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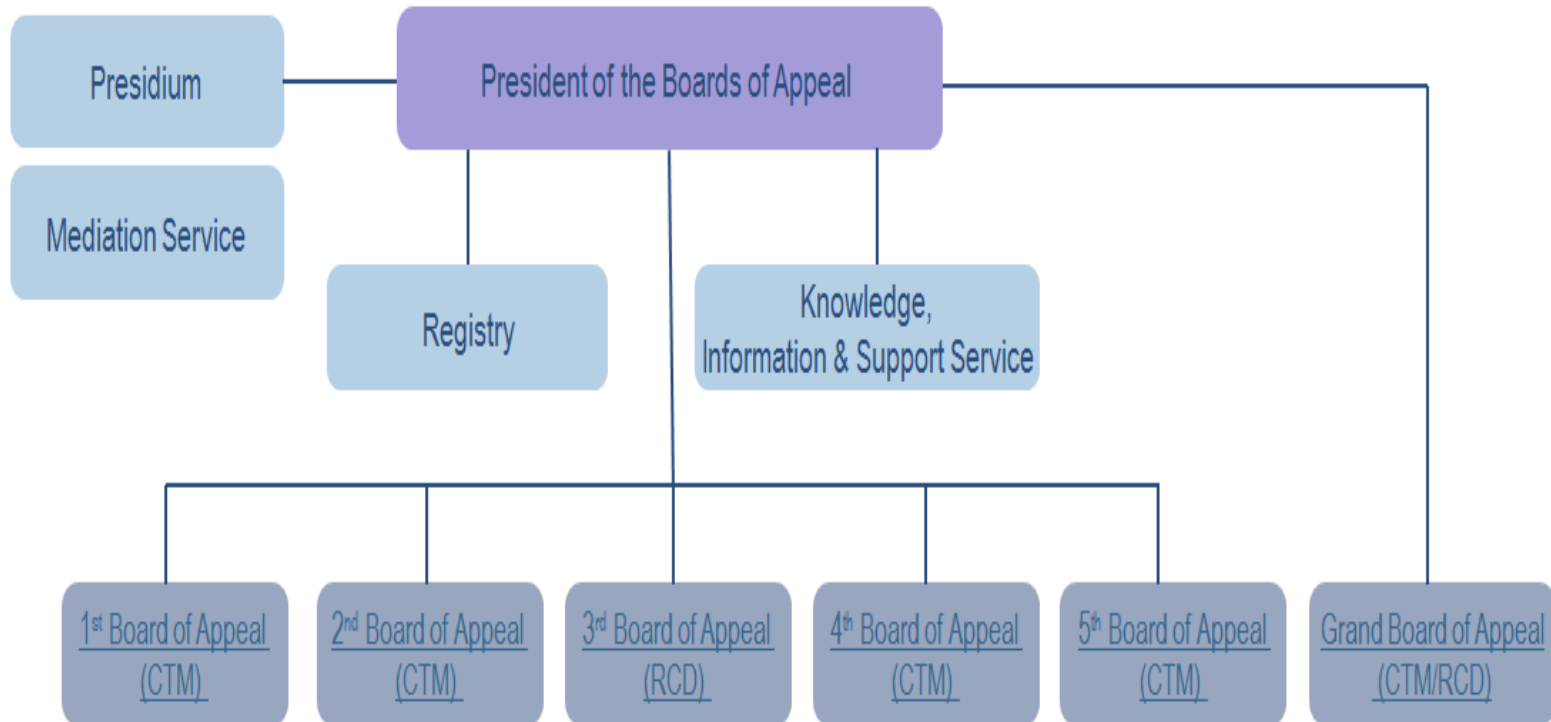
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IP and European Quasi-Judicial Bodies: Board of Appeal OHIM

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Introduction: organisation of the Boards





Composition

- A President (from Greece)
- Three chairpersons (One German, one Spanish, one UK)
- Members: 3 Germans, 1 Austrian, 1 Finish, 2 French,
2 Italians, 2 Dutch, 1 Spanish, 1 Greek,
1 Belgian, 1 Hungarian
- 6 women, 13 men

