed to a claim for distinctiveness in the Community being based on documents relating to the single market as a whole (all territories together), without analysing in depth the situation in each Member State.

This approach has not been followed by the CFI in its *Shape of a long-necked bottle* decision³⁹. The Court established that the applicant’s evidence referring in a general way to various Member States “does not provide any precise information as to the market share held by the mark applied for and as to amounts invested by the company to promote it”⁴⁰. Finally, the CFI observed that in the case of an application for a mark consisting of a bare shape, the use of this mark in association with word elements makes it impossible to determine whether the mark has acquired distinctiveness as a result of its shape, the word elements, or a combination of both⁴¹.

³⁷ Decision of the First Board of Appeal of 11 June 2004 in Case R 0946/2002-1 (MANZANILLA GONZALEZ PALACIOS (Fig. mark)), paras. 15-16.

³⁸ See CFI judgments of 5 March 2003 in Case T-237/01 (BSS), para. 52, of 3 December 2003 in Case T-16/02 (TDI), para. 52 and of 30 March 2000 in Case T-91/99 (Options), para. 27.

³⁹ CFI Judgment of 29 April 2004 in Case T-399/02 (Long necked bottle in which is a slice of lemon has been plugged).

⁴⁰ CFI Judgment in Case T-399/02 cited above, para. 50.

⁴¹ CFI Judgment in Case T-399/02 cited above, para. 51.

GENERICISATION

In *Bostongurka*⁴², the ECJ held that the question as to whether a mark has become generic depends on the perception of the relevant public to which the mark is addressed. If that “public” comprises not only ultimate consumers or end users of the product in question but also intermediaries in the chain of distribution, the opinion of all those in trade dealing with the product commercially is equally relevant.

RELATIVE GROUNDS FOR REFUSAL

PROCEDURAL QUESTIONS

Art. 73 concerns both the requirement to give reasons for a decision (first sentence) and the right to be heard (second sentence).

When it is a question of giving the reasons for a decision, the CFI indicated that the Boards of Appeal do not have to develop fully each of the grounds upon which their decisions are based, if they expressly adopt for a particular ground the reasoning of the Opposition Division on this point⁴³.

When it is a question of the right to be heard, the CFI annulled a decision upon the basis that this decision was founded on elements that had not been submitted to one of the parties, in this case the opponent, who did not have the opportunity to respond to certain submissions of the applicant on the evidence of proof of use⁴⁴.

On the other hand, it is within the discretion of the OHIM to decide whether oral hearings under Art. 75(1) CTMR will be held. The refusal to hold an oral hearing does not violate the right to be heard when the submissions which the party in question wishes to make are not such as to modify the decision⁴⁵.

Art. 74(1) CTMR sets out the framework within which the OHIM can examine the facts, and Art. 74(2) gives a discretionary power to disregard facts or evidence not submitted in due time.

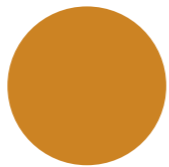
⁴² ECJ Judgment of 29 April 2004 in Case C-371/02 (Bostongurka), paras. 24-26.

⁴³ CFI Judgment of 13 July 2004 in Case T-115/03 (Blue Jeans Gas/Gas Station), paras. 17-19. This judgment relates to an *inter partes* case, but should be equally applicable to *ex parte* cases.

⁴⁴ CFI Judgment of 8 July 2004 in Case T-334/01 (Hippovit/Hippoviton), paras. 54-55.

⁴⁵ CFI Judgment of 13 July 2004 in Case T-115/02 (“a”/“á”), para. 30.





In *inter partes* cases, the OHIM is limited to the examination of facts and evidence submitted by the parties. However, the OHIM does not violate Art. 74(1) CTMR if it accepts without evidence well-known facts that are likely to be known to anyone, or which may be learnt from generally accessible sources. An example of such a fact is that Pablo Picasso is a famous painter. Requiring a party to prove this is something that would unnecessarily increase the burden of proceedings. This avoids decisions that are based on a factual basis that is manifestly incomplete or contrary to reality⁴⁶.

Is the OHIM bound to accept facts put forward by one party that are not contested by the other party? With certain exceptions⁴⁷, the Boards of Appeal contest the application of this principle of civil procedure to the administrative procedure of an appeal. This is based upon the fact that Art. 74(1) says "...the Office shall examine the facts of its own motion..." which is usually interpreted by the Boards of Appeal as meaning that it falls upon the OHIM to proceed to its own examination of the facts, evidence and observations of the parties⁴⁸.

In the case *Hubert/Saint-Hubert 41*⁴⁹, the appellant submitted that the CFI had infringed the principle under which the parties determine the scope of the case; in particular, the appellant argued that both parties before the CFI (that is the opponent in the original opposition proceedings and the OHIM) had agreed that the signs were phonetically similar and that there was a likelihood of confusion, and that therefore the CFI should have adopted these findings.

The ECJ rejected this argument⁵⁰. The basis for the ECJ's rejection was the specific position of the OHIM as a party⁵¹: the OHIM may not alter the subject matter of the dispute. This does not mean however that the OHIM cannot seek to overturn a decision of the Board of Appeal, once it is reckoned that the CFI is not bound by the points of agreement between the OHIM and the applicant. In the *BIOMET* case the CFI accepted that the OHIM has the right to take views or positions different from those in the contested Board decision.

⁴⁶ CFI Judgment of 22 June 2004 in Case T-185/02 (*Picaro/Picasso*), paras. 29-32.

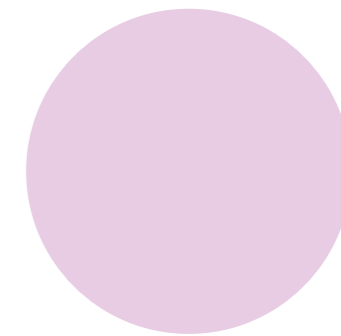
⁴⁷ Decision of the Third Board of Appeal of 25 April 2001 in Case R-501/2000-3 (*Mademoiselle/Mademoiselle B.*), para. 14: the OHIM cannot contest *ex officio* the validity of an earlier right if the applicant has not contested it.

⁴⁸ An interpretation which has been confirmed by the judgment of the CFI of 13 June 2002 in Case T-232/00 (*Chef/Cheff*), para. 45.

⁴⁹ CFI Judgment of 12 December 2002 in Case T-110/01 (*Hubert/Saint-Hubert 41*), (appeal brought before the ECJ) and ruled on in October 2004).

⁵⁰ ECJ Judgment of 12 October 2004 in Case C-106/03 P (*Hubert/Saint-Hubert 41*), paras. 26 and 37.

⁵¹ ECJ Judgment '*Hubert/Saint-Hubert 41*' cited above, paras. 50 and 51



In 2003, the decision *Kleencare/Carclin*⁵² indicated that the Boards of Appeal should re-examine *ex officio* all of the legal and factual aspects of the litigation. In this line of reasoning, the decision *Vitafruit/Vitafruit* decided that the examination of an appeal by a Board is not limited to the issues raised by the appellant⁵³.

The 1st Board of Appeal considers, however, that the re-examination is limited to those matters of fact and law that are linked to the substance of the case, and does not extend to questions of the formal regularity and admissibility of the opposition, which cannot be challenged for the first time before it⁵⁴.

Anticipating the modifications which will be made to Art. 8 of the Rules of Procedure of the Boards of Appeal, in the case of *Dual Force/Dual*, the 1st Board has accepted some submissions from the defendant in the form of a "counterclaim" which sought a reformulation of the decision attacked upon the basis of a point that was not raised in the appeal⁵⁵.

The *Kleencare/Carclin* decision of the CFI appears to encourage the Boards of Appeal to exercise the discretionary power conferred by Art. 74(2) CTMR to accept new evidence and facts outside of the time limits fixed by the body of the OHIM that made the first instance decision that is now being appealed against⁵⁶.

To this extent, the *Kleencare/Carclin* decision contradicts the earlier case-law of the CFI relating to the peremptory nature of certain time limits, which, if breached, leads to an automatic sanction that escapes the discretionary power of Art. 74(2) CTMR. Examples of such peremptory time limits are Rule 22 IR for proof of use⁵⁷, and Rule 18 IR for the submission of elements relating to the admissibility of a notice of opposition⁵⁸.

⁵² CFI Judgment of 23 September 2003 in Case T-308/01 (*Kleencare/Carclin*).

⁵³ CFI Judgment of 8 July 2004 in Case T-203/02 (*Vitafruit/Vitafruit*), para. 21. However, that does not mean that the Board of Appeal is required, every time it annuls a decision, to consider, of its own initiative, whether that decision is flawed by a substantial procedural violation such as to justify the application of Rule 51 IR (reimbursement of appeal fee), where the application is unsupported by specific allegations. See CFI judgment of 28 April 2004 in Joined Cases T-124/02 and T-156/02 (*Vitastate/Vitakraft*), para. 70.

⁵⁴ Decisions of the First Board of Appeal of 26 January 2004 in Case R 166/2003-1 (*Chovi/Covo*), para. 14 and of 18 February 2004 in Case R 949/2001-1 (*Tosca Blu (Fig. mark)/Tosca*), para. 13-16.

⁵⁵ Decision of the First Board of Appeal of 19 January 2004 in Case R 97/2003-1 (*Dual Force/ Dual*), paras. 12-16. According to the Opposition Division, the earlier mark had been put to genuine use, but there was no likelihood of confusion. In the decision of the Board, it was stated that the applicant could not appeal as the opposition decision was in its favour. The applicant could however still contest the assessment of the use of the earlier mark by a "counterclaim". See also the decision of the Third Board of Appeal of 1 April 2003 in Case R 1127/2000-3 (*Vips/Vips*), (appeal pending before the CFI) where a "counter-appeal" was said to be not possible, each party having to file a separate notice of appeal if it was dissatisfied with the first decision.

⁵⁶ See CFI judgment '*Kleencare/Carclin*' cited above, paras. 28, 30 – 32.

⁵⁷ CFI Judgment of 23 October 2002 in Case T-388/00 (*ILS/ELS*), paras. 28-30.



