

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 26 June 2008 — Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v Günter Guni and trekking.at Reisen GmbH

(Case C-278/08)

(2008/C 223/46)

Language of the case: German

Referring court

Oberster Gerichtshof

Parties to the main proceedings

Applicant: Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH

Defendants: Günter Guni and trekking.at Reisen GmbH

Questions referred

1. Must Article 5(1) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks ('Directive 89/104')⁽¹⁾ be interpreted as meaning that a trade mark is used in a manner reserved for the proprietor of the trade mark if the trade mark or a sign similar to it (such as the word component of a word and figurative trade mark) is reserved as a keyword with a search engine operator and advertising for identical or similar goods or services therefore appears on the screen when the trade mark or the sign similar to it is entered as a search term?
2. If the answer to Question 1 is yes:
 - (A) Is the trade mark proprietor's exclusive right infringed by the utilisation of a search term identical with the trade mark for an advertisement for identical goods or services, regardless of whether the accessed advertisement appears in the list of hits or in a separate advertising block and whether it is marked as a 'sponsored link'?
 - (B) In respect of the utilisation of a sign identical with the trade mark for similar goods or services, or the utilisation of a sign similar to the trade mark for identical or similar goods or services, is the fact that the advertisement is marked as a 'sponsored link' and/or appears not in the list of hits but in a separate advertising block sufficient to exclude any likelihood of confusion?

⁽¹⁾ OJ 1989 L 40, p. 1.

Appeal brought on 25 June 2008 by the Commission of the European Communities against the judgment delivered by the Court of First Instance (Fifth Chamber, Extended Composition) on 10 April 2008 in Case T-233/04 *Kingdom of the Netherlands, supported by Federal Republic of Germany v Commission of the European Communities*

(Case C-279/08 P)

(2008/C 223/47)

Language of the case: Dutch

Parties

Appellant: Commission of the European Communities (represented by: H. van Vliet, K. Gross and C. Urraca Gaviedes, Agents)

Other parties to the proceedings: Kingdom of the Netherlands, Federal Republic of Germany

Form of order sought

- Primarily:
 - (a) set aside the judgment under appeal;
 - (b) **declare inadmissible** the action seeking annulment of the Decision;
 - (c) order the Kingdom of the Netherlands to pay the costs of the proceedings before the Court of First Instance and those of the present appeal;
- In the alternative:
 - (a) set aside the judgment under appeal;
 - (b) **dismiss** the action seeking annulment of the Decision;
 - (c) order the Kingdom of the Netherlands to pay the costs of the proceedings before the Court of First Instance and those of the present appeal.

Pleas in law and main arguments

- In its first plea, the Commission submits that the Court of First Instance erred in declaring the action brought by the Kingdom of the Netherlands to be admissible.

In the view of the Commission, it is clear from the Court's case-law, and in particular from its order in Case C-164/02, that a Member State cannot seek the annulment of a Commission decision by which the Commission declares an aid measure notified by that Member State to be compatible with the common market.