

Question referred

Is Council Directive 2000/78/EC⁽¹⁾ to be interpreted as meaning that the prohibition on all forms of discrimination on grounds of age precludes national rules from upholding a collective agreement between an airline company and the trade organisation representing that company's pilots which provides for compulsory retirement at 60 years of age, when that agreement provision, which applied also before the entry into force of the Council Directive and before the entry into force of the national implementing legislation, has as its purpose the protection of aviation safety on the basis of a general consideration of reduced performance ability with age, without a specific assessment of the individual pilot's performance ability, but such that the individual pilot may apply to be allowed to continue in his employment for a year at a time following approval by a committee made up of employer and employee representatives?

⁽¹⁾ OJ 2000 L 303, p. 16.

Appeal brought on 24 June 2011 by United States Polo Association against the judgment of the General Court (Second Chamber) delivered on 13 April 2011 in Case T-228/09: United States Polo Association v Office for Harmonisation in the Internal Market (Trade Marks and Designs) and Textiles CMG, SA

(Case C-327/11 P)

(2011/C 311/25)

Language of the case: English

Parties

Appellant: United States Polo Association (represented by: P. Goldenbaum, Rechtsanwältin, T. Melchert, Rechtsanwalt and I. Rohr, Rechtsanwältin)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

The appellant claims that the Court should:

- set aside the Judgement of the General Court of 13 April 2011 in case T-228/09,
- annul the decision of the Board of Appeal R 08861/2008-4,
- order OHIM to pay its own costs and those of the appellant,
- and, should Textiles CMG S.A. intervene in the proceedings, order Textiles CMG S.A. to pay its own costs.

Pleas in law and main arguments

The appellant submits that the judgment of the General Court is vitiated by misinterpretation and misapplication of Article 8

(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 (now Article 8(1)(b) of Regulation No. 207/2009) on the Community Trade Mark⁽¹⁾.

Based on this misinterpretation and misapplication, the General Court wrongly came to the conclusion that the Board of Appeal had been correct in finding that there was a likelihood of confusion between the trade marks **U.S. POLO ASSN.** (contested application) and **POLO-POLO** (earlier mark).

The General Court did not carry out a correct and complete global assessment of the likelihood of confusion and it did not sufficiently take into account or misapplied the principles of the case-law of the Court of Justice of the European Union in this regard.

The main arguments of the appellant regarding the deficiencies of the General Court's finding can be summarized as follows:

1. The General Court has misapplied the principles laid down in case 120104 Medion [2005] ECR I-8551 regarding the possible independent distinctive role of one element in a composite sign although it does not dominate the overall impression.

The General Court has first — correctly — denied that the word 'POLO' was dominant in the younger mark but has then — wrongly — derived an alleged independent distinctive function of the element 'POLO' from the fact that the other elements 'U.S.' and 'ASSN.' were short initials and abbreviations and from an assumed lack of meaning and alleged insufficient level of distinctiveness. This shows a wrong understanding of the requirement of an independent distinctive function of one element in a composite sign.

The ruling of the Medion case can by no means be construed as establishing a general rule that any element of normal distinctiveness shared by two trademarks is to be regarded as having an independent distinctive role in a composite sign. The General Court has not taken into consideration that according to the Medion case there is a relation of rule and exception, the usual case being that the average consumer perceives a mark as a whole with the possibility that the overall impression may be dominated by one or more components of the composite sign and the exception being that, if an element is not dominant in the overall impression, it can only in exceptional cases beyond the usual case have an independent distinctive role. The General Court has not submitted any reasons for such an exceptional case.

2. The General Court attributed an exclusive and decisive value to the fact that the two opposing signs share the element 'POLO' without correctly applying the principles of global assessment of the likelihood of confusion, such as emerges, in particular, from Case C-251/95 SABEL [1997] ECR I-6191.

It has not observed the principle that the general public perceives the mark as a whole and does not analyse its various details but — with respect to the earlier mark — has just taken one component and compared it with the younger mark.

In particular, it failed to take the circumstances of the present case fully into account, by disregarding the differences between the opposing signs, in particular the striking duplication of the element 'POLO' in the earlier mark. The single element 'POLO' does neither dominate the earlier mark 'POLO-POLO' nor does it have an independent distinctive role in the composite sign and the General Court has not even alleged such a function here.

Further, the earlier mark 'POLO-POLO' viewed as a whole does not have any meaning in any Community language. Therefore, no conceptional comparison can be made.

3. The General Court has not taken into consideration the principle that it is only if all the

other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of one element.

4. The General Court's argumentation is contradictory and inconsistent in the following points:

The General Court on the one hand found that the elements 'U.S.' and 'ASSN.' had no meaning as such. On the other hand, it pointed out that 'U.S.' would be perceived by the relevant public as referring to the geographical origin. Further, even if one assumed that some consumers might not understand the abbreviation 'ASSN.', consumers would have no reason to overlook or overhear it but — according to the principles laid down in the MATRA TZEN case — would all the more perceive it as a distinctive element.

⁽¹⁾ OJ L 78, p. 1

Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 8 July 2011 — Alexandra Schulz v Technische Werke Schussental GmbH und Co.KG

(Case C-359/11)

(2011/C 311/26)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Alexandra Schulz

Defendant: Technische Werke Schussental GmbH und Co.KG

Question referred

Is Article 3(3) of, in conjunction with point (b) and/or (c) of Annex A to, Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC ⁽¹⁾ to be interpreted as meaning that a provision of national law on price variations in natural gas delivery contracts with domestic customers, who are supplied gas within the framework of the general duty to supply (standard-rate customers), satisfies the transparency requirements if, in that provision, the grounds, preconditions and scope of the price variation are not stipulated but customers are assured that gas suppliers will give them sufficient advance notice of any price increases and they have the right to terminate the contract if they are unwilling to accept the amended contractual terms and conditions as communicated?

⁽¹⁾ OJ 1998 L 176, p. 57.

Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 20 July 2011 — Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren

(Case C-386/11)

(2011/C 311/27)

Language of the case: German

Referring court

Oberlandesgericht Düsseldorf

Parties to the main proceedings

Applicant: Piepenbrock Dienstleistungen GmbH & Co. KG

Defendant: Kreis Düren

Other party to the proceedings: Stadt Düren

Question referred

Is a 'public contract' within the meaning of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ⁽¹⁾ to be understood as also meaning a contract between two local authorities whereby one of them assigns strictly limited competence to the other in return for the reimbursement of costs, in particular where the task assigned concerns only ancillary business, not official activities as such?

⁽¹⁾ OJ 2004 L 134, p. 114.