

Action brought on 14 July 2009 — Commission of the European Communities v Slovak Republic

(Case C-264/09)

(2009/C 282/36)

Language of the case: Slovak

Parties

Applicant: Commission of the European Communities (represented by: O. Beynet, F. Hoffmeister and J. Javorský, acting as Agents)

Defendant: Slovak Republic

Form of order sought

— that by failing to grant non-discriminatory access to its transmission system the Slovak Republic has failed to fulfil its obligations under Articles 20(1) and 9(e) of European Parliament and Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ⁽¹⁾

— order the Slovak Republic to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of the directive expired on 1 July 2004.

⁽¹⁾ OJ 2003 L 176, p. 37

Reference for a preliminary ruling from High Court of Justice (England and Wales), Chancery Division, made on 12 August 2009 — Interflora Inc, Interflora British Unit v Marks & Spencer plc, Flowers Direct Online Limited

(Case C-323/09)

(2009/C 282/37)

Language of the case: English

Referring court

High Court of Justice (England and Wales), Chancery Division

Parties to the main proceedings

Applicants: Interflora Inc, Interflora British Unit

Defendants: Marks & Spencer plc, Flowers Direct Online Limited

Questions referred

1. Where a trader which is a competitor of the proprietor of a registered trade mark and which sells goods and provides services identical to those covered by the trade mark via its website (i) selects a sign which is identical (in accordance with the Court's ruling in Case C-291/00) with the trade mark as a keyword for a search engine operator's sponsored link service, (ii) nominates the sign as a keyword, (iii) associates the sign with the URL of its website, (iv) sets the cost per click that it will pay in relation to that keyword, (v) schedules the timing of the display of the sponsored link and (vi) uses the sign in business correspondence relating to the invoicing and payment of fees or the management of its account with the search engine operator, but the sponsored link does not itself include the sign or any similar sign, do any or all of these acts constitute 'use' of the sign by the competitor within the meaning of Article 5(l)(a) of First Council Directive 89/104/EEC ⁽¹⁾ of 21 December 1988 ('the Trade Marks Directive') and Article 9(l)(a) of Council Regulation 40/94 ⁽²⁾ of 20 December 1993 on the Community trade mark ('the CTM Regulation')?
2. Is any such use 'in relation to' goods and services identical to those for which the trade mark is registered within the meaning of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation?
3. Does any such use fall within the scope of either or both of:
 - (a) Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation; and
 - (b) (assuming that such use is detrimental to the distinctive character of the trade mark or takes unfair advantage of the repute of the trade mark) Article 5(2) of the Trade Marks Directive and Article 9(l)(c) of the CTM Regulation?
4. Does it make any difference to the answer to question 3 above if:
 - (a) the presentation of the competitor's sponsored link in response to a search by a user by means of the sign in question is liable to lead some members of the public to believe that the competitor is a member of the trade mark proprietor's commercial network contrary to the fact; or
 - (b) the search engine operator does not permit trade mark proprietors in the relevant Member State of the Community to block the selection of signs identical to their trade marks as keywords by other parties?

5. Where the search engine operator (i) presents a sign which is identical (in accordance with the Court's ruling in Case C-291/00) with a registered trade mark to a user within search bars located at the top and bottom of search pages that contain a sponsored link to the website of the competitor referred to in question 1 above, (ii) presents the sign to the user within the summary of the search results, (iii) presents the sign to the user by way of an alternative suggestion when the user has entered a similar sign in the search engine, (iv) presents a search results page to the user containing the competitor's sponsored link in response to the entering by the user of the sign and (v) adopts the user's use of the sign by presenting the user with search results pages containing the competitor's sponsored link, but the sponsored link does not itself include the sign or any similar sign, do any or all of these acts constitute 'use' of the sign by the search engine operator within the meaning of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation?
6. Is any such use 'in relation to' goods and services identical to those for which the trade mark is registered within the meaning of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation?
7. Does any such use fall within the scope of either or both of:
- (a) Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation; and
- (b) (assuming that such use is detrimental to the distinctive character of the trade mark or takes unfair advantage of the repute of the trade mark) Article 5(2) of the Trade Marks Directive and Article 9(l)(c) of the CTM Regulation?
8. Does it make any difference to the answer to question 7 above if:
- (a) the presentation of the competitor's sponsored link in response to a search by a user by means of the sign in question is liable to lead some members of the public to believe that the competitor is a member of the trade mark proprietor's commercial network contrary to the fact; or
- (b) the search engine operator does not permit trade mark proprietors in the relevant Member State to block the selection of signs identical to their trade marks as keywords by other parties?
9. If any such use does fall within the scope of either or both of Article 5(l)(a) of the Trade Marks Directive/Article 9(l)(a) of the CTM Regulation and Article 5(2) of the Trade Marks Directive/Article 9(l)(c) of the CTM Regulation:
- (a) does such use consist of or include 'the transmission in a communication network of information provided by a receipt of the service', and if so does the search engine operator 'select or modify the information', within the meaning of Article 12(1) of European Parliament and Council Directive 2000/31/EC ⁽¹⁾ of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('the E-commerce Directive')?
- (b) does such use consist of or include 'the automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request' within the meaning of Article 13(1) of the E-commerce Directive?
- (c) does such use consist of or include 'the storage of information provided by a recipient of the service' within the meaning of Article 14(1) of the E-commerce Directive?
- (d) if the use does not consist exclusively of activities falling within the scope of one or more of Article 12(1), 13(1) and 14(1) of the E-Commerce Directive, but includes such activities, is the search engine operator exempted from liability to the extent that the use consists of such activities and if so may damages or other financial remedies be granted in respect of such use to the extent that it is not exempted from liability?
10. If the answer to question 9 above is that the use does not consist exclusively of activities falling within the scope of one or more of Articles 12-14 of the Ecommerce Directive, may the competitor be held jointly liable for the acts of infringement of the search engine operator by virtue of national law on accessory liability?

⁽¹⁾ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks
OJ L 40, p. 1

⁽²⁾ OJ L 11, p. 1

⁽³⁾ OJ L 178, p. 1