In its decision in *Hippovit/Hipoviton*⁵⁹ the CFI applied the *Kleencare/Carclin* principle by faulting the Board for not having taken into account “additional evidence ... where new factors emerge, even if such evidence is adduced after the expiry of that time-limit”.

Finally, in its decision *Kaul v OHIM (CAPOL/ARCOL)*⁶⁰ the CFI took the view that in order for Art. 74 (2) to be applied by the Boards, the submission of facts and evidence must be late in regard to the Board proceedings (and not the first instance proceedings), which is said not to be the case if such new facts and evidence are submitted within the period for submitting a written statement setting out the grounds of the appeal.

The OHIM considers the *CAPOL/ARCOL* case to be based on an erroneous perception of the respective roles of the opposition divisions and the Boards and of the rules applicable in these proceedings and has therefore decided to bring an appeal against this decision to the ECJ.

According to well-established case-law, evidence presented for the first time before the CFI is inadmissible⁶¹.

The CFI has found that the OHIM only has to take into account one, or a part, of the earlier rights invoked, where the rejection of the CTM application in its totality does not require a decision to be made on the other earlier rights put forward by the opponent in support of his opposition⁶². An express request by an opponent that the OHIM examines the relative grounds for refusal in each of the Member States where it has earlier rights does not bind the OHIM to do so⁶³.

The CFI has also confirmed that the absolute grounds for refusal cannot be raised in the framework of an *inter partes* procedure based upon relative grounds for refusal⁶⁴.

LIKELIHOOD OF CONFUSION

The risk of confusion is in principle appreciated from the point of view of the final consumer of the goods and services in question⁶⁵. That requires taking into account not only the actual situation at the point of sale, but also, depending on the situation involved, pre-sale situations (such as use in advertising), and post-sale situations, such as when the product purchased is actually used. The analysis of likelihood of confusion usually proceeds in three steps: a comparison of the products to determine whether they are similar or not; a comparison of the signs applying visual, phonetic, and conceptual criteria; and an overall evaluation of all the relevant circumstances of the case, such as the degree of proximity of the products and the signs, the degree of distinctiveness of the earlier sign, the degree of sophistication of the public concerned, etc.

The CFI confirmed the importance of a conceptual analysis of the signs, it being possible to overcome visual or phonetic similarities when the signs have a clear and definite meaning, as was the case, for example with the sign *Sir* (*against Zirh*)⁶⁶, with *Galáxia* (*against Gala*)⁶⁷, or with *Picasso* (*against Picaro*)⁶⁸.

In certain cases, the use of the earlier mark can be such as to acquire a certain reputation, as an indication of origin, for goods and services other than those relied upon in the opposition. In these cases, this reputation is without incidence on the appreciation of the risk of confusion. So, for example, if the opponent's mark has a reputation for beer, but in this opposition is registered for clothing, the applicant cannot raise this as a factor lessening the likelihood of confusion⁶⁹. However, if the mark has become well known in a context other than as indicating the origin of goods and services (for example, as the name of the cartoon character Asterix)⁷⁰ this can be an important factor in differentiating the marks conceptually.

This was the case with the name Picasso, whose function as a family name overwhelms its distinctive capacity as a word as such. The impossibility of separating this name from the personality of the famous Spanish painter

58 CFI Judgment ‘Chef/Cheff’ cited above, para. 35.

59 CFI Judgment ‘Hippovit/Hipoviton’ cited above, paras. 56-58.

60 CFI Judgment of 10 November 2004 in Case T-164/02 (*CAPOL/ARCOL*).

61 For example, see CFI Judgment of 18 February 2004 in Case T-10/03 (*Conforflex/Flex*), para. 52.

62 CFI Judgment of 17 March 2004 in Joined Cases T-183/02 and T-184/02 (*Mundicor/Mundicolor*), paras. 70-72.

63 CFI Judgment of 16 September 2004 in Case T-342/02 (*MGM/MGM*), para. 48.

64 CFI Judgment of 30 June 2004 in Case T-186/02 (*Dieselit/Diesel*), paras. 70-71.

65 CFI Judgment of 22 June 2004 in Case T-185/02 (*Picaro/Picasso*), paras. 51 and 59-60.

66 CFI Judgment of 3 March 2004 in Case T-355/02 (*Zirh/Sir*), para. 50.

67 CFI Judgment of 22 June 2004 in Case T-66/03 (*Galáxia/Gala*), para. 27.

68 CFI Judgment of 22 June 2004 in Case T-185/02 (*Picaro/Picasso*), para. 57.

69 CFI Judgment of 3 July 2003 in Case T-129/01 (*Bud/Budmen*), para. 56.

damages its capacity to act as an indicator of origin for vehicles and prevents it having a high degree of distinctive character in relation to these products⁷¹.

The meaning of a sign is appreciated by considering the sign as a whole. Thus the combination of the words ‘mundi’ and ‘color’ is devoid of a clear and precise meaning even if each of these elements has a clear meaning⁷². Although the word ‘vita’ may evoke “... a very general meaning suggesting a positive quality attributable to a large range of different goods or services...”⁷³, the public does not consider such elements as being the distinctive and dominant element of the mark and thus this word does not give the word ‘Vitakraft’ a definite meaning in Spanish which distinguishes it conceptually from ‘Krafft’⁷⁴.

A descriptive element that is common to two signs cannot be dominant; it is a subsidiary element in the global comparison of the marks, the important factor being the differences between the distinctive elements of the two signs. For instance, the prefix ‘chuf’ being descriptive in Spanish for tiger nuts, a comparison of the signs ‘Chufi’ and ‘Chufafit’ must focus on the final syllable that contains the distinctive element of the marks⁷⁵.

Common suggestive elements are taken into consideration in the comparison of signs. Thus the earlier right ‘Happidog’ and the semi-figurative application for ‘Happy dog’ were found to be phonetically and conceptually identical and to cover identical goods and services. This was sufficient to find a likelihood of confusion even though the sign ‘Happidog’ is very suggestive (indeed orally descriptive) of dog food⁷⁶.

A similar approach was adopted in a comparison of the earlier mark ‘Flex’ with the application ‘Conforflex’, where flex was the dominant element as ‘confor’ was descriptive. As the signs were similar and the goods identical, a likelihood of confusion was found, despite the fact that the earlier mark might be suggestive (if not descriptive) for bedding products and could only claim a very limited range of protection⁷⁷.

As far as visual and phonetic similarities are concerned, the CFI confirmed that their respective importance depends on the trade channels that are usual for the goods and services concerned. The visual similarities are most important when the products are displayed prior to, and during the purchase process, rather than ordered orally. This is the case for cosmetics⁷⁸ and clothes⁷⁹.

MARKS WITH A REPUTATION

Art. 8(5) CTMR only applies to earlier *registered* marks⁸⁰. The degree of reputation required is higher where the distinctiveness *per se* of the earlier mark is weak. Thus the proof of reputation submitted in respect of the mark FEMME for perfumes did not show, in itself, a reputation such as would eclipse the descriptive sense of the sign, and hence this use was not sufficient to establish a link (as required by the ECJ decision *Adidas*) between the earlier mark and the sign of the CTM application REFLETS DE FEMME⁸¹.

Although the reputation of the earlier mark does not have to be proved to exist on the actual day of the publication of the opposed CTM application, it has been found that a reputation established more than 30 years before this date may have evaporated in the meantime, particularly if the technological development of the products in question has been such as to revolutionise the market in question⁸².

For a finding that use of the CTM application would blur the distinctiveness, or tarnish the reputation of the earlier mark, there needs to be a link between the signs and a degree of proximity between the goods and services considered, dissimilar though they may be. Thus the mark SPA for mineral water would suffer a blurring of its distinctiveness from the use of the mark AROMASPA for cosmetics, “...the distance between these products not being sufficiently large for the public not to establish a certain link between them...”⁸³.

70 CFI Judgment of 22 October 2003 in Case T-311/01 (Starix/Asterix), para. 58.

71 CFI Judgment ‘Picaro/Picasso’ cited above, paras. 57 and 61; and CFI Judgment ‘Starix/Asterix’ cited above, paras. 60-61.

72 CFI Judgment ‘Mundicor/Mundicolor’ cited above, paras. 90 and 95.

73 CFI Judgment of 6 October 2004 in Case T-356/02 (Krafft/Vitakraft), para. 52.

74 CFI Judgment ‘Krafft/Vitakraft’ cited above, para. 56.

75 CFI Judgment of 6 July 2004 in Case T-117/02 (Chufi/Chufafit), paras. 53-54.

76 CFI Judgment of 31 March 2004 in Case T-20/02 (Happy dog/Happidog), paras. 45-46.

77 CF Judgment ‘Conforflex/Flex’ cited above, paras. 56-60.

78 CFI Judgment ‘Zirh/Sir’ cited above, para. 51-54.

79 CFI Judgment of 6 October 2004 in Joined Cases T-117/03 to T-119/03 and T-171/03 (NL(fig)/ ‘NLSPORT’, ‘NLJEANS’, ‘NLACTIVE’ and ‘NLCollection’), para.50.

80 Decision of the First Board of Appeal (Tosca Blu (Fig. mark)/Tosca), cited above para. 52. The same approach is no doubt valid for Art 4(4)(a) of the First Directive 89/104/EEC of the Council, of 21 December 1988, to Approximate the Laws of the Member States Relating to Trade Marks.

81 Decision of the First Board of Appeal of 19 December 2003 in Case R 220/2001-1 (Reflets de femme/Femme), paras. 51 and 59.

82 Decision of the First Board of Appeal ‘Dual Force/Dual’ cited above, paras. 30-33.



The argument that the earlier right would have its reputation tarnished by use of the CTM application is rarely specifically advanced by opponents. It is limited to those cases where there is a sort of moral incompatibility between the goods and services of the earlier mark with a reputation, and those for which registration is sought⁸⁴.

An example of a successful action based on detriment to reputation was where the earlier mark REHAB had acquired a reputation in the field of charitable activities. The use of the sign TOTAL REHAB by a profit-making business would be detrimental to its reputation, regardless of the goods and services in question (here dietetic foods and drinks, health clubs, etc.)⁸⁵.