Organisation of the Boards

- MPAC – Management and Planification Advisory Committee
The MPAC was introduced by [Decision 2014-5](#) of 7 November 2014 of the Presidium of the Boards of Appeal on the organization of the Boards
- It is composed of the President of the Boards of Appeal, the Chairpersons, the Registrar and the Head of the Knowledge, Information and Support Service. It reports to the President of the Boards of Appeal and to the Presidium on any question regarding the management of the Boards of Appeal



Organisation of the Boards

- Knowledge Circle Appeal Processes
- The KC Appeal Processes was created to develop instructions for internal and external stakeholders concerning Boards of Appeal proceedings
- It is composed of the various Chairpersons of the Boards of Appeal, one Member and Legal Assistant per Board, the Registrar and representatives from ICLAD, OD and CGS



Organisation of the Boards

- CCCG-TM/D – Coherence Consistency and Convergence Group-Trade Marks / Designs established in November 2013
- CCCG-TM/D are composed of Members of the Boards of Appeal, who identify and discuss trends in the Boards' case-law, prepare comments on the Office guidelines in trade mark and design matters, participate in the legal reform of the Community Trade Mark and Design Regulation, contribute to conferences and the Liaison meetings on trade marks and designs and represent the Boards in the Office's projects that involve issues regarding trade mark and design law



The Grand Board

- Proposal for a Council Regulation amending Regulation (EC) No 40/94 on the Community trade mark COM(2002) 767, 27.12.2002
- Experience and an assessment of the functioning of the Boards of Appeal has revealed that there is a need for improvement with regard to certain aspects of these Boards. This mainly relates to giving them additional means of improving the efficiency of their activities and their output. It is also crucial for the credibility, particularly outside the EU, of the Community system and of the work carried out by the Office. It is also a crucial point for the users
- (4) In addition, in order to avoid contradictions between the various Boards in similar cases, and taking into account the difficulties this poses for the Office's work and for the outside world, it is now possible for the Boards of Appeal to take decisions, in certain cases, in an enlarged Board. The deliberations of this enlarged Board should provide useful guidelines and principles for cases which have never been addressed before in order to guarantee the consistency required in the decisions of the Boards of Appeal

The Grand Board



- Introduced in 2004
- First case in July 2006
- 19 cases since



The Enlarged Board

- Public order:1
- Emblems:1
- Geographical origin:1
- Three dimensional marks:2
- Slogan: 1
- Distinctive character: 2
- Comparison of the goods and services: 1
- Notion of complementarity of goods: 1
- Comparison of marks containing a non-distinctive element: 1
- Repeated filings:1
- Acquired distinctiveness: 1
- Procedural issues:6
- Withdrawal: 1



Composition of the Grand Board

- Article 135 and 136a(2) EUTMR
- Chaired by the President of the Boards
- Nine members, including the President of the Boards of Appeal, the chairmen of the Boards, the rapporteur designated prior to referral to the Grand Board, if applicable, and members drawn in rotation from a list comprising the names of all members of the Boards of Appeal
- Quorum: 7 Article 1b(5) Rules of procedure



Criteria for referral

- Article 135 EUTMR
- Importance of the case
- Legal difficulty
- Or any other circumstances
- Referral by the President of the Board or a Board
- Cases raising the same point of law and multiple or related appeals are referred to the Grand Board



Decision of the Grand Board

- Article 136(8) EUTMR
- Decisions taken by the Grand Board on appeals or opinions on questions of law referred to it by the Executive Director pursuant to Article 135 shall be binding on the decision-making instances of the Office referred to in Article 130



Single member Boards

- Article 135(5) CTMR and Article 1(c) RP-BoA
- Since the entry into force of Council Regulation 422/2004 the Board may decide on a single member Board composition
- The member must be legally qualified

Single member Boards

- Decision 2014-3 of 26 May 2014 of the Presidium of the Boards of Appeal on the devolution to a single member of cases on appeal against decisions of the examiners taken according to Article 7 CTMR
- Lack of legal difficulty, limited importance of the case, and the absence of other specific circumstances
- The case may be referred back to a 3 members composition by the Rapporteur of the case, notably if the single member considers that the contested decision taken by the examiner has to be annulled in part or in its entirety



Composition and Role of the Presidium

- Members are the President, the Chairpersons and elected members
- Decides:
On the composition of the Boards
- Determination of the objective allocation criteria of the appeals



Allocation of appeals to the specific Boards

- Allocated by the registry by rotation
- German to the 1st, 4th and 5th Board
- Italian 1st, 2d and 5th
- English, French and Spanish : all Boards
- Other languages
- Multiple appeals are assigned to the same Board
- Reallocation possible with agreement of the Chairpersons or by decision of the Presidium



Role of the Chairperson

Article 135 EUTMR

- Allocation of cases
- Composition of the Board for each case
- Modification of the composition: Article 2 RoP BoA



Standard of review of the decision of the 1st Instance

- De novo
- Review of all facts and evidence
- Not limited to the arguments of the parties
- Conflict (?) with to provide the grounds of appeal (in the absence of which the appeal is not admissible) and the general principle that it is for the parties to define the scope of review See Max Planck Study, par. 4.241)



Legal nature of the BoA



The Boards are not a Court of Law

- 13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 51

A procedure is, initially, a matter for OHIM, its Opposition Divisions first of all and, then, on appeal, its Boards of Appeal which, in spite of the independence enjoyed by those departments and their members, remain nonetheless departments of OHIM



The Boards are not a Court of Law

- 25/04/2013, T-284/11, Metroinvest, EU:T:2013:218, § 62

As regards, in the first place, the alleged infringement regarding Article 6(1) of the ECHR, the Court has precluded the possibility of relying on a right to a fair ‘hearing’ before the Boards of Appeal of OHIM, since proceedings before the Boards of Appeal are administrative and not judicial in nature (see, to that effect, Case T-63/01 Procter & Gamble v OHIM (Soap bar shape) [2002] ECR II-5255, paragraphs 22 and 23, and Case T-273/02 Krüger v OHIM – Calpis (CALPICO) [2005] ECR II-1271, paragraph 62)



Then... a quasi-judicial body?

- 61/65, EU:C:1966:39

The expression 'court or tribunal' in Article 177 of the EEC Treaty may in certain circumstances include bodies other than ordinary courts of law



The notion of Quasi-judicial Bodies

- 31/05/05, ECLI:EU:C:2005:333, para. 31

According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether **the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law** and whether it is **independent** (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23, Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577, paragraph 33, Case C-195/98 Österreichischer Gewerkschaftsbund [2000] ECR I-10497, paragraph 24, and Case C-516/99 Schmid [2002] ECR I-4573, paragraph 34). Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a **decision of a judicial nature** (see, in particular, Case C-134/97 Victoria Film [1998] ECR I-7023, paragraph 14, and Österreichischer Gewerkschaftsbund, paragraph 25)



Then... a quasi-judicial body

- C-203/14 , para. 17
- It is a permanent Body
- Established by law
- Members are independent
- Jurisdiction is compulsory
- Charged with the settlement of disputes
- Bound to apply rules of law
- Bound by rules of adversary procedure similar to those used by the ordinary courts of law



The Boards: a permanent body?

- The answer is quite obvious
- Article 135 EUTMR
- The Boards of Appeal shall be responsible for deciding on appeals from taken pursuant to Article 131 to 134a

Established by law?

- Established by law : 130 CTMR
- Article 130: Competence
- For taking decisions in connection with the procedures laid down in this Regulation, the following shall be competent:
 - (e) The Boards of appeal

Jurisdiction is compulsory

- A decision of the Office shall be appealed to the Boards
- No direct appeal to the GC



Inter partes procedure

- Procedure are inter partes in opposition and cancellation cases

Bound by the Law

- 27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 66

It must be observed, in the first place, that decisions concerning registration of a sign as a Community mark which the Boards of Appeal are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of the decisions of Boards of Appeal must be assessed solely on the basis of that regulation, as interpreted by the Community judicature, and not on the basis of a previous decision-making practice of those boards



In charge of the settlement of disputes

- Dispute regarding the refusal of a mark under absolute grounds
- Dispute regarding opposition proceedings
- Dispute regarding cancellation proceedings
- Dispute regarding other issues: registration of transfers, division, surrenders, limitations etc...

Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Presidium decides on objective criteria of allocation of cases (Art. 136(1)(a), Art. 1 RP BoA)
- The case are objectively allocated by the registrar in accordance said criteria

Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Article 76:

In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. In invalidity proceedings taken pursuant to Article 52, the Office shall limit its examination to the grounds and arguments submitted by the parties.

Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- 20/03/2013, T-277/12, Caffè Kimbo, EU:T:2013:146, § 39

The Boards cannot exceed the scope of the appeal

03/07/2013, T-236/12, Neo, EU:T:2013:343, § 24.

The Board of Appeal has no power to reopen the examination process with respect to goods and services not subject to the appeal proceedings.



Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- The Board may hear the parties, summon and hear witnesses and experts: article 77 and 78
- The parties are bound by procedural delays: article 76(2)
- The Board may suspend proceedings: article 104
- The Board may award costs: article 85



Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Designation of the rapporteur by the Chairman of each Board: article 4 Rules of procedure
- Rapporteur prepares communications to the parties



Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Deliberation: article 12 of the Rules of proceedings
- Rapporteur submits a draft
- Deliberations shall be secret
- Voting: article 13
- During the deliberations the opinion of the rapporteur shall be heard first, and, if the rapporteur is not the Chairman, the Chairman last
- If voting is necessary, votes shall be taken in the same sequence, save that if the Chairman is also the rapporteur, he shall vote last. Abstentions shall not be permitted

Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- A party may file an ancillary appeal: article 60(2)
- 2. In inter partes proceedings, the defendant may, in his response, seek a decision annulling or altering the contested decision on a point not raised in the appeal. Such submissions shall cease to have effect should the appellant discontinue the proceedings

Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- 03/07/2013, T-106/12, Alpharen, EU:T:2013:340, § 24

Article 1(d)(2) of that regulation states that, if the case is referred to another Board, that Board must not comprise members who were party to the contested decision. That provision does not apply if the case is referred to the Grand Board.



Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Stay of proceedings by an EU trade mark court where an application for revocation or for a declaration of invalidity has already been filed at the Office: article 104.



Bound by rules of adversary procedure similar to those used by the ordinary courts of law

- Duty to state reasons: article 75

Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

Independence

- 06/10/2015, ECLI:EU:C:2015:664, para.10

Not occupying a hierarchical or subordinate position in relation to any other body and **not taking orders or instructions from any source whatsoever** (see judgment in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 22); it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members (judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and *TDC*, C-222/13, EU:2014:2265, paragraph 30).

No hierarchical or subordinate position

- The President, chairmen and Board members are not part of the management of the Office
- The President of the Boards of Appeal and the chairpersons and members of the Boards of Appeal shall not be examiners or members of the Opposition Divisions, the Department in charge of the Register or Cancellation Divisions: article 136(9) EUTMR

Boards not bound by instructions

- Article 136(7) EUTMR
- Boards are not bound by the Office guidelines
12/05/2009, T-410/07, Jurado, EU:T:2009:153, § 20
- A Board is not bound by a previous decision of the same
or another Board
- However if a Board wants to depart from a previous
decision of the Grand Board it shall refer the case to
the GB article 1(b) of the Rules of Procedure of the
Boards of appeal



Independence

- Article 136 EUTMR

The members of the Boards shall be independent. In their decisions they shall not be bound by any instructions (Art.136(7) CTMR)



Independence

- Moreover, independence must be guaranteed by specific safeguards, such as rules on appointment and security of tenure: El-Yassini, at paragraph 21; Jokela, at paragraph 20, Schmid, at paragraph 41; Köllensperger, at paragraphs 19 to 25; Abrahamsson, at paragraphs 36 and 37; De Coster, at paragraphs 18 to 21
- Syfait v Glaxo SmithKline, at paragraph 31