LIMITATIONS OF THE EFFECTS OF A MARK

The exclusive right granted to CTM proprietors does not extend to prohibiting a third party from using in the course of trade descriptive indications concerning the geographical origin of goods, provided that the third party is using such indications in accordance with honest practices in industrial or commercial matters.

In the *Kerry Spring*⁸⁶ case, the ECJ found that conformity with honest practices did not in principle mean that a descriptive indication should not be used *as a mark*, but that an investigation into the circumstances of the particular case was required. The particular circumstances to which the national court should pay attention in this case included “in particular the shape and labelling of the bottle in order to assess, more particularly, whether the producer of the drink bearing the indication of geographical origin might be regarded as unfairly competing with the proprietor of the trade mark”⁸⁷.

Art. 6(1) of the Trade Mark Directive or Art. 12 CTMR cannot however be interpreted as conferring a right to register a mark that includes or consists of a descriptive indication. The limitation on the rights of a proprietor of a mark cannot therefore be invoked in either examination⁸⁸ or opposition⁸⁹ proceedings.

83 Decision of the Second Board of Appeal of 12 December 2003 in Case R 168/2003-2 (Spa/Aromaspa), paras. 26-28.

84 Decision of the Third Board of Appeal of 25 April 2001 in Case R 283/1999-3 (Hollywood/Hollywood) (chewing gum against tobacco) and of the First Board of Appeal of 26 March 2003 in Case R 165/2002-1 (Chivas/Chivas Regal) (whisky against animal feed).

85 Decision of First Board of Appeal of 14 July 2004 in Case R 311/2003-1 (Total Rehab/Rehab), paras. 93-96.

86 ECJ Judgment of 7 January 2004 in Case C-100/02 (Kerry Spring), paras. 19-27.

87 ECJ Judgment ‘Kerry Spring’ cited above, para. 26.

88 ECJ Judgment of 16 September 2004 in Case C-404/02, *Nicolas plc v Registrar of Trade Marks*, paras. 31-33; ECJ Judgment ‘Das Prinzip der Bequemlichkeit’ cited above, para. 45; ECJ Judgment ‘Libertel’ cited above, para. 59.

THE USE REQUIREMENT

It has been established since the *Minimax*⁹⁰ decision that use does not have to be particularly quantitatively significant to be characterised as genuine use. The order of the ECJ in *La Mer* states: “Even minimal use can therefore be sufficient to qualify as genuine, on condition that it is deemed to be justified, in the economic sector concerned, for the purpose of preserving or creating market share for the goods or services protected by the mark.”⁹¹

With this approach the ECJ has diverged from the past case-law of the CFI, according to which the economic difficulties and thus the particular circumstances encountered by an enterprise were not an excuse for the weakness of its sales⁹². The ECJ has also indicated that the circumstances subsequent to the five-year proof of use period can be taken into account to appreciate the genuineness of the use provided they translate the real intentions of the proprietor during that five-year period⁹³.

In the *Hipovit/Hippoviton* case, the CFI set out the factors relevant for an assessment of genuine use as being the volume of commercial activity, the production or marketing capacities or the degree of diversification of the undertaking exploiting the mark⁹⁴. The ratio of the sales figures generated for products under the mark to the total turnover of the mark owner are a minor factor and are not decisive in an assessment of genuine use⁹⁵.

Sales figures under the earlier mark that are low in number and/or value can be justified by the particular circumstances of the proprietor of the earlier mark. However, “the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the party opposing new registration to produce additional evidence to dispel possible doubts as to its genuineness”⁹⁶.

That a product is in its commercial launch phase can be a justification for a low level of sales⁹⁷. In the *Hipovit/Hippoviton* case, the sales were for 450 units, with a value of €6 000 over a period of four and a half months.

89 CFI Judgment ‘Happidog/Happy dog’ cited above, para. 56.

90 ECJ Judgment of 11 March 2003 in Case C-40/01 (Minimax), para. 39.

91 ECJ Order of 27 January 2004 in Case C-259/02 (La Mer), para. 21 See also paras. 18-27.

92 CFI Judgment of 9 July 2003 in Case T-156/01 (Miss Giorgi/Giorgio Aire), para. 39-42.

93 ECJ Order ‘La Mer’ cited above, para. 31 See also paras. 18-27.

94 CFI Judgment ‘Hippovit/Hipoviton’ cited above, para. 36.

95 CFI Judgment ‘Hippovit/Hipoviton’ cited above, para. 50.

96 CFI Judgment ‘Hippovit/Hipoviton’ cited above, para. 37.

In the case *Vitafruit/Vitafruit*, the sales amounted to 3 500 units with a value of €4 800 over a period of 11 months. The CFI held in the latter case that this figure “is not so low that it may be concluded that the use is merely token, minimal or notional for the sole purpose of preserving the rights conferred by the mark”⁹⁸.

Unless there is an explicit objection from the proprietor, the consent of the proprietor is presumed when the mark is used by a third party⁹⁹. However, OHIM cannot find that there has been a genuine use of a mark simply on the basis of some catalogues, the mere submission of which is supposed to demonstrate a wide use of the mark. Such evidence on its own does not demonstrate how widely such catalogues were distributed, nor how many sales were made: “The mere existence of those catalogues could, at most, make it probable or credible that goods protected by the earlier marks were sold or, at least, offered for sale within the relevant territory, but it cannot prove that fact.”¹⁰⁰

Pursuant to Art. 43(2) CTMR, a mark that is subject to an obligation of proof of use is treated as if it is registered only for the *actual* goods and services for which use is proved. This is the case for a mark registered for “fruit and vegetable juices without fermentation (except must)”, and used for “concentrated juices of various fruits”, even though the goods of the registration and the goods used form a homogenous category of products as to their nature and end use¹⁰¹.

The starting date for calculating the five-year period after which the obligation of use arises is the date of registration (Art. 43(2) CTMR). This must be understood as “the date of the completion of the registration procedure” (Art. 10(1) of Council Directive 89/104/EEC). If it is a question of international marks, the relevant date is not the registration date at the International Bureau, but the date at which registration formalities are completed at national level (that is in the countries designated in the international registration)¹⁰².

This date of completion of the registration formalities of an international trade mark can be delayed for a maximum period of 12 or 18 months¹⁰³ if there is no provisional refusal and, if a notice of provisional refusal has been sent to WIPO by the office of the designated Contracting Party, until a final decision is delivered as regards the absolute or relative ground in question¹⁰⁴.

This approach is that of Art. 155 CTMR¹⁰⁵, which is applicable to international registrations designating the European Community: when the registration formalities have been completed by OHIM, this date is published by OHIM according to Art. 147 CTMR, and it is from this date of publication that the five-year grace period begins to run.

If it is a question of national systems which open opposition proceedings after registration (for example, Germany), the date of completion of the registration formalities can only happen after a decision has been made rejecting the opposition. Thus, for example, a German national mark that has been registered for more than five years is not subject to an obligation to provide proof of use if it was subject to an opposition that only closed two years before the publication of the opposed CTM application¹⁰⁶.

Art. 43(2) CTMR and Rule 22(1) IR are silent on the time period within which a request that the opponent provides proof of use must be submitted. The CFI has not clarified this question to any great degree by finding that, “the request must be made expressly and timely to OHIM”¹⁰⁷.

The Boards of Appeal consider that a request for proof of use submitted to them for the first time is inadmissible.¹⁰⁸ A case is pending before the CFI where the CFI has to decide upon the admissibility of such a request filed before the Opposition Division after proceedings had been closed, but before the notification of the decision¹⁰⁹.

97 CFI Judgment ‘Hippovit/Hipoviton’ cited above, para. 53.

98 CFI Judgment ‘Vitafruit/Vitafruit’ cited above, para. 49.

99 CFI Judgment ‘Vitafruit/Vitafruit’ cited above, paras. 24-28.

100 CFI Judgment ‘Krafft/Vitakraft’ cited above, para. 34. See also paras. 31-33.

101 CFI Judgment ‘Vitafruit/Vitafruit’ cited above, paras. 5 and 51-54.

102 Decision of the Fourth Board of Appeal of 20 November 2001 in Case R 776/2000-4 (Naturôme/Naturoma), paras. 14-16.

103 Time period granted by Art 5(2) Madrid Agreement or Art 5(2)(b) Madrid Protocol for offices of the designated Contracting Parties to notify provisional refusals.

104 Rule 17(5)(a) of the Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement

105 Introduced by Council Regulation (EC) No 1992/2003 of 27 October 2003. This Regulation entered into force on 1 October 2004.

106 Decision of the Second Board of Appeal of 29 April 2004 in Case R 625/2003-2 (Cuk/Puck), paras. 27-28.

107 CFI Judgment ‘Mundicor/Mundicolor’ cited above, para. 38.

108 Decision of the First Board of Appeal of 3 February 2004 in Case R 415/2003-1 (Elite/Elite Elite (Fig. mark)), para. 20; Decision of the First Board of Appeal ‘Tosca Blu (Fig. mark) /Tosca’ cited above, para. 35.

109 Decision of the Fourth Board of Appeal of 15 January 2003 in Case R 396/2001-4 (Flex/Flexi Air), (appeal pending before the CFI).

THE FIRST FULL YEAR OF THE RCD

Promoting the registered Community design

2004 was the first full year of the registered Community design (RCD) and activity focused on examining, registering and publishing the RCD applications as efficiently as possible. By early December 2004, 12 812 applications were received comprising 48 465 designs. After less than two years of activity, the OHIM is now ranked second in the world in terms of filing and registration of designs, behind only China.

The process of registering Community design applications is now swift and efficient. Out of the cumulative figure of 89 092 designs received since April 2003, 88% have already been processed and published. Less than 1% of applications are either considered not to meet the legal conditions required, refused during examination proceedings after the grant of the filing date, or withdrawn by the applicant. The three-month target for publishing most applications is now being met in all straightforward cases.

Applicants from western countries dominate the ownership of RCDs; those from EU Member States own 77% of Community designs and just five countries (Germany, the United Kingdom, Italy, France and Spain) account for 65% of the designs. It is interesting to note that, at the top of the ranking, there is a clear difference between the profile of CTM owners (25% are of US origin) and the profile of RCD owners (25% are of German origin).

The ownership of RCDs is also concentrated in a relatively small number of industries: nearly 80% of designs are in the 13 top Locarno classes. The five industries which use the system most represent 40% of design applications; these are furnishing (6), packaging (9), clothing (2), fluid distribution equipment (23) and household goods (7).



NEW RULES TO APPLY

As part of the obligation on the OHIM to apply the international rules on classification, 2004 saw the entry into force of a new edition of the Locarno Classification, a designs-related international classification of products prepared under the aegis of WIPO in 1968 and duly revised every five years by a panel of experts from 44 Member States. The OHIM uses this classification to classify the products which designs are applied to or incorporated into.

On 1 January 2004, the 8th edition of the Locarno Classification entered into force. This reclassified some products, added new products and created new subclasses. It is applied by the OHIM for all RCD applications filed on or after that date. Pending RCD applications or already registered Community designs having a filing date prior to 1 January 2004 will not be reclassified and there will be no option for their reclassification available to RCD applicants or proprietors, even at the time of the renewal, for a new period of five years.

This new classification had repercussions for the more extensive Eurolocarno database created by the OHIM, giving about 1 500 new words, translated into the 20 official languages of the EU. The database now contains 6 687 original terms (all translated into the other 19 languages). To respond to the needs of the system, Eurolocarno should be sufficiently complete to allow all applicants to find appropriate terms to cover their designs. An ongoing expansion procedure was put in place in 2004.

The registered
Community design
goes electronic

E-BUSINESS AND DESIGNS

In the context of the OHIM's e-business initiative, the difficulties of the RCD e-filing system were addressed and an improved version of this tool was released in November. At present, 13% of RCD applications are made electronically, while RCDs have been published online since the first publication in April 2003.

However, at present only the RCD Bulletin can be accessed online. It is hoped that RCD-ONLINE, a new project launched by the OHIM during 2004, will meet the need of users and national offices to access information on RCDs. The RCD-ONLINE system aims to enhance the transparency of the OHIM's RCD operations and to enable users to access non-confidential information on RCDs more easily. In particular, users need to have simple and quick access to the RCD database to handle earlier rights searches before applying for RCD or CTM applications.

THE HAGUE AGREEMENT

The OHIM will monitor the developments regarding the international registration of designs by WIPO and the prospect of eventual accession to the Geneva Act of the Hague Agreement (which entered into force on 23 December 2003). A public survey was launched in January 2004 by the European Commission to evaluate the opportunity for the EU to join this instrument, but the Commission has not yet reached a formal proposal. The OHIM has started to prepare for this eventuality and to contribute to the smooth operation of the international registration system, in the event of accession.

DESIGNS EXAMINATION

The target of processing RCD applications which contain no specific formality or other problem within three months has been reached regularly this year, mainly thanks to the examiners' efforts and also the efforts invested in new working tools such as the examination guidelines. The examination guidelines are available in all five languages of the OHIM on the website. The ongoing internal training was seen as crucial to harmonise the way decisions are made.





Building and maintaining a quality-based process for registering Community designs is a commitment from the OHIM towards its users. With this aim, the following have been carried out during 2004: quality control and inspections (regarding the Community Designs Bulletin), and Design examination process documentation.

DESIGNS INVALIDITY

The granting of registered Community design rights is not subject to substantive examination. As a consequence, the control of the validity of registered designs is centralised in post-registration proceedings before the OHIM or before Community designs courts. This is a key part of a strong Community design system. Consolidation of the RCD will largely depend on how effective enforcement actions are and how the validity of registered designs is controlled within the established proceedings.

Guidelines for the proceedings relating to a declaration of invalidity of a registered Community design were adopted by the President of the OHIM on 26 April 2004 and published in the June 2004 issue of the OHIM Official Journal. The guidelines are available on the OHIM's website in the five languages of the OHIM and the procedure has been made as simple as possible. As users need accurate and swift invalidity decisions, the purpose of the guidelines is to avoid long proceedings and unnecessary exchanges between parties and to reduce to the minimum the number of notifications. To facilitate this, parties are advised to present all grounds, facts and evidence in the same document. As a consequence and in practice, the general rule is that a second round of argument between parties remains exceptional. On average, decisions are reached in about six months even though the classic legal rules of party protection are binding on the invalidity division.

On 27 April 2004, the first invalidity decision was taken by the OHIM in Italian. In this decision, the OHIM decided to cancel the registration of a Community design (a stool). To date, 60 invalidity applications have been received, 13 decisions have been taken and are available on the OHIM's website in the language of the proceedings. Half of the RCD invalidity applications have been made by Spanish applicants but in 50% of the cases the language of proceedings is English.

In two-thirds of the 13 cases decided so far, the RCD was declared invalid. In these cases, and as a general rule, the invalidity costs are borne by the holder of the RCD, a fact that should encourage the public to defend rights which they believe are infringed by a RCD.



Consolidating
the system



Customer care

Many relevant changes occurred during 2004 that required a general re-orientation of the global communication strategy of the OHIM. Priority was given to a more specific targeting of actions, based on market studies and analysis carried out. A clear differentiation was established between the two main target groups: the IP profession at large, and the potential users of the CTM and RCD systems.

The main needs of the IP profession are to receive in-depth and first-hand information on the OHIM's practice and developments to be able to advise their clients. In 2004 important developments had to be communicated: the enlargement of the EU; the adoption of the modifications of the Community Trade Mark Regulation; and the long-awaited link between the Madrid Protocol and the Community trade mark system. In addition to this, the OHIM embarked on a revolutionary approach to communication with a wide-ranging e-business project.

The OHIM participated in a large number of events in the new Member States in order to inform users of the new opportunities that enlargement brings for these countries. In particular, the OHIM participated in numerous activities organised by TAIEX, the Technical Assistance and Information Exchange unit of the Enlargement Directorate General of the European Commission. Information on the major changes in the Community Trade Mark Regulation was communicated to the users of the system during IP congresses, national days and other events.

For the link between the Madrid Protocol and the Community trade mark system, a communication strategy was developed and implemented from the end of September. A series of seminars was held, starting with a Conference on the Accession of the European Community to the Madrid Protocol at WIPO, followed by other events in the US, Japan, South Korea, Switzerland, Italy and Turkey. Similar events will follow in the near future.



A new pilot project was launched for the first target group, with two training sessions on the filing of RCD applications for administrative staff of law firms and associations were carried out in Alicante. The response was extremely positive with great interest being shown by the IP profession for such training activities.

For the second target group – the potential users of any of the two systems – the approach had to be completely different, since here the main focus had to be on raising the general awareness of the importance of IPR in general and the existence of the CTM and RCD systems in particular. Due to the difficulty of reaching a large number of companies, the OHIM is collaborating with existing networks and information channels. Important steps in this direction have been undertaken during 2004: partnership training for the European Information Centre network was organised and held in Alicante, at the OHIM's premises. This is considered to be a starting point for increasing collaboration.

EC TECHNICAL ASSISTANCE PROGRAMMES

ECAP II, EU-CHINA S2 AND CARDS

The OHIM continued to implement ECAP II, EU-China S2 and CARDS, in 2004. While the EU-China S2 programme was finished in July, ECAP II and CARDS will continue until 2006 and 2005, respectively.

During the course of 2004, three new countries in south-east Asia became beneficiaries of the EC-ASEAN Intellectual Property Rights Co-operation Programme (ECAP II), namely Laos, Cambodia and Malaysia. While national activities also began with Indonesia in 2004, OHIM continued to implement trade mark and design activities at regional and national level with the Philippines, Singapore, Thailand and Vietnam. The main areas of co-operation were the administration of trade marks and designs, in particular human resource development, and IP awareness. In addition, the OHIM carried out two regional activities that addressed pertinent legal and administrative issues relating to the Community design system.

The Work Plan Programme was also completed successfully. Seven activities have taken place this year either in the EU or China to complete the 14 activities foreseen. The Programme has covered all aspects of the administration and functioning of a trade mark office and the European system of protecting geographical indications. The topics covered in the activities carried out this year have been: practical aspects of registration of geographical indications; financial and budget systems of trade mark offices; raising awareness for entrepreneurs in China; trade mark examination guidelines; well-known trade marks; practice on examination, opposition and cancellation of trade marks; and a geographical indications study tour in the EU. In addition the Chinese translation of the OHIM's examination and opposition guidelines was published in the framework of the Programme.

The implementation of the CARDS programme with the Balkan countries (Albania, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia and Serbia-Montenegro) started in 2004 with an introductory seminar in each country. Two additional regional seminars were carried out: one on trade mark procedures that was held in Alicante in April and the other on the Community trade mark system held in Zagreb in June.

LIAISON MEETINGS AND NEW INITIATIVES

As in previous years, three Liaison Meetings (Procedure & Practice, IT & Information and Design) were held in Alicante. Member States, candidate countries and EFTA countries, as well as EC, WIPO and EPO, participated in these. The results of the work of the ad hoc Working Group on XML, created in 2003, were approved by the IT & Information Liaison Meeting in June, which meant the adoption of a European XML standard for trade marks.

The ever-increasing technical relations between the OHIM and national offices, both within and outside the EU, led to the creation of the team on relations with IP Offices on 1 October. The main task of this team is to facilitate contact and maintain communication channels between the OHIM and national offices to improve and enhance the information flow.



CUSTOMER CARE UNIT

A Customer Care Unit (CCU) has been created to centralise and deal effectively with customer complaints concerning CTMs and RCDs. The aim is to submit a formal written answer to customers in no more than 15 working days from the reception of the complaint. The procedure will consist in forwarding the complaint to the affected department so that it can send back the elements of response to the CCU and the unit can submit the final reply to the customer. A specific e-mail address and fax number have been created to encourage customers to submit their complaints directly to the CCU. A promotional text has also been placed on the OHIM website so that customers know about the new customer-orientated service and become familiar with it.