Independence

- **Appointment and security of tenure**
- Article 129 and 136: Boa-President and chairpersons appointed by the Council by simple majority, from a list of candidates proposed by the Management Board, following an open and transparent selection procedure. Before being appointed, the candidate selected by the Management Board may be invited to make a statement before any competent European Parliament committee and to answer questions put by its members
- Members appointed by the Management Board, for a renewable term of five years (Art. 136(2) CTMR)



Procedure of appointment of the Members

- Transparent procedure
- Pre-selection committee made of the President or Vice-president of the Office, President of the Boards of appeal, Chairpersons of the Office administrative Board and Budget Committee, representative of National Offices and the Commission



Procedure of appointment of the members

- CA/07/S34/3.2/ANI/EN(T)
- Establishes a list of 3 candidates
- Majority of $\frac{3}{4}$ of the votes
- Secret ballot (article 8(4) of the Rules of Procedure of the Administrative Board)
- Eliminary: rounds of voting: the candidate who receives the lowest number of vote is eliminated
- If at a given point a candidate receives a majority of $\frac{3}{4}$ of the votes his name will be send to the Council



Removal of the Presidents and the members

- The President, chairpersons and Board members are not subject to the general disciplinary power of the Office
- Removed from office by the CJ for serious grounds only on the recommendation of the President of the Boards of Appeal, and after consulting the chairman chairperson of the Board to which the member concerned belongs Art. 136 (1) and (6)

Renewal

- Renewal without new selection procedure: article 136
- President: after a prior positive evaluation of his performance by the Management Board
- Chairpersons and members : after a prior positive evaluation of their performance by the Management Board, and after consulting the President of the Boards of Appeal



Impartiality

- Article 137: Reasons for recusation
- 1. Members of the Boards of Appeal may not take part in any proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties
- The recusation may follow a positive declaration by a member to that effect or upon request of a party
- The decision will be taken by the Board without the participation of that member
- The member will nonetheless have the opportunity to provide comments: article 3 of the Rules of procedure



Autonomy of the Boards

- The Boards are separated from the Office
- Article 131(5) CTMR states that the President of the Boards of Appeal, and the chairmen and members of the Boards of Appeal may not be examiners, or members of the Opposition Divisions, Administration of Trade Marks and Designs and Legal Division, or cancellation Divisions



Autonomy of the Boards

- The organisational autonomy of the Boards of Appeal has been reinforced by Council Regulation (EC) No 422/2004 of 9 February 2004 amending Regulation (EC) No 40/94 on the Community trade mark (OJ EU 2004 L 70, p. 1)
- Article 1, point 35, of that regulation gives the Boards of Appeal their own President, who is endowed with managerial and organisational powers in relation to the Boards of Appeal. Regulation No 422/2004 also strengthened the judicial nature of the Boards of Appeal by creating an Enlarged Board of Appeal, the function of which is clearly to achieve greater uniformity in the case law of the Boards of Appeal. Such a structure is typical of judicial bodies



The Board of Appeal has no power to reopen the examination process with respect to goods and services not subject to the appeal proceedings

- Judgment of 3 July 2013, 'NEO', para. 24ss
- It follows that the Board of Appeal exceeded the limits of its powers as defined in Article 64(1) of Regulation No 207/2009, read in conjunction with the first sentence of Article 59 of that regulation, in as much as it ex officio re-opened the examination of the application for registration of the Community trade mark in respect of the services referred to in that application in the light of the absolute grounds for refusal set out in Article 7 of Regulation No 207/2009 and found that the mark applied for was devoid of any distinctive character to distinguish those services within the meaning of Article 7(1)(b) and (c) and 7(2) of that regulation



The Boards are Quasi-judicial Bodies

- Opinion of Advocate General BOT delivered on 28 November 2013 in case C-532/12P (National Lottery Commission v OHIM – Mediatek Italia and De Gregorio (Representation of a hand))
- 93. The third line of argument is based on the role performed by the competent OHIM bodies in disputes relating to Community trade marks. **Far from being confined to an exclusively administrative role, those bodies perform a quasi-judicial function equivalent to that of national courts deciding on a counterclaim in infringement proceedings.** Furthermore, Article 100(2) of Regulation No 207/2009 confers on their decisions the force of res judicata. Accordingly, it therefore seems illogical that the scope of the review carried out on the application and interpretation of the national law differs significantly depending on whether the application for a declaration of invalidity is made as a primary claim before OHIM or as a counterclaim before the national court.