PROMOTING THE RCD

As part of its attempts to raise awareness of the Community design, the OHIM has intensified its relationships with the design world's main players such as BEDA (Bureau of European Designers Association), the ISCID (International Council of Societies of Industrial design) and ICOGRADA (International Council of Graphic Design Associations), which are now invited to the OAMI Users Group.

The OHIM actively communicated on the RCD to international associations such as AIPLA, INTA and ECTA and also at the national level (notably in the German paralegal day, UK day, IBC in United Kingdom, ITMA, Italian Day, French day, Andema in Spain, Finland, APRAM and Congrès Scientifique International de l'AEDA in France, CLIPAS). Some foreign delegations also had the main points of the RCD presented to them (notably delegations from Romania, Turkey, ECAP, Saudi Arabia, and the WIPO/EPO/OHIM IP experts training programme).

Cooperation continued with the IP offices of the EU Member States and the Benelux Designs Office to discuss technical examination policies and other subjects of common interest. In total, 31 delegations attended the third Design Liaison Meeting.

The OHIM's group of experts in design matters met three times in 2004. Two meetings were largely dedicated to a project for a European Design Award which the European Commission intends to create. Through this group of experts OHIM provided the opportunity for the Commission to meet the major players in the design field. They were consulted on the feasibility of the whole project and on its practicalities.

Effort was also made to train the personnel of the OHIM and a total of 45 people received information sessions. Systematically, all newly-hired personnel are trained in designs.

Promoting
our services
worldwide



Improving
HR policies

During 2004, the OHIM continued with its efforts to improve its existing HR policies as well as to launch new policies to ensure the sound management of the OHIM and its business.

Compared with the previous year, 2004 saw an increase in the number of OHIM staff, mainly due to continuing recruitment of temporary staff (most of them coming from the new Member States) and national experts seconded from the national offices. At the end of 2004, the OHIM had 668 officials, temporary staff members and seconded national experts within an establishment plan of 675 posts. However, during 2004 a temporary pool of agency staff (equivalent to some 20 people during the year) undertook tasks either to overcome the backlog or as part of the outsourcing of some tasks. Apart from that, some 100 additional external staff (agency staff doing replacements, trainees, IT staff and others) have worked at the OHIM.

More precisely, some 30 temporary staff from the new Member States and 15 seconded national experts – from the national offices of the UK, Norway, Denmark, Switzerland, Germany, Netherlands, Slovakia, the Czech Republic and Portugal – were working in the OHIM by the end of 2004. During 2004 a new selection procedure for temporary staff from the new Member States was launched in order to establish reserve lists to cover the departures (due to end of contract) due in 2005.

2004 saw the definition (and agreement with the staff) of a long-term employment policy. This policy is based on a steady workload (to be reached some time in 2008 once the e-business, the Madrid Protocol, the gains in productivity and some outsourcing projects have produced results) in which 630 posts will be needed. The employment policy is based on the assumption that up to 80% of the business plan can be met by permanent staff, so that at least 20% of staff have flexible contracts. This flexible side will consist of temporary staff with contracts of up to five years and national experts seconded for up to three years. The permanent side of the establishment plan will be filled, when vacancies arise, with EU officials recruited via external competitions organised



in cooperation between OHIM and the European Personnel Selection Office (EPSO). A transitory solution has been found for temporary staff in place at the OHIM at present until the moment of the first OHIM external competition (due in 2007 or 2008).

One of the new HR-related policies that the OHIM developed during 2004 is teleworking.

In the first pilot project (started in 2003), the technical equipment for teleworkers was tested on the OHIM premises. When it was clear that the basic equipment was functional, a second pilot project was launched. This involved fifteen members of staff becoming full-time teleworkers, based at home. The pilot project ran for six months and tested the technical equipment at a distance as well as the communication infrastructure and logistic aspects.

Following the positive results of the pilot project, the OHIM management decided to launch a third pilot project on a larger scale and over a longer period which will focus on the impact of teleworking on staff and management.

Training,
teleworking,
appraisal

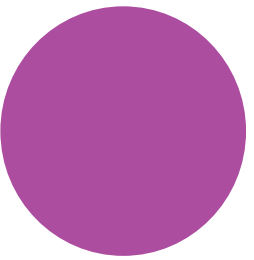
TRAINING AND APPRAISAL

2004 has seen the maintenance of the level of training undertaken in 2003 (about 10 training days per head on average) with an increase in the offer of training in the IP field. 2004 also saw the fine-tuning of the appraisal and promotion procedures modified in 2002 and 2003 as well as the elaboration of the OHIM's job mapping and its inclusion in the SAP HR database.

In particular this year, training in the impact of enlargement for the OHIM and the CTM and RCD systems was provided involving three sessions, plus several more for trade mark examiners. In addition, as part of a continuing process, staff from many of the new Member States were recruited and trained before 1 May.

A risk-prevention policy was installed in the OHIM in 2004 and the ergonomic and safety aspects of the work have been integrated into the current practices of the OHIM. The social policies and activities of the OHIM were maintained in 2004 in parallel with the launch of a rethinking of those policies as well as a reflection on the appropriate organisational structures in which they should be implemented.

The new Staff Regulations of Officials of the European Communities approved in Brussels entered into force on 1 May 2004. The total implementation of that reform by the OHIM will not be completed until the beginning of 2005.



In 2004, OHIM focused on two main targets: the concentration of the real-estate portfolio in one area of Alicante and the implementation within the OHIM premises of an activity-based physical work environment. To achieve the concentration of the real-estate portfolio, a new office building was rented close to the OHIM headquarters, whose construction was completed at the end of the year. This new building will replace the provisional buildings in central Alicante during 2005.

The implementation of an activity-based environment started with the creation of pilot spaces in the OHIM's headquarters, organised according to this alternative model of workspace. Its use will constitute an experiment for the definition of the internal space in the aforementioned newly-rented building, which will become in turn a prototype for the implementation of an activity-based environment in the OHIM headquarters.

At the same time, given the current security situation, a plan was implemented to increase the physical protection of the OHIM buildings.

The OHIM continues to focus on investment to improve the speed, efficiency and quality of registering Community trade marks and designs in the medium term. 2004 saw the consolidation and development of a number of initiatives begun in 2003. In particular, attention focused on improving the e-business services and enhancing the back-office trade mark and designs information systems.

IMPROVING CLIENT SERVICE

A first wave of e-business improvements were launched in 2004. Users can now access the EUROACE classification tool directly via the Internet, use the goods and services as stored on the OHIM database and insert them directly into the e-filing form. Upon receipt of electronically-filed applications, users instantly receive a CTM application number and subsequently a receipt.

There is also bi-directional e-communication up to publication of the application via the mailbox on MyPage, which is the password-protected personalised part of the OHIM website. This gives clients one information point for all CTM-related activities (new and recent filings, searches, links to databases, communication to and from the OHIM, etc.) as well as faster and more direct communication from OHIM (via the MyPage mailbox).

The CTM e-filing system was updated and improved, and the Madrid Protocol was also made available online. CTM-ONLINE 2004 offers applicants and other interested parties online access to trade mark data including status information and enhanced search capabilities. By mid-2005, CTM files will be available online as will the forms to request inspection of files. The second wave of e-business is underway and the new services due to be launched during 2005 are:

- > e-search – providing search reports via MyPage.
- > RCD-ONLINE – the same service as CTM-ONLINE but for designs, allowing users to carry out basic and detailed searches, making information easier to understand and to access.
- > E-OPPOSITION – enabling clients to file oppositions online and to receive communications via a mailbox.
- > MyCalendar – an additional tool on MyPage, enabling deadlines in CTM files to be viewed.

A third wave of projects was begun in October 2004. These include:

- > e-renewal – the renewal of Community trade mark applications online.
- > e-person – owners and representatives may update information recorded under their Euromarc ID directly via MyPage.

Other developments during 2004 included an operational exchange system of data (B2B), allowing applicants to integrate the e-filing process into their own internal systems and offering them the possibility to initiate a batch filing of trade marks. In addition, efforts were made to develop and enhance back-office internal management systems for the Boards of Appeal and for asset and financial management, taking into account the new Financial Regulation requirements. The document-management project delivered its first results and will gradually grow in 2005 towards an integrated system for managing files, documents and images.

IMPROVING EFFICIENCY

During 2004, the OHIM also started the Euromarc ++ project. This will provide a new transactional tool to support the CTM business and eventually replace the Euromarc system now in use.

The requirements for the new system are based on the principles defined in collaboration with the management of the OHIM, i.e. enhanced flexibility, simplicity and transparency, the possibility for one examiner to deal with one trade mark application from the start to the end of the registration procedure (“one file, one examiner”), and finally, in the wake of the e-business strategy, reconciliation of back and front office systems.

This overhaul will provide staff with a reliable, convenient, high-performance tool and users with information that is clear, comprehensive and correct. It will ultimately enable users to carry out more of their business online, and empower them to take more control of their applications, thereby simplifying the registration process.

The first module of Euromarc++ will cover the CTM examination process (that is, the period from the filing date check to the publication of the application). Work on this module started in August 2004 and it is expected to go into production at the end of 2005.

IT INFRASTRUCTURE, TECHNOLOGY AND SECURITY

Further enhancements were made to secure information and increase the availability of systems. The ISO17799 certification process, started in 2003 and aiming to put in place a security management framework with the adequate security measures implemented and controlled, led to the certification of the OHIM for the process of registering Community designs.

A first version of the European trade mark XML standard, TM-XML, was realised in collaboration with national offices and international IP organisations. This data format standardises the trade mark business language and will facilitate information exchange and collaboration between all stakeholders in the trade mark business process.

THE OHIM'S FINANCIAL EVOLUTION IN 2004

The significant number of CTM applications and the corresponding fee income allowed the OHIM, already back in 1997, to cover its expenditure, to become self-financing and to build up a substantial reserve of €72 million by the year-end 2003.

During 2004, the OHIM experienced several events with significant budgetary impact. Some are mentioned in this Annual Report: an increase in the number of CTM and RCD applications, elimination of the CTM examination backlog, e-business; other events were the result of decisions taken previously which became effective in 2004: EU-enlargement, new prices for search reports.

In 2004, revenue showed a very positive evolution, with an 18% increase in comparison to 2003, reaching €131 million, a record for the OHIM, thanks to a higher than foreseen number of CTM applications (nearly 60 000 instead of 53 000). 2004 was also the first full year of operation of the Community design system, with expectations largely exceeded (close to 50 000 designs instead of 40 000), leading to income from design fees of €11 million, twice as much as in 2003.

Of course, revenue depends on client demand for services. Almost 90% of revenue relates to application and registration fees, including additional class fees. Variations, such as the increase in revenue in 2004, are outside the direct control of the OHIM.

Expenditure increased by 19% compared to 2003 and reached €115 million, but still remained 11% lower than budgeted, mainly thanks to important reductions in procedural costs. 48% of expenditure concerned staff (salaries, training, recruitment, etc.), whereas 23% related to buildings, IT, infrastructure and other operating expenses and 29% were directly linked to the CTM and RCD registration procedure, particularly search reports and translations.

Staff expenditure increased by 12% due to higher salaries (usual salary increases pursuant to the Staff Regulations and the impact of the reform of the Staff Regulations) and to more external staff (agency staff, national

experts) being employed and reached €55 million. The 675 posts foreseen in the Establishment Plan remained stable. The significant productivity increase described in the Annual Report (CTM and design examination, opposition) more than compensated for these increases.

Expenditure on buildings, IT, infrastructure and other operating expenses reached €27 million, +12%. This significant increase is basically due to the substantial investments in e-business, document management and improvements in administrative IT systems.

The most notable variation in expenditure concerned procedural operations (search reports, translations, publication). Expenditure on procedural operations reached €33 million, + 40%, and was a direct consequence of the elimination of the backlog in CTM examination resulting in an average increase in national searches, translations and publication of 64%, 86% and 61% respectively.

The number of countries carrying out national searches and the number of languages to be translated significantly increased after EU enlargement. The effect of this on expenditure was rather limited in 2004 due to the normal delays in processing CTMs. Efforts aiming at mitigating expected increases in procedural costs were already initiated in 2003 and showed their first fruits in 2004: lower prices for search reports (€20 instead of €28), lower translation prices, improved re-use of translations thanks to the Euronice tool and better planning of CTM and RCD translations.

The much higher than expected number of CTM and RCD applications, savings in general and the important efforts in reducing translation costs converted the €11 million deficit foreseen in the 2004 budget into a €19 million surplus. One essential change in the way of dealing with CTMs is the Madrid Protocol, to which the European Community acceded on 1 October 2004. Its effects on the OHIM's finances are important, not so much as far as the year 2004 is concerned, but in the mid- to long-term, as the new procedure requires less examination work and no translations. This will lead to substantial savings. This same logic applies also to the new version of e-filing that went live in November 2004.

As a consequence of these developments and taking into account income from renewals in 2006, the OHIM's profitability has significantly improved. The OHIM has started to work with the European Commission with a view to passing on savings to its clients by reducing its fees in the near future.



BUDGETARY EXECUTION

A strong
and solid
position

BUDGETARY INCOME 2004

CTM fees:	115 091 126.00 €
Design fees:	11 217 278.40 €
Publications:	797 877.53 €
Other services:	359 411.76 €
Bank interest:	3 189 591.74 €
TOTAL:	130 655 285.43 €

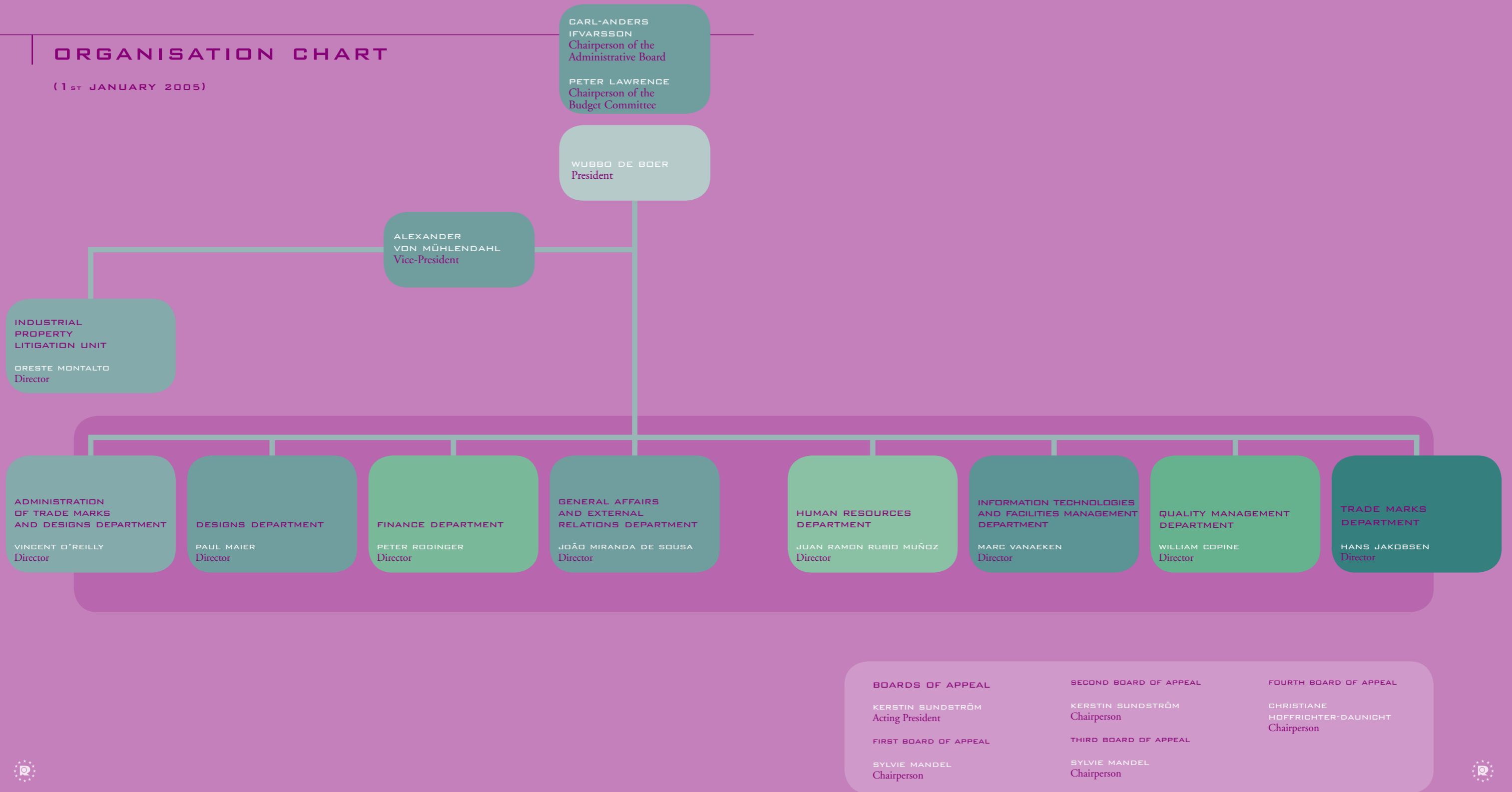
BUDGETARY EXPENDITURE 2004

> Staff expenditure:	54 665 550.64 €
> Buildings, equipment and miscellaneous operating expenditure:	27 214 781.78 €
> Publishing, promotion and integration:	529 491.39 €
> Expenditure regarding the Community trade mark registration procedure:	32 179 154.88 €
> Expenditure regarding the Community design registration procedure	69 000.00 €
> TOTAL:	114 657 978.69 €



ORGANISATION CHART

(1ST JANUARY 2005)



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[http://mineco.fgov.be/organization_](http://mineco.fgov.be/organization_market/index_nl.htm)
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Υπουργείο Εμπορίου,
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[ipo.asp/](http://www.commerce.gov.mt/about_ipo.asp/)

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STATISTICS

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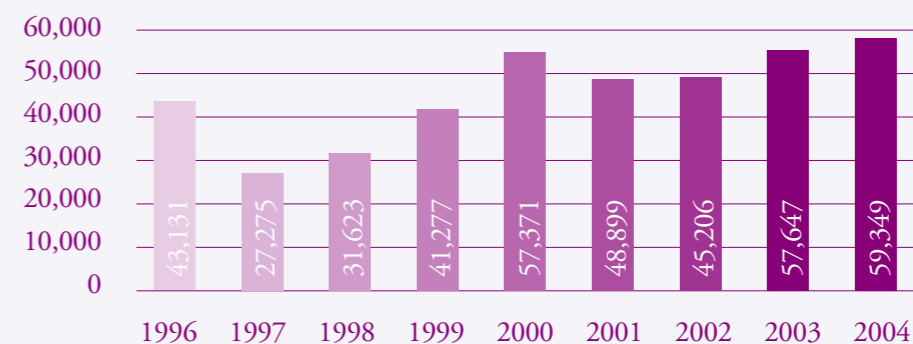
OVERVIEW

COMMUNITY TRADE MARKS	PREVIOUS YEARS	2004	CUMULATIVE
Community trade mark applications	352,429	59,349	411,778
Registrations	203,173	34,484	237,657

OPPOSITIONS	PREVIOUS YEARS	2004	CUMULATIVE
Oppositions	66,635	10,725	77,360
Oppositions settled	47,096	9,704	56,800

APPEALS	PREVIOUS YEARS	2004	CUMULATIVE
Appeals before the Boards of Appeal	5,149	1,208	6,357
- Appeals settled	4,256	1,075	5,331
Appeals before the CFI	272	110	382
- Cases concluded before the CFI	115	76	191
Appeals before the ECJ	28	7	35
- Cases concluded before the ECJ	4	22	26