The Boards are Quasi-judicial Bodies



- H. Jung, ‘Gemeinschaftsmarke und Rechtsschutz’, in Festschrift für Ulrich Everling, edited by O. Due, M. Lutter and J. Schwarze, Nomos Verlagsgesellschaft Baden-Baden, p. 611, at p. 614
- G.C. Rodríguez Iglesias, ‘El Tribunal de Justicia de las Comunidades Europeas’, in El derecho comunitario europeo y su aplicación judicial, edited by G.C. Rodríguez Iglesias and D.J. Liñan Nogueras, Editorial Civitas, p. 374, at p. 401
- V. Scordamaglia, ‘La tutela giurisdizionale dei privati nei confronti delle decisioni degli uffici comunitari di proprietà industriale’, (1996) Rivista di Diritto Industriale, 107, 119
- O. Montalto, ‘La Oficina Comunitaria de Marcas; recursos y procedimientos judiciales’, in Marca y diseño comunitarios, coordinated by A. Bercovitz Rodríguez-Cano, published by Aranzadi, Pamplona, 1996, p. 167, at p. 168
- A. von Mühlendahl, ‘Rechtsmittel gegen Entscheidungen des Harmonisierungsamts für den Binnenmarkt – Marken, Muster und Modelle’, in Aktuelle Herausforderungen des geistigen Eigentums (ed. J. Strauss), Festgabe von Freunden und Mitarbeitern für Friedrich- Karl Beier zum 70. Geburtstag, published by Carl Heymanns Verlag KG, p. 303, at p. 307



Standard of review of the decisions of the Boards

Appeal to the GC

Article 65 EUTMR

- Lack of competence
- Infringement of an essential procedural requirement
- Infringement of the Treaty
- Infringement of the EUTMR
- Misuse of power

Standard of review

- The appeal is **not de novo** since the applicant is generally prevented from adducing new evidence in an appeal lodged before the Court
- Correctness, reasonableness?
- Two type of decisions
- **In case of the exercise of a discretion:** request for suspension, admissibility of additional evidence, request for a hearing, requesting the appearance of a witness, production of documents, inspection, additional expert reports, annulment and remittal to the first instance
- Case T-664/13, par. 32-33
- Discretion does not exclude a judicial review of the decision by the Courts of the European Union
- Judicial review restricted to the absence of a manifest error of assessment or misuse of powers

Misuse of power

- T-556/12, para. 50

It must be borne in mind that the concept of misuse of power has a precisely defined scope in European Union law and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. In that respect, the Court has consistently held that a decision may amount to a misuse of power only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (Case T-30/00 Henkel v OHIM (Image of a detergent product) [2001] ECR II-2663, paragraph 70, Case T-247/01 eCopy v OHIM (ECOPY) [2002] ECR II-5301, paragraph 22).



- In all other situations the Court applies a standard of ‘correctness’



- In total the Court and the General Court have rendered app. 930 judgments and orders with regard to the EUTMR
- For the same period the Boards have rendered 27000 decisions
- The actual appeal rate exceeds 10%



Decisions by the Boards

Year	No. of appeal filed	No of decisions	Confirmation ex- parte	Confirmation inter- partes
97/2005	7862	5739		
2006	1659	1657	81%	64%
2007	1952	1776	84%	67%
2008	1815	1866	82%	65%
2009	1588	1848	82%	62%
2010	2570	1787	78%	65%
2011	2622	2166	79%	68%
2012	2339	2513	80%	65%
2013	2602	2568	84%	66%
2014	3284	2783	81%	67%
2015	2611	2911	77%	65%



A preoccupying trend: appeal to the GC

GC Judgements rendered by 2015				
	2012	2013	2014	2015
Confirmed	121	137	167	245
Annulled	33	17	35	45
Partly Annulled	7	10	14	21
Others	50	51	68	85
Confirmation rate ^[1]	77.3%	86.6%	80.6%	82.2%

[1] According to the Balance Scorecard of the OHIM Strategic Plan 2011/2015 Indicator 2.3, the Appeal confirmation rate is defined as the proportion of cases fully or partially confirmed (measured against total including reverse in full, giving half weigh

N.B. These statistics are based on the number of appeal cases judged rather than on the number of judgments rendered. Therefore, if one judgment covers five appeals, it will be counted as five.