COMMUNITY TRADE MARK (CTM) APPLICATIONS



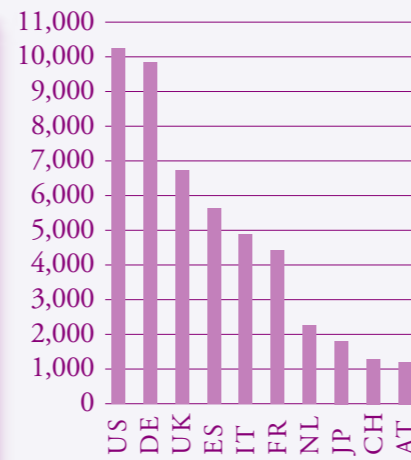
Total: 411,778
Average: 45,753



BREAKDOWN OF CTM APPLICATIONS BY COUNTRY OF ORIGIN

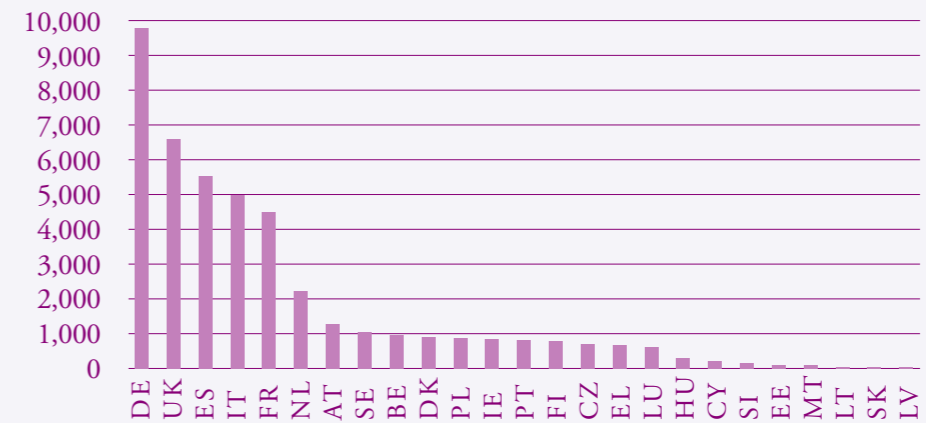
COUNTRY (TOP 10)	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
(US) United States of America	10,708	24.31	10,314	17.38	95,977
(DE) Germany	7,223	16.40	9,772	16.47	67,558
(GB) United Kingdom	5,588	12.68	6,593	11.11	51,297
(IT) Italy	3,281	7.45	4,967	8.37	31,218
(ES) Spain	3,136	7.12	5,546	9.34	30,634
(FR) France	2,805	6.37	4,494	7.57	26,933
(NL) Netherlands	1,212	2.75	2,117	3.57	11,811
(JP) Japan	1,263	2.87	1,487	2.51	11,590
(CH) Switzerland	959	2.18	1,339	2.26	9,007
(SE) Sweden	923	2.10	1,021	1.72	8,405
TOTAL (TOP 10)	37,098	84.21	47,650	80.29	344,430
TOTAL OTHER	6,956	15.79	11,699	19.71	67,348
TOTAL	44,054	100.00	59,349	100.00	411,778

COUNTRY (TOP 10) 2004	2004	%
(US) United States of America	10,314	17.38
(DE) Germany	9,772	16.47
(GB) United Kingdom	6,593	11.11
(ES) Spain	5,546	9.34
(IT) Italy	4,967	8.37
(FR) France	4,494	7.57
(NL) Netherlands	2,117	3.57
(JP) Japan	1,487	2.51
(CH) Switzerland	1,339	2.26
(AT) Austria	1,317	2.22
TOTAL (TOP 10)	47,946	80.79
TOTAL OTHER	11,403	19.21
TOTAL	59,349	100.00



MARKET	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
EU	27,776	63.05	40,759	68.68	262,967
NON-EU	16,278	36.95	18,590	31.32	148,811
TOTAL	44,054	100.00	59,349	100.00	411,778

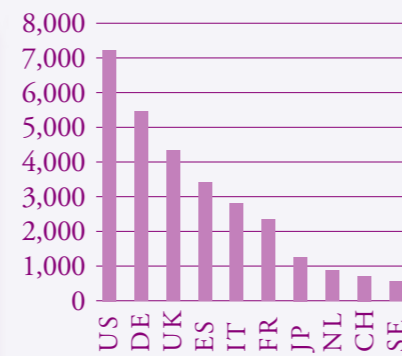
EUROPEAN UNION	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
(BE) Belgium	651	1.48	870	1.47	6,079
(CZ) Czech Republic	25	0.06	295	0.50	473
(DK) Denmark	692	1.57	764	1.29	6,301
(DE) Germany	7,223	16.40	9,772	16.47	67,558
(EE) Estonia	7	0.01	31	0.05	57
(GR) Greece	137	0.31	277	0.47	1,376
(ES) Spain	3,136	7.12	5,546	9.34	30,634
(FR) France	2,805	6.37	4,494	7.57	26,933
(IE) Ireland	407	0.92	546	0.92	3,798
(IT) Italy	3,281	7.45	4,967	8.37	31,218
(CY) Cyprus	35	0.08	88	0.15	365
(LV) Latvia	2	0.00	8	0.01	12
(LT) Lithuania	3	0.01	17	0.03	28
(LU) Luxembourg	225	0.51	266	0.45	2,065
(HU) Hungary	23	0.05	117	0.20	301
(MT) Malta	9	0.02	28	0.05	102
(NL) Netherlands	1,212	2.75	2,117	3.57	11,811
(AT) Austria	649	1.47	1,317	2.22	6,510
(PL) Poland	32	0.07	583	0.98	837
(PT) Portugal	308	0.70	508	0.86	2,971
(SI) Slovenia	10	0.02	77	0.13	154
(SK) Slovakia	4	0.01	16	0.03	29
(FI) Finland	402	0.91	441	0.74	3,653
(SE) Sweden	923	2.10	1,021	1.72	8,405
(GB) United Kingdom	5,588	12.68	6,593	11.11	51,297



BREAKDOWN OF REGISTERED TRADE MARKS BY COUNTRY OF ORIGIN

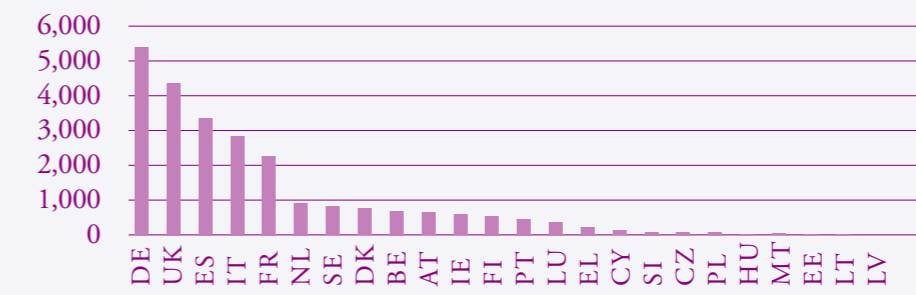
COUNTRY (TOP 10)	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
(US) United States of America	7,225	24.89	7,129	20.67	57,704
(DE) Germany	4,843	16.69	5,323	15.44	39,226
(GB) United Kingdom	3,672	12.65	4,315	12.51	30,019
(IT) Italy	2,265	7.80	2,889	8.38	18,745
(ES) Spain	1,899	6.54	3,309	9.60	16,605
(FR) France	1,839	6.34	2,232	6.47	15,106
(JP) Japan	897	3.09	1,128	3.27	7,410
(NL) Netherlands	739	2.55	918	2.66	6,090
(CH) Switzerland	649	2.24	795	2.31	5,340
(SE) Sweden	652	2.25	659	1.91	5,223
TOTAL (TOP 10)	24,682	85.04	28,697	83.22	201,468
TOTAL OTHER	4,343	14.96	5,787	16.78	36,189
TOTAL	29,025	100.00	34,484	100.00	237,657

COUNTRY (TOP 10) 2004	2004	%
(US) United States of America	7,129	12.01
(DE) Germany	5,323	8.97
(GB) United Kingdom	4,315	7.27
(ES) Spain	3,309	5.58
(IT) Italy	2,889	4.87
(FR) France	2,232	3.76
(JP) Japan	1,128	1.90
(NL) Netherlands	918	1.55
(CH) Switzerland	795	1.34
(SE) Sweden	659	1.11
TOTAL (TOP 10)	28,697	83.22
TOTAL OTHER	5,787	16.78
TOTAL	34,484	100.00



MARKET	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
EU	18,228	62.80	22,310	64.70	149,907
NON-EU	10,797	37.20	12,174	35.30	87,750
TOTAL	29,025	100.00	34,484	100.00	237,657

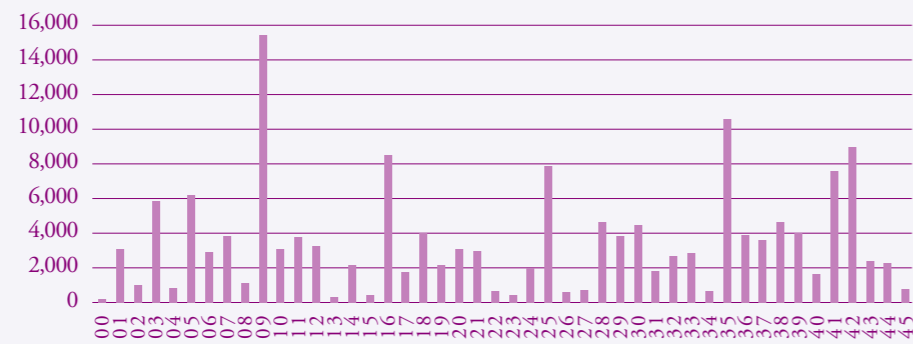
EUROPEAN UNION	AVERAGE PREVIOUS YEARS	%	2004	%	CUMULATIVE
(BE) Belgium	439	1.51	457	1.33	3,527
(CZ) Czech Republic	9	0.03	14	0.04	68
(DK) Denmark	465	1.60	546	1.58	3,803
(DE) Germany	4,843	16.69	5,323	15.44	39,226
(EE) Estonia	1	0.00	5	0.01	9
(GR) Greece	83	0.28	99	0.29	594
(ES) Spain	1,899	6.54	3,309	9.60	16,605
(FR) France	1,839	6.34	2,232	6.47	15,106
(IE) Ireland	258	0.89	360	1.04	2,167
(IT) Italy	2,265	7.80	2,889	8.38	18,745
(CY) Cyprus	22	0.08	22	0.06	175
(LV) Latvia			1	0.00	1
(LT) Lithuania	1	0.00	1	0.00	3
(LU) Luxembourg	175	0.60	142	0.41	1,190
(HU) Hungary	17	0.06	12	0.03	114
(MT) Malta	6	0.02	8	0.02	42
(NL) Netherlands	739	2.55	918	2.66	6,090
(AT) Austria	410	1.41	432	1.25	3,305
(PL) Poland	8	0.03	14	0.04	62
(PT) Portugal	201	0.69	219	0.64	1,425
(SI) Slovenia	4	0.01	15	0.04	40
(SK) Slovakia	4	0.01			7
(FI) Finland	292	1.01	318	0.92	2,361
(SE) Sweden	652	2.25	659	1.91	5,223
(GB) United Kingdom	3,672	12.65	4,315	12.51	30,019



CTM - BREAKDOWN BY CLASS - TOP 5

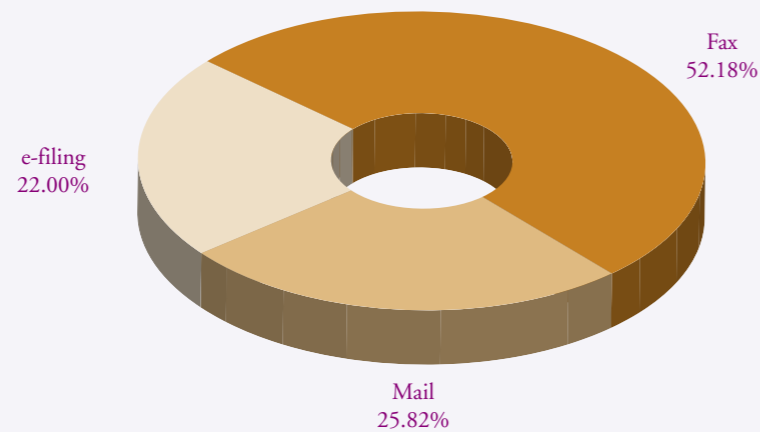
CLASS	1996 - 2003	%	2004	%	CUMULATIVE	%
09	106,964	11.51	15,311	9.64	122,275	11.24
42	80,952	8.71	9,125	5.75	90,077	8.28
35	59,520	6.40	10,744	6.76	70,264	6.46
16	60,430	6.50	8,741	5.50	69,171	6.36
41	46,490	5.00	7,805	4.91	54,295	4.99
TOTAL (TOP 5)	354,356	38.12	51,726	32.57	406,082	37.31
TOTAL OTHER	575,163	61.88	107,095	67.43	682,258	62.69
TOTAL	929,519	100.00	158,821	100.00	1,088,340	100.00

APPLICATIONS - BREAKDOWN BY CLASS 2004



BREAKDOWN BY ORIGIN

ORIGIN	2004	%
Fax	30,971	52.18
Mail	15,322	25.82
e-filing	13,056	22.00
TOTAL	34,484	100.00



OPPOSITION

CTM STATUS YEAR (OPP STATUS)	AVERAGE PREVIOUS YEARS	2003-2004
Applications published	37,654	38,219
Applications opposed	7,326	7,614
% of applications published	19.46%	19.92%

PROCESSING OF OPPOSITIONS

	2003	2004
Oppositions filed	9,938	10,725
Oppositions resolved	8,826	9,704
- by taking a decision	2,582	3,229
- without a decision	6,244	6,475
Oppositions in progress		20,560
- subject to a 'cooling-off' period		6,863

INVALIDITY/REVOCAION

	2003	2004
Applications made	271	299
Cases closed	162	250
- by taking a decision	142	237
- without a decision	20	13
Applications pending	403	452



APPEALS

APPEALS	2003	2004
Before the Boards of Appeal	719	1,208
- <i>ex parte</i>	198	406
- <i>inter partes</i>	521	802
Cases closed	1,160	1,075
Before the CFI	99	110
- <i>ex parte</i>	22	22
- <i>inter partes</i>	77	88
Cases closed	47	76
- Judgment/Order	34	63
- Removals	13	13
Before the ECJ	7	7
- <i>ex parte</i>	3	3
- <i>inter partes</i>	4	4
Cases closed	2	22
- Judgment/Order	2	21
- Removals	0	1

APPEALS BEFORE THE BOARDS OF APPEAL

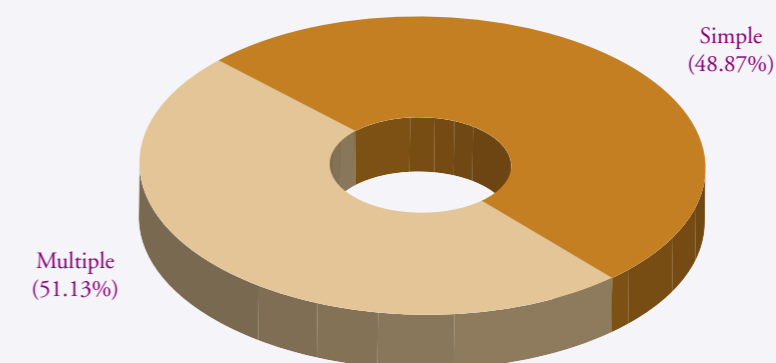
APPEALS	ex parte 2003	ex parte 2004	inter partes 2003	inter partes 2004
Appeals filed	198	406	521	802
Cases resolved (*)	350	370	810	703
- <i>without a decision</i>	18	23	28	14
- interlocutory revision	4	16	0	3
- withdrawal / restitutio in integrum	14	7	28	11
- with a decision	332	347	782	689
- inadmissibility	22	31	37	25
- upholding decision	212	257	416	378
- annulment	53	33	169	122
- partial annulment	45	26	57	63
- decision on costs after friendly settlement	0	0	103	101

(*) The number of cases closed does not necessarily coincide with cases resolved as one same appeal may entail more than one decision and one decision may close more than one appeal.

DESIGNS (RCD) - APPLICATIONS

APPLICATIONS	AVERAGE PREVIOUS YEARS	%	2004	%
Number of applications	10,472	100.00	14,012	100.00
Single applications	5,004	47.78	6,847	48.87
Multiple applications	5,468	52.22	7,165	51.13

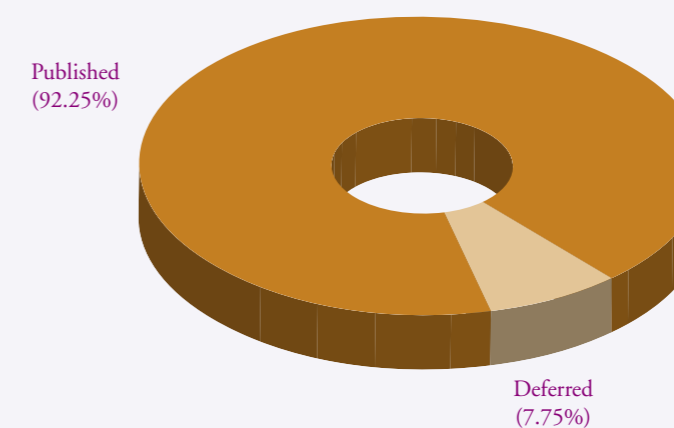
RCD - NUMBER OF APPLICATIONS (2004)



NUMBER OF DESIGNS

DESIGNS	AVERAGE PREVIOUS YEARS	2004
Designs filed	40,623	53,607
Designs withdrawn	93	292
Registered designs	19,934	57,765
Published designs	18,447	53,279
Deferred designs	1,487	4,486

NUMBER OF DESIGNS (2004)



COUNTRY OF ORIGIN OF RCD APPLICATIONS - TOP 20

NATIONALITY OF APPLICANTS	AVERAGE PREVIOUS YEARS	%	2004	%
(DE) Germany	9,922	24.42	13,322	24.85
(IT) Italy	5,763	14.19	8,271	15.43
(US) United States Of America	4,111	10.12	4,317	8.05
(GB) United Kingdom	3,579	8.81	4,264	7.95
(FR) France	2,815	6.93	4,539	8.47
(ES) Spain	2,865	7.05	3,226	6.02
(JP) Japan	1,711	4.21	2,141	3.99
(NL) Netherlands	1,575	3.88	2,189	4.08
(CH) Switzerland	1,085	2.67	1,337	2.49
(DK) Denmark	1,226	3.02	1,189	2.22
(AT) Austria	821	2.02	1,327	2.48
(SE) Sweden	1,007	2.48	856	1.60
(BE) Belgium	699	1.72	1,073	2.00
(HK) Hong Kong	617	1.52	760	1.42
(TW) Taiwan	295	0.73	535	1.00
(FI) Finland	296	0.73	530	0.99
(PT) Portugal	167	0.41	321	0.60
(IE) Ireland	171	0.42	315	0.59
(AU) Australia	197	0.48	255	0.48
(IC) British Channel Islands (Jersey & Guernsey)	187	0.46	173	0.32
TOP 20	39,109	96.27	50,940	95.02
TOTAL OTHER	1,514	3.73	2,667	4.98
TOTAL	40,623	100.00	53,607	100.00

RCD - BREAKDOWN BY CLASS - TOP 5

CLASS	AVERAGE PREVIOUS YEARS	%	2004	%
06	5,282	12.78	6,723	12.45
09	4,074	9.86	4,052	7.50
02	3,155	7.63	3,997	7.40
23	2,541	6.15	3,303	6.12
07	2,105	5.09	3,217	5.96
TOP 5	17,157	41.51	21,292	39.43
TOTAL OTHER	24,173	58.49	32,701	60.57
TOTAL	41,330	100.00	53,993	100.00



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Annual Report 2004

2005 – 88 p. – 21 x 29,7 cm

ISBN 92-9156-084-7



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