Defining a new standard of review?

- T-228/02 Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II-4665, 'OMPI', paragraphs 154, 155 and 159; Case T-256/07 People's Mojahedin Organization of Iran v Council [2008] ECR II-3019, 'PMOI I', paragraphs 141 to 143; and Case T-284/08 People's Mojahedin Organization of Iran v Council [2008] ECR II-3487, 'PMOI II', paragraphs 74 and 75
- Review restricted to verifying that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of power



Standard of judicial review

- Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 382; Case 55/75 Balkan-Import-Export [1976] ECR 19, paragraph 8; Case 9/82 Øhrgaard and Delvaux v Commission [1983] ECR 2379, paragraph 14; Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraphs 24 and 25; and Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 39
- Limited judicial review in cases of complex assessments
- The Community judicature may not substitute its assessment of the facts for the factual assessment made by the authority concerned
- Judicial review limited to examining the accuracy of the findings of fact and law made by the authority concerned
- The action taken by the authority is not vitiated by a manifest error or misuse of powers and that it clearly did not exceed the bounds of its discretion
- A manifest error of assessment of the facts

- Case C-38/09 P, para. 77 in addition, it must be recalled that the General Court, which has jurisdiction only within the limits set by Article 73(2) of Regulation No 2100/94, was not required to carry out a complete review in order to determine whether or not the SUMCOL 01 variety lacked distinctness for the purposes of Article 7(1) of Regulation No 2100/94 but that it was entitled, in the light of the scientific and technical complexity of that condition, compliance with which must be verified by means of a technical examination which, as is clear from Article 55 of Regulation No 2100/94, is to be entrusted by the CPVO to one of the competent national offices, to limit itself to a review of manifest errors of assessment



- Article 73 CPVO
- Further appeal
- 1. A further appeal to the Court of Justice of the European Communities shall lie from decisions of the Board of Appeal
- 2. The further appeal may be lodged on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation, or of any rule of law relating to their application or misuse of power

- Article 65 CTMR
- 1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals
- 2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power

- Deference
- No reversal of the decision unless the assessment of facts is clearly erroneous
- Not be able to second guess the PTO's decision or otherwise substitute its own judgment or reasoning for that of the PTO. - See more at:
<http://corporate.findlaw.com/intellectual-property/supreme-court-eases-standard-of-appellate-review-for-decisions-of.html#sthash.KPjG45oa.dpuf>



This standard of review complies with Human Rights Legislation

- Bryan vs. The united Kingdom, [1995] ECHR 50, par. 46-47
- Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the Court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational
- Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (art. 6-1)



The Canadian example

- The service Master Company vs. 385229 Ontario Ltd, 2015 FCA 114
- [16] The standard of review to be applied in an appeal of a decision of the Board is reasonableness. In particular, the Board's interpretation of the Act as its home statute is subject to deference. As a result, in order for this Court to intervene in the Board's conclusion that the evidence postdating the appellant's first use of SERVICEMASTER is irrelevant, the Court must find that conclusion to be unreasonable.
- The Court can only substitute its opinion if the decision is unreasonable

Does trade mark examination requires a technical expertise?

- Preamble (13) of the Regulation recognizes the special character of trade mark law

“It is necessary to ensure that parties who are affected by decisions made by the Office are protected by the law in a manner which is suited to the special character of trade mark law. To that end provision is made for an appeal to lie from decisions of the examiners and of the various divisions of the Office”
- Board Members shall have at least 15 years of experience in these matters
- Typically the member have a minimum knowledge of three